

TECHNICAL ISSUES IN CHARITY LAW

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on Technical Issues in Charity Law.

You can download the Consultation Paper free of charge from our website at <http://www.lawcom.gov.uk> (see A-Z of projects > Charity Law).

The response form includes the text of the questions and provisional proposals in the Consultation Paper, with space for answers. You do not have to respond to every question or proposal. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question and provisional proposal is followed by a reference to the Chapter of the Consultation Paper in which that question or proposal is discussed, and the paragraph at which it can be found. Please consider the discussion before responding.

We invite responses from 20 March 2015 to **3 July 2015**.

Please send your completed form:

by email to propertyandtrust@lawcommission.gsi.gov.uk

OR

by post to James Linney, Law Commission, 1st Floor, Tower, Post Point 1.53,
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If you send your comments by post, it would be helpful if, wherever possible, you could also send them electronically (for example, by email to the above address, in any commonly-used format).

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above). Charity Law and Policy Unit, Liverpool Law School, University of Liverpool
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CHANGING PURPOSES, AMENDING GOVERNING DOCUMENTS AND APPLYING PROPERTY CY-PRÈS

Charities incorporated by statute or by Royal Charter: changing purposes and amending governing documents

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.

Do consultees agree?

Chapter 4, paragraph 4.30

We agree. We think the Privy Council has the capacity to oversee this.

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?

Chapter 4, paragraph 4.31

We agree. This sounds like an appropriate safeguard with an effective balance between oversight and empowerment.

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?

Chapter 4, paragraph 4.32

In substance we agree. However, we would be concerned where, for whatever reason, the express power is more limiting than the proposed statutory power. In such circumstances, we suggest that the statutory should still apply in the spirit of enablement.

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, bye-laws and regulations, to form a basis for Royal Charter charities to seek amendments to their governing documents.

Chapter 4, paragraph 4.37

We strong agree, but such guidance must make it expressly clear that it is only guidance and does not have any legally binding effect in itself.

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?

Chapter 4, paragraph 4.54

We support this idea in principle. However, we have concerns over the definition of what would amount to a 'minor amendment' in the context of Royal Charter and statutory charities. The affected charities are diverse and quite distinct as bodies, so one size may not fit all. For example, in relation to University Colleges, changes to the ways in which trustees are appointed where this oversight from another body would be a very controversial measure, but not for other charter bodies. The devil here is in the detail.

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

Chapter 4, paragraph 4.55

For the reasons given above, it is difficult to be prescriptive here. As noted above, membership might or might not be a minor issue, and changes to how trustees are appointed or removed from office could be controversial. Who runs a charity and who are members of charity are unlikely to be minor issues, as they go to the very core of the governance and activity of the charitable body. Contrast this with increasing trustee's power to employ staff, where necessary, which may raise elements of disagreement but does not go to the core values and mission of the organisation. Even here, though, it is possible to envisage circumstances where exercising such a power would be controversial, especially where the organisation is strongly wedded to the voluntary principle, for example.

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.

Chapter 4, paragraph 4.56

We have no strong views, but, given the difficulties of creating an effective list of minor amendments in the first place, we would have concerns as to whether this process of secondary legislation to amend the contents of the list is desirable.

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?

Chapter 4, paragraph 4.59

We agree, as this brings the proposed power in line with s.280 Charities Act 2011 (which allows reform of administrative provisions in unincorporated charities by the trustees). This is entirely consistent with the concept of minor amendments; it would be unnecessarily bureaucratic to require the trustees to make application to the Charity Commission.

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?

Chapter 4, paragraph 4.66

We agree. This sounds like an appropriate safeguard – it is important for all views to be heard, even where the proposed change is classed as a minor amendment.

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?

Chapter 4, paragraph 4.67

We agree. To do otherwise invites unnecessary complexity, purely on the basis of the origin of the provisions affected.

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

Do consultees agree?

Chapter 4, paragraph 4.68

We agree. We see no reason why these minor amendments, having gone through the proposed process, should not have immediate effect.

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).

Chapter 4, paragraph 4.69

No. We feel this is unnecessary. The proposed process around minor amendments, which includes a resolution of the trustees and members (where they exist) is sufficiently robust and can be trusted. Reporting would seem superfluous.

