

# CHARITIES BILL [HL]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Charities Bill [HL] as introduced in the House of Lords on 26 May 2021 (HL Bill 17).

- These Explanatory Notes have been prepared by the Department for Digital, Culture, Media and Sport in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The Charities Bill (“the Bill”) gives effect to the Law Commission’s recommendations to reform various technical issues in the law governing charities. It does so primarily by amending the Charities Act 2011 (“the Charities Act”) but also by amending other legislation such as the Universities and College Estates Act 1925 and the Trusts of Land and Appointment of Trustees Act 1996. The impact of these changes will significantly improve the efficiency of the sector, release more funds for use on charitable purposes rather than administration, and reduce unnecessary and overly bureaucratic regulation that not only increases the sector’s costs but also is a factor in discouraging people from volunteering to become trustees.
- 2 Charities legislation is commonly perceived as being complicated, uncertain and in places unduly burdensome. This can delay or prevent a charity’s activities, discourage people from volunteering to become trustees and force charities to obtain expensive legal advice. It also hinders the Charity Commission in its regulation of the sector.
- 3 The Bill will do the following.
  - Give charities wider or additional powers and flexibility:
    - to amend their governing documents;
    - to decide on how they procure goods and services;
    - to make “ex gratia” payments (which charities have a moral obligation, but no legal power, to make).
  - Clarify when property can be applied cy-près<sup>1</sup>, including the proceeds of failed fundraising appeals.
  - Produce a clearer and less administratively burdensome legal framework for buying, selling, leasing and mortgaging charity land.
  - Clarify and expand the statutory regime that applies to permanent endowment.
  - Introduce a power – with appropriate safeguards – for charities to borrow from their permanent endowment and to make certain social investments using permanent endowment.
  - Facilitate, where appropriate, charity mergers and incorporations.
  - Confer additional powers on the Charity Commission:
    - to authorise charities to pay an equitable allowance;
    - to require charities to change or stop using inappropriate names; and
    - to ratify the appointment or election of charity trustees where there is uncertainty concerning the validity of their appointment or election.
  - Improve and clarify certain powers of the Charity Tribunal.

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<sup>1</sup> Cy-près means “as near as possible”. When a charitable purpose cannot be carried out, the Charity Commission can direct under a scheme that the funds should be used for other similar charitable purposes.

## Policy background

- 4 The Law Commission's project originated from its Eleventh Programme of Law Reform, published in July 2011. The Programme explained that the project would comprise, in part, certain issues arising from the review of the Charities Act 2006 by Lord Hodgson of Astley Abbotts, which concluded in 2012. Government and the Law Commission first agreed terms of reference for the project in June 2013, and they were later updated to include a review of certain aspects of the law relating to social investment by charities and again to review the law relating to the use of permanent endowment. The Law Commission consulted on, and then published, its recommendations on social investments in 2014, and its recommendations for statutory reform were implemented in the Charities (Protection and Social Investment) Act 2016. The Law Commission consulted on the remaining issues in its project in 2015, with a supplementary consultation in 2016, and published its final recommendations in its report *Technical Issues in Charity Law* in 2017.
- 5 Further information on the policy and background to the Law Commission's recommendations is provided in its final report and the consultation papers which preceded it.<sup>2</sup>
- 6 Government's response to the report, published in 2021, accepted the majority of the Law Commission's recommendations.<sup>3</sup> The Bill implements the recommendations that were accepted.

## Legal background

- 7 The first definition of charity was set out in the preamble to the Statute of Charitable Uses 1601. Since then, there have been numerous statutes and regulations refining the definition of charitable purposes and regulating charities' activities in a number of ways. In modern times, significant changes were introduced by the Charities Act 1960 and the Charities Act 1992, which was followed by a consolidation Act in 1993. Further important developments were introduced in the Charities Act 2006, which was again followed by a consolidation in the Charities Act 2011.
- 8 The key legislation and regulations impacted by the Bill are:
  - a. the Charities Act 2011;
  - b. the Charities (Qualified Surveyors' Reports) Regulations 1992;
  - c. the Charities (Total Return) Regulations 2013; and
  - d. the Universities and College Estates Act 1925.