We invite the views of consultees as to whether the power of amendment (see paragraph 4.54 above) should operate (a) alongside, or (b) instead of, guidance from the Privy Council concerning the reallocation of provisions in governing documents (see paragraph 4.37 above).

Chapter 4, paragraph 4.72

Guidance is not the same as a statutory power. We therefore do not see the conundrum.

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.

Chapter 4, paragraph 4.88

Whatever the merits or otherwise of increasing the role of the Charity Commission to oversee significant amendments to governing documents, we would have concerns over the capacity of the Charity Commission to conduct such work, given their budgetary constraints. We would therefore support the Law Commission's view in paragraph 4.77.

We find it difficult to see any benefit to the effective operation of the relevant charitable bodies by reducing the involvement of the Charity Commission.

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?

Chapter 4, paragraph 4.89

We agree – we see no merit in the current distinction.

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?

Chapter 4, paragraph 4.90

We agree. This would be a significant benefit to the administration of such charities.

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.

Chapter 4, paragraph 4.91

We agree with the aim, but consider 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; this would need careful consideration in drafting to emphasise that the guidance is meant to be guidance, and is not prescriptive in character.

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.

Chapter 4, paragraph 4.92

Not at this stage. The impact of any amendments introduced would need to be reviewed before any further intervention might be considered necessary.

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

Do consultees agree?

Chapter 4, paragraph 4.97

We have no strong views, noting that PCCs have always operated differently to other charitable bodies.

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 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 under the Education Reform Act 1988 could be improved; and
- (6) whether, and if so how, the amendment procedures for the universities and colleges set out in Figure 7 could be improved.

Chapter 4, paragraph 4.110

We are of the view that 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. Practical concerns are best left to those better placed to make operational comments.



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.

Chapter 4, paragraph 4.112

We are not aware of any other categories that would need special provision.

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.

Chapter 4, paragraph 4.114

We have no experience and having nothing useful to add here.

Other charities: changing purposes and cy-près schemes

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.

Chapter 5, paragraph 5.19

It would be easier to both explain and understand the procedures if there were a uniform process for incorporated and unincorporated charities to follow. Many charity trustees are unaware of the legal form of the charity and the same is perhaps even more true for donors. We do express deep reservations about having a dual regime for pre-existing charities on the one hand and new charities on the other. Any new regime should, in our view, apply both prospectively and retrospectively. We are also concerned that enacting a dual regime is fraught with difficulty. We note that similar provisions in the Companies Act 2006, which applied only to some companies and not others, were detailed in the regulations and not within the primary legislation, which impacted negatively on awareness and understanding of these changes.

We are also of the view that, contrary to the view expressed in paragraph 5.14, it is highly unlikely that the legal structure for a charity is chosen on the basis of the powers of amendment available to it.

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?

Chapter 5, paragraph 5.32

In principle we agree, subject to two broad considerations. We feel that the cy-près scheme is fit for purpose as it stands. Moreover, we have concerns over whether setting a threshold on the ability to change purposes based on income alone might bring some charities with a low income but high asset value within the more generous operation of s.275.

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

Chapter 5, paragraph 5.33

Subject to our comments above, we believe detailed consideration is best left to charities and practitioners on this issue.

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?

Chapter 5, paragraph 5.34

We agree. If the use of the land closely relates to the charitable purpose, then s.275 should provide adequate protection to the donor's intention in creating designated land in the first place. This is because any change under s.275(4)(b) must, so far as is reasonably practicable, include purposes which are 'reasonably similar in character to those that are to be replaced.' See also our comments in relation to designated land later in this consultation document, which, if enacted, would remove the need for this extension of the s.275 power.

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.

Chapter 5, paragraph 5.35

We believe notification, plus the veto, provide regulatory oversight. We are aware that many may see this as an unnecessary requirement. However, we believe that such a check and balance is appropriate. Practice demonstrates that some charities (often small charities with small incomes (less than £25k)) may not be clear of their own objects, so really need Charity Commission oversight of any proposed changes. One additional point we have heard expressed, and with which we agree, is that the presence of 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.

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.