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<sup>2</sup> *Technical Issues in Charity Law* (2015) Law Commission Consultation Paper No 220; and *Technical Issues in Charity Law, Supplementary Consultation* (2016), both available at <https://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/>.

<sup>3</sup> Government response to Law Commission report on *Technical Issues in Charity Law* (22 March 2021), available at <https://www.gov.uk/government/publications/government-response-to-law-commission-report-on-technical-issues-in-charity-law>.

## Territorial extent and application

- 9 Clause 41 sets out the territorial extent of the Bill, that is the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect.
- 10 This Bill extends to England and Wales only, subject to certain exceptions. Clause 24, Schedule 1, and paragraphs 12 and 45 of Schedule 2, extend as far as the enactments to which they apply, which in some cases will be narrower, and in others broader, than the general application of the Bill: see clause 41 of the Bill.
- 11 In relation to Wales, charity law is reserved to the United Kingdom Government by section B22 of paragraph 1 of Schedule 7A to the Government of Wales Act 2006 and therefore no Legislative Consent Motion is required.
- 12 In relation to Scotland, charity law is not reserved to the United Kingdom Government by Schedule 5 of the Scotland Act 1998 and is therefore devolved to the Scottish Parliament.
- 13 In relation to Northern Ireland, charity law is not an excepted or reserved matter under Schedule 2 or 3 of the Northern Ireland Act 1998 and is therefore transferred to the Northern Ireland Assembly.
- 14 Clause 24 makes amendments to, and repeals sections of, the Universities and College Estates Act 1925 (“the UCEA 1925”). Schedule 1 makes changes necessary to remove redundant references to the UCEA 1925 from other legislation. The UCEA 1925 applies to named institutions in England and has UK wide extent. Some of the provisions which are amended by Schedule 1 also extend to Scotland or to the UK.
- 15 Paragraph 12 of Schedule 2 makes an amendment to section 5(8) of the Coal Industry Act 1987. Whilst the Coal Industry Act 1987 extends to England and Wales and Scotland, section 5(10) makes clear that section 5(8) does not apply to Scotland.
- 16 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned.
- 17 Paragraph 45 of Schedule 2 inserts a new section 77(2)(e) into the Companies Act 2006. The Companies Act 2006 has UK extent, however, the new section 77(2)(e) will only apply to charitable companies in England and Wales.
- 18 Given the limited scope of applicability of the amendments made by clause 24, Schedule 1 and paragraphs 12 and 45 of Schedule 2, no legislative consent motions are required for Scotland or Northern Ireland.
- 19 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

# Commentary on provisions of Bill

## Part 1: Purposes, Powers and Governing Documents

### Clause 1: Alteration of charitable company's purposes

- 20 Clause 1(2) amends section 198(2)(a) of the Charities Act, which defines those amendments of a charitable company's articles which will constitute a "regulated alteration" of its objects (companies have "objects" under the Companies Act 2006, whereas charities have "purposes" under the Charities Act; the two terms are synonymous). The amendment means that an alteration to the statement of the company's objects which does not alter the substance of the charitable purposes of the company will not constitute a "regulated alteration". However, it also means that an amendment other than to the statement of the company's objects, which nonetheless alters the substance of the company's charitable purposes, will constitute a regulated alteration.
- 21 The following are some examples of an amendment "which alters the charitable purposes of the company".
- a. A change in the geographical area of benefit, for example, "for the benefit of the residents of X parish". Changing this to "for the benefit of the residents of Y parish", or "X and Y parish", or a wider geographical area that included X parish, would be a regulated alteration.
  - b. A change to a part of the statement of purposes which sets out the means of achieving those purposes, for example, changing "the advancement of education by the provision of a school" to "the advancement of education", would be a regulated alteration. Contrast this with a change to a part of the statement of purposes which merely gives an example of how the purposes might be achieved: changing "the advancement of education including, but not limited to, by the provision of a school" to remove reference to the provision of a school would not be an alteration to the charitable purposes of the company.
  - c. For certain charities, such as almshouse charities, the criteria for beneficiaries is so fundamental to the charity's purposes that an amendment to those provisions would constitute an alteration of the charitable purposes of the company.
- 22 The amendment reflects the description of a "regulated alteration" of a Charitable Incorporated Organisation's (CIO) constitution in section 226(2)(a) of the Charities Act.
- 23 Clause 1(3) inserts a new subsection into section 198 of the Charities Act. The new subsection sets out the matters which the Charity Commission must consider in deciding whether or not to give consent to an alteration of a charitable company's purposes. Clause 2(2)(b) replicates that provision for CIOs. Those considerations are:
- a. The purposes of the company when it was established.
  - b. The desirability of securing that the purposes of the company are, so far as reasonably practicable, similar to the purposes being altered. This consideration thus takes into account the current purposes of the company, including any changes since it was established.
  - c. Current social and economic circumstances.
- 24 The new considerations broadly reflect the matters which the Charity Commission must have regard to, under section 67(3) of the Charities Act, when changing the purposes of an

unincorporated charity by way of a cy-près scheme. However, the reference to “the spirit of the original gift” is replaced with “the purposes of the company when it was established” in recognition of the fact that there may not always be an identifiable “original gift”.

- 25 The new considerations are the same as those which the Charity Commission will have to consider in deciding whether to consent to an alteration to the purposes of an unincorporated charity under the new section 280A(10), inserted by clause 3(2). Accordingly, the Bill creates consistency in the matters that the Commission must consider when deciding whether to consent to a change of purposes by a charity, regardless of whether the charity is a company, CIO, or unincorporated charity.
- 26 The amendment to section 337 of the Charities Act by clause 37 of the Bill confers on the Charity Commission a discretionary power to give notice of a proposed amendment, or to require the charity to give such notice, before consenting to a regulated alteration.

## Clause 2: Amendments to constitution of CIOs

- 27 Clause 2 aligns the process for the amendment of a CIO’s constitution with the process for a charitable company.
- 28 Clause 2(3) inserts new subsections (1A), (1B), and (1C) into section 227 of the Charities Act. New subsection (1B) provides for amendments to a CIO’s constitution to take effect on the date that the resolution containing the amendment is passed, or on a later date specified in the resolution. New subsection (1A) creates an exception for an alteration of the CIO’s purposes, which takes effect only when registered by the Commission, or on a later date specified in the resolution. (CIOs are required by section 227 of the Charities Act to send to the Charity Commission a copy of a resolution under section 224 amending their constitution, as well as a copy of the constitution as amended and any other documents that the Commission requires. This is in line with the requirement under section 26(1) of the Companies Act 2006, but without creating a criminal offence for failure to comply.)
- 29 The replacement section 226(1) (inserted by clause 2(2)) and new section 227(1C) (inserted by clause 2(3)) ensure that any regulated alteration cannot take effect unless the Charity Commission has given its prior consent, despite the provisions in new sections 227(1A) and (1B). It is, however, possible to pass a resolution that is not expressed to take effect until the Charity Commission has given its consent. Such conditional resolutions can already be made by companies, and it will now be possible for CIOs to pass similar resolutions. These amendments align the taking effect of amendments to the constitution of a CIO with the taking effect of amendments to a charitable company’s articles of association.
- 30 New section 226(2A) (inserted by clause 2(2)) sets out the matters which the Charity Commission must consider in deciding whether or not to give consent to an alteration of the purposes of a CIO. This subsection replicates that provision for companies: see paragraphs 23 to 25 above.
- 31 The amendment to section 337 of the Charities Act by clause 37 of the Bill confers on the Charity Commission a discretionary power to give notice of a proposed amendment, or to require the charity to give such notice, before consenting to a regulated alteration.

## Clause 3: Powers of unincorporated charities

### **Repeal of certain existing powers**

- 32 Clause 3(1) repeals:
  - a. the power under sections 267 to 274 of the Charities Act for certain unincorporated charities (with an income of £10,000 or less and which do not hold designated land) to resolve to transfer all their property to another charity;

- b. the power under sections 275 to 279 of the Charities Act for a small unincorporated charity (with an income of £10,000 or less and no designated land) to alter its purposes; and
  - c. the power under section 280 of the Charities Act for any unincorporated charity to modify administrative provisions in its governing document.
- 33 It replaces these specific powers with a new general power to amend the governing documents of an unincorporated charity under new sections 280A and 280B: clause 3(2). A resolution passed under sections 268(1), 275(2) or 280(2) of the Charities Act prior to the commencement of clause 3 will not be affected by the repeal of sections 267 to 280: clause 3(3).