Chapter 5, paragraph 5.36

We agree. Change of purpose is significant, and should therefore have the blessing of any members.

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.

Chapter 5, paragraph 5.37

No, we are in favour of regulatory oversight.

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.

Chapter 5, paragraph 5.39

We have no experience and having nothing useful to add here.

Other charities: amending governing documents

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.

Chapter 6, paragraph 6.15

We agree 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 power needs to be underpinned by a principle, enshrined in the wording of the Act. By way of example, allowed changes under this provision could be limited to 'non-purposive changes in the best interests of the charity'.

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.

Chapter 6, paragraph 6.16

See comments above.

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.

Chapter 6, paragraph 6.18

We have no experience in practice and having nothing useful to add here.

Cy-près schemes and the proceeds of fundraising appeals

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.

Chapter 7, paragraph 7.38

We do not agree that the requirement for a general charitable intention should be removed generally. We believe that its removal may deter some donors from making gifts; if, for example, a living donor made a contribution to a failed appeal to build a local hospice and then discovered that funds had been applied cy-près, they may be aggrieved and reluctant to make further, similar donations. However, we can see some merit in the removal of the requirement for smaller donations. In these situations, **either** the donor is unlikely to care about the specific charitable purpose, as long as the funds are used for a recognised charitable purpose. In any event, a general charitable intent in such cases would be easier to find as a matter of construction. What constitutes a small donation would require further consideration.

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.

Chapter 7, paragraph 7.44

We have no evidence as to the practical operation of these procedures and therefore make no particular comment.

We invite the view 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.

Chapter 7, paragraph 7.49

We are of the view that such powers should remain with the Charity Commission. In general terms, trustees may not be properly equipped or advised to make these decisions. In addition, currently a decision of the Charity Commission on the operation of cy-près is appealable to the First Tier Tribunal (Charity) and this jurisdiction would be lost.

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.

Chapter 7, paragraph 7.50

See above.

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.

Chapter 7, paragraph 7.52

We have no evidence as to the practical operation of these procedures and therefore make no particular comment.

REGULATING CHARITY LAND TRANSACTIONS AND THE USE OF PERMANENT ENDOWMENT

Acquisitions, disposals and mortgages of charity land

We provisionally propose that the provisions of Part 7 of the Charities Act 2011 relating to dispositions to connected persons be repealed.

Do consultees agree?

Chapter 8, paragraph 8.68

We suggest that there is scope to retain the rules relating to dispositions to connected persons. The requirements of Part 7, Charities Act 2011 are useful for those managing charities, as they 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. However, we do believe there is scope to rationalise the definition of connected persons in s.118 (see below).

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?

Chapter 8, paragraph 8.70

We propose that there are more significant definitional issues with ‘connected persons’. There are four different definitions in the Act (this section, s.188 (remuneration); ss. 198(2) & 200 (alteration of objects by companies) and s.249 (alteration of objects by CIO)), and the definition of a connected person within the companies legislation is different again (s.252, Companies Act 2006). This makes it difficult for charity trustees to navigate (particularly given the prevalence of the corporate structure for charities).

In relation to the proposal re: charity’s wholly-owned subsidiary companies, we are concerned there may be unintended consequences (e.g. reputational) in taking this forward. We agree that we can see no benefit in including a trustee for a charity who is not also a ‘charity trustee’.

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?

Chapter 8, paragraph 8.85

We consider that while the current regime on dispositions of charity land may be unpopular in the sector, it provides a necessary check and balance on dealings with land. There is a value in the existing self-certification scheme and conveyancing requirements; not least that they remind trustees of what they are meant to be doing. Responsibility is often increased on trustees, but to shoulder such responsibility the trustees need to be aware of what they are meant to be doing. Experience suggests that trustees would, if a general duty to obtain and consider advice was introduced, seek advice in all cases (given the concern over the impact of a duty which has not been carried out balanced against a 'reasonable belief' to only get advice were necessary). Even where the trustees are aware of their risk appetite, they may be unaware of the legal impact of the transactions they are entering into; for example, a loan secured by way of a legal mortgage may lead to the property being repossessed if the mortgage debt is not met (a more preferential security than a lien or other form of loan).

Moreover, trustees would likely seek advice from surveyors as to the current value of the property. The impulse therefore might be to sell, rather than taking the long term view e.g. considering a change of use rather than selling a valuable asset as at undervalue due to current restrictions on how the property is used or its current state of repair. Charity trustees, like other trustees, should balance the current financial interests of the charity with its long term stability.

For charity trustees to meaningfully assess the risk involved and whether advice would be necessary, this requires effective guidance. This is recognised in para 8.83 of the proposals, where it is suggested that it would be for the Charity Commission to issue such guidance. If the Law Commission's proposal re: advice is implemented, we are strongly of the view that such guidance should be statutory. The Charity Commission does not have law making powers, but its guidance, without legal challenge in a tribunal or court, has that practical effect and will shape the action of the sector. Given the potential complexity of this risk assessment, we would have concerns whether Charity Commission guidance would be effective in this sphere, and would prefer that clear guidance was given within any statutory definition.

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?

Chapter 8, paragraph 8.89

We agree with the comments made in the relevant paragraphs of Chapter 8. We do not see that these requirements add anything but time and expense to effective dealing with designated land. The general duties re: land transactions (which, as above, we suggest should be retained) provide sufficient safeguards for the land. Moreover, in removing these requirements the temptation to treat designated land as land that can readily be sold is removed; in reality a cy-près scheme is needed to dispose of such land. This should improve the coherence of dealings with such land.

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.

Chapter 8, paragraph 8.91

Given our views on the advice requirement, we do not consider that it should be extended to exempt charities. We also feel that, as a general principle, it would be better to reduce the number of exempt charities by registration than modify the law as it relates to exempt charities.

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.

Chapter 8, paragraph 8.95

Again, given our views on the advice requirement, we see no particular strength in a different regime for the acquisition of interests in land, as the same issues apply re: land as an asset class.

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?

Chapter 8, paragraph 8.109

We agree. We think that purchasers should be protected in these circumstances. This would facilitate charity land transactions, particularly as we feel that 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.

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?

Chapter 8, paragraph 8.123

No, because of our position on the advice requirement generally.

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.

Chapter 8, paragraph 8.125

We have no strong views, but can see no major benefit given our stance on the proposed new regime.

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.

Chapter 8, paragraph 8.127

We have no evidence as to the practical operation of these procedures and therefore make no particular comment.

Permanent endowment

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?

Chapter 9, paragraph 9.51

Yes, we agree, for the reasons stated in para 9.50.

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?

Chapter 9, paragraph 9.57

We agree. This would be a useful clarification in an area where there is recognised confusion.

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.

Chapter 9, paragraph 9.60

We agree with Lord Hodgson's view that the thresholds should be increased, but consider that the level of such increase is a matter for those working in the sector. We welcome a more flexible approach to permanent endowment more generally.

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.

Chapter 9, paragraph 9.63

Whilst we can see the attraction in aligning the time period with the s.268 and s.275 procedures, we would have concerns about the Charity Commission's ability to comply with these time frames, given the current crisis of adequate resourcing of its functions.

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.

Chapter 9, paragraph 9.66

We consider that the current regimes are broadly satisfactory, to the extent that they provide adequate safeguards to protect charity assets.

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.

Chapter 9, paragraph 9.68

We have no evidence as to the practical operation of these procedures and therefore make no particular comment.

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.

Chapter 9, paragraph 9.80

We are concerned that, while a new regime might be seen as attractive, we would not wish to undermine donors' confidence in their original donations. We can see real difficulties in providing a more permissive regime without losing the relevant clarity and certainty for donors. For example, if such a new scheme were to apply, it would presumably have to be created for future transactions, leaving existing permanent endowment rules in place. This would create an additional category of flexible permanent endowment, which would not add clarity and may cause additional burdens for those dealing with charity assets.

We could see some benefit in addressing some existing concerns with the current rules on permanent endowment, which may be inhibiting activity in the sector. For example, some clarification over whether charities may mortgage property held on permanent endowment would be useful. This would appear to be permitted in operational guidance, but legal issues remain such as what happens to the mortgagee when the relevant property needs to be sold?