### **The new power under section 280A: general**

- 34 The new power introduced by clause 3(2) is intended to be a wide power for unincorporated charities (whether trusts or unincorporated associations) to amend any provision in their governing documents. The term “trusts” in section 280A has the meaning given in section 353(1) of the Charities Act, namely the provisions establishing a charity as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not.
- 35 Subject to the express restrictions set out in section 280A(2) and (3), that the amendment must be expedient in the interests of the charity and that the power cannot be exercised in a way which would result in the institution ceasing to be a charity, and the general duties on trustees, there is no limitation on the type of amendment that may be made under the power. The power could be used, for example, to give the trustees more powers than they have under the existing governing document. Any amendment that could have been made under sections 267 to 280 can be made under the new section 280A.
- 36 The power cannot be excluded or modified by a charity’s governing document, and it applies in addition to any other amendment powers that are available to the charity trustees.

### **Regulated alterations**

- 37 While new section 280A provides unincorporated charities with a power to amend any provision in their governing documents, certain amendments will require the written consent of the Charity Commission. Those amendments are set out in subsection (8). Subsection (8)(a) to (c) reflects the amendments which would be “regulated alterations” (under sections 198 and 226 of the Charities Act) if they were made by a charitable company or CIO. Examples of amendments that would fall within section 280A(8)(a) are given in paragraph 21 above. Subsection (8)(d) to (f) provides for amendments that are specific to unincorporated charities. Subsection (8)(e) (in combination with subsection (9)) provides that an amendment that would have required the consent of a person (other than a trustee or member of the charity) is a regulated alteration, unless that person consents to the amendment or has died or (if a corporation or other body) is no longer in existence.
- 38 Subsection (8)(f) (in combination with subsection (9)) provides that any amendment which would “affect any right directly conferred by the trusts of the charity” on a named person, or the holder of an office or position specified in the trust of the charity (other than that of a trustee or member) is a regulated alteration, unless that person consents to the amendment or has died or (if a corporation or other body) is no longer in existence. Trustees and members are excluded from the definition on the basis that their rights are adequately protected by the requirement that they pass a resolution to exercise the amendment power.
- 39 The following amendments would generally be regulated alterations:
- a. changing a power for X to nominate trustees for appointment;
  - b. changing a power for X to set the spiritual direction of a faith charity;

- c. changing a requirement for X to consent to certain decisions or proposed amendments;
- d. changing a right for X to be consulted on a particular matter;
- e. changing a right for X to receive certain documents;
- f. changing the named recipient of the charity's property in a dissolution clause; and
- g. introducing a power to merge in circumstances where Charity X is named as the recipient of property in the event of dissolution, and the creation of the power to merge renders the dissolution clause redundant.

40 On the other hand, the following amendments would not be regulated alterations:

- a. changing the right of trustees to co-opt further trustees (since trustees are excluded from the definition);
- b. changing the rights of members to appoint or remove trustees, or the requirement for members to ratify certain decisions (since members are excluded from the definition);
- c. changing the rights of a category of people (such as the residents of a particular neighbourhood) to vote on certain matters (since they are not named persons, and do not hold a particular office or position specified in the governing document); and
- d. changing provisions that confer benefits on individuals who are not named in the governing document, or provisions that confer indirect benefits, such as the benefits to a supplier of goods or services to the charity being affected by an amendment which causes the charity to stop purchasing those goods or services.

41 Subsection (8)(g) ensures that any amendment which would give any person (including the trustees or members of the charity) a power to make a regulated alteration, for example, a power to change the charity's purposes, is itself a regulated alteration.

42 New section 280B, subsections (2), (3) and (4), provide further definition of the amendment described at section 280A(8)(c). The definition of "benefit" is consistent with the definition in section 199 of the Charities Act<sup>4</sup> which applies for the purposes of the equivalent regulated alteration for charitable companies. The definition of persons who are connected with the charity is consistent with section 200 of the Charities Act which defines a "connected person" for the purposes of the equivalent regulated alteration for charitable companies.