Additionally, any changes to the current regime will need to feed in to the SORP requirements, particularly in clarifying definitions between both sets of the requirements.

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.

Chapter 9, paragraph 9.82

We are of the view that this is best addressed by those consultees with operational experience.

PAYMENTS TO CHARITY TRUSTEES AND OTHER NON-BENEFICIARIES

Remuneration for the supply of goods and the power to award equitable allowances

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?

Chapter 10, paragraph 10.47

We can see no principled objection to the extension of the s.185 mechanism to the supply of goods, but note that it might be more difficult for a trustee to satisfy the requirements in the context of the supply of goods. The justification for the provision of services by a particular trustee would be easier to demonstrate than the provision of goods by that trustee, other than in very narrow circumstances relating to specialised goods, or where the price of supply is at a discount compared to market driven alternatives.

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.

Chapter 10, paragraph 10.49

We are of the view that this is best addressed by those consultees with operational experience.

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?

Chapter 10, paragraph 10.59

We think there is a logical argument to be made for the introduction of such a power, not least to make the current process more transparent. We agree that this would lead to a welcome reduction in both time and other costs.

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.

Chapter 10, paragraph 10.60

We are of the view that the criteria in s.191 would be applicable here, as we feel that these criteria provide sufficient safeguards of the public interest and are more easily understood than the discretionary criteria that the court apply.

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.

Chapter 10, paragraph 10.62

We have no evidence as to the practical operation of these procedures and therefore make no particular comment.

Ex gratia payments out of charity funds

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?

Chapter 11, paragraph 11.40

Yes, we agree. There are sufficient safeguards within the general duties of trusteeship.

We invite the views of consultees as to the appropriate financial threshold for the exercise of such a new statutory power.

Chapter 11, paragraph 11.41

We are of the view that this is best addressed by those consultees with operational experience. However, 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).

We provisionally propose that the Minister be given a power to vary the financial threshold by secondary legislation.

Do consultees agree?

Chapter 11, paragraph 11.42

See comments above re: threshold setting.

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?

Chapter 11, paragraph 11.43

Yes, we would wish that such a power was available to those in the sector, but would not seek to impose such a power on all organisations.

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.

Chapter 11, paragraph 11.48

We are of the view that this is something that the trustees should determine for themselves. There could be unforeseen consequences in making such payments within the governance of organisations, so that responsibility should properly lie with the trustees and no-where else. It follows that our answers to (2) and (3) are unnecessary.

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?

Chapter 11, paragraph 11.50

Yes, we agree. We see no compelling reason to distinguish between the powers applicable to the administration of the functions of a charity based on the legal origin of the organisation.

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?

Chapter 11, paragraph 11.51

Yes, see above.

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.

Chapter 11, paragraph 11.53

We have no evidence as to the practical operation of these procedures and therefore make no particular comment.

INCORPORATION, MERGER AND INSOLVENCY

Charity incorporations and mergers

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.

Chapter 12, paragraph 12.50

The current regime does not appear to be an inhibiting factor in 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).

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?

Chapter 12, paragraph 12.54

Given the nature of merger, which already a process requires a significant change to the original form of a charity, we can also see no strong reason for additional requirements for property held as permanent endowment. Indeed, this may be a prohibiting factor in effective merger, and we believe the requirements of similarity are sufficient in all property transfers.

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.

Chapter 12, paragraph 12.56

We have no evidence as to the practical operation of the s.268 power and therefore make no particular comment.

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.

Chapter 12, paragraph 12.67

We have no experience of using vesting declarations and therefore make no particular comment.

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?

Chapter 12, paragraph 12.68

While we see much strength in the arguments provided in para 12.62 about not removing this exception, we feel that the interests of an effective merger should take precedence. Except in the case of absolute covenants (see below), many covenants restricting assignment are fully qualified in practice, so that the landlord cannot refuse consent unreasonably. In 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.

We invite the views of consultees as to whether the section 310 power and its exceptions are otherwise satisfactory.

Chapter 12, paragraph 12.69

We consider that the powers and the exceptions are otherwise satisfactory.

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.

Chapter 12, paragraph 12.70

Given our view on qualified covenants, we feel this is unnecessary. If, however, the proposal re: qualified covenants is not taken forward, we would be of the view that the power should not apply to absolute covenants, as the landlord has clearly expressed the view that the transfer cannot take place unless and until the landlord 'lifts' the covenant by agreeing any terms they feel are relevant as a condition for doing so. 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, and there is equal force in the contention that landlords chose the absolute restriction in preference to the other forms available for good reason.

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?

Chapter 12, paragraph 12.76

Yes, we see no reason for any distinction.

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?

Chapter 12, paragraph 12.92

We agree, both with the proposal and the need to deal with the original mischief that s.311(2) was introduced to address.

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.

Chapter 12, paragraph 12.94

We have no evidence as to the experiences of retaining shell charities and therefore make no particular comments to make.

Charitable trusts in insolvency

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?

Chapter 13, paragraph 13.74

We agree, as we see no substantial reason to distinguish between the two.

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?

Chapter 13, paragraph 13.75

We agree, but express some concern about the capacity of the Charity Commission to make such amendments (as, after all, they drafted the original guidance). It also adds support for our earlier view re: guidance on dispositions of charity land that the Charity Commission's guidance is seen as having force of law and can cause complications when it is not as accurate as it needs to be.

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.

Chapter 13, paragraph 13.76

We believe that this is a very specialised matter, best left to those with considerable experience of the subtleties of the Insolvency regime.

CHARITY COMMISSION POWERS

Charity names

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?

Chapter 14, paragraph 14.37

We agree.

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.

Chapter 14, paragraph 14.39

We agree. Given that the rationale is largely to prevent public confusion, the technical status of a charity is irrelevant, be it exempt, registered or unregistered.

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?

Chapter 14, paragraph 14.43

We agree, particularly as this appears already to be happening with CIOs.

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?

Chapter 14, paragraph 14.47

We agree, as this speaks directly to the concern over public confidence in the names of organisations.

Determining the identity of a charity's trustees

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?

Chapter 15, paragraph 15.7

We agree, as this is in the best interests of the effective administration of charities.

THE CHARITY TRIBUNAL AND THE COURTS

The Charity Tribunal and the courts

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?

Chapter 16, paragraph 16.32

We think that increasing choice will facilitate more effective access to justice.

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.

Chapter 16, paragraph 16.34

We have no experience of the differing costs identified and therefore make no particular comment.

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.

Chapter 16, paragraph 16.39

We do not consider that authority from the Charity Tribunal or the Charity Commission should be obtained, for the reasons put forward in paragraph 16.38. We note, however, that in relation to the second reason provided in that paragraph, 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.

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.

Chapter 16, paragraph 16.41

We have no direct experience of the likely costs of having to obtain authorisation and therefore make no particular comment.

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?

Chapter 16, paragraph 16.54

We agree, as we consider that the current position may be an obstruction to access to justice. Charity trustees, particularly in relation to the costs associated with litigation, are generally risk adverse and having the protection of a *Beddoe* order may encourage the trustees to take necessary legal action.

We invite the views of consultees as to whether the Attorney General should always be a party to applications for a *Beddoe* order.

Chapter 16, paragraph 16.55

We agree that this is best left to the Charity Tribunal.

We invite the views of consultees as to the differing costs of seeking *Beddoe* protection from (a) the Charity Commission, (b) the court, and (c) the Charity Tribunal.

Chapter 16, paragraph 16.64

We have no direct experience of the costs of seeking to obtain *Beddoe* protection and therefore make no particular comment.

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.

Chapter 16, paragraph 16.86

We are concerned that the suggested solutions to the problems identified are disproportionate to the risk posed by such problems. For the reasons advanced in paragraphs 16.78 – 16.84, we think that inaction here is best.

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.

Chapter 16, paragraph 16.93

We think oversight by the Attorney General provides an effective mechanism, and see no compelling reason for intervention in this area. We note that a proposed requirement to notify the Attorney General and for the office to be joined to an action 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.

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.

Chapter 16, paragraph 16.102

We agree with the provisional view of the Law Commission, principally on the basis that we are of the view that the reference process is designed to provide guidance and further the development of the law, not to provide substantive remedies for the parties concerned.