43 Schedule 2, paragraphs 5 to 7 amend sections 350, 351 and 352 of the Charities Act to ensure that the definitions of particular connected persons (child, spouse and civil partner; controlled institution; and substantial interest in body corporate) in those sections apply to the new section 280A(8)(c).

44 The amendment to section 337 of the Charities Act by clause 37 of the Bill confers on the Charity Commission a discretionary power to give notice of a proposed amendment, or to require the charity to give such notice, before consenting to a regulated alteration.

### **Amendment to the charity's purposes**

45 Section 280A(10) lists the matters which the Charity Commission must have regard to in deciding whether to give effect to an amendment which would alter the purposes of a charity.

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<sup>4</sup> As amended by paras 41 and 42 of Schedule 2 to the Bill, so as to exclude the provision of indemnity insurance authorised by section 189 from the meaning of "benefit".

These are the same matters that the Commission must consider if the Commission is deciding whether to consent to a change of purposes by a charitable company or CIO (see clauses 1 and 2, and paragraphs 23 to 25 and 30 above).

### **Passing a resolution under the new power**

- 46 Section 280A, subsections (4), (5) and (6), set out how to pass a resolution under the new power. The operation of the power depends on the governance structure of the charity in question.
- a. If the charity has a membership body which has a decision-making role under the charity's governing document (for example, an entitlement to attend a general meeting and vote on the appointment of the trustees or to vote on the charity's reports and accounts), a resolution must be passed by a majority of the trustees and by a further resolution of those members.<sup>5</sup> The members' resolution must be passed either:
    - i. by at least 75% of those voting at a general meeting<sup>6</sup>; or
    - ii. unanimously if the resolution is not considered at a general meeting (for example, it might be practical for a small membership body to approve the resolution by email).
  - b. If the charity does not have a membership body (which will be the case for most charitable trusts), the power is exercisable by a resolution of 75% of the charity's trustees.

### **Taking effect of a resolution passed under the new power**

- 47 The new section 280B, subsection (1), sets out when a resolution under section 280A takes effect. The resolution takes effect on the latest of:
- a. the date that it is passed;
  - b. the date specified (if any) in the resolution for it to take effect;
  - c. if the charity has a separate body of members which needs to approve the resolution of the trustees, the date on which such approval is obtained; or
  - d. if the amendment makes a regulated alteration which requires Charity Commission consent, the date on which the Charity Commission gives consent.
- 48 Section 280A(7) provides that, notwithstanding section 280B(1), no amendment that makes an alteration requiring Charity Commission consent (under subsection (8)) can take effect unless and until that consent is obtained. However, the trustees can obtain Charity Commission consent before or after passing the resolution and/or putting it to the membership for approval.

### **Clause 4: Power to amend Royal Charter**

- 49 Clause 4 inserts a new section 280C into the Charities Act, which provides charities established or regulated by Royal Charter with a new statutory power to amend any provision in their Royal Charter.<sup>7</sup> The power will assist Royal Charter charities that do not

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<sup>5</sup> If the members request an amendment to the resolution, the trustees will need to pass a fresh resolution reflecting that amendment and then put it to the members a second time.

<sup>6</sup> The provision also permits a resolution to be passed without the need for a vote, provided there is no expression of dissent by any member at the meeting.

<sup>7</sup> The power will not be available to amend Royal Charters which incorporate a trustee body which is not itself a charity.

currently have an express power to make the amendment sought and which must therefore petition, and pay, for a supplemental Charter if they wish to amend the Charter. Many Royal Charters contain an express power of amendment, which is tailored to the charity. If a proposed amendment could be made under an existing express power in the Charter, that procedure must be followed, and the power in section 280C is not available: section 280C(2)(b).

- 50 The power is exercisable by resolution and subject to the approval of Her Majesty by Order in Council. Subsection (4) describes the process for passing a resolution in the case of a charity that has a membership body which has a decision-making role under the Charter. This process is similar to that for unincorporated charities with a membership body that must pass a resolution under the new section 280A: see paragraph 46 above.
- 51 To avoid potentially wasted costs of putting a proposed amendment to a vote of the charity's membership, only for the amendment to be refused, charities should speak to the Privy Council Office at an early stage of the process. That will enable potential problems to be resolved, and the Privy Council Office to indicate approval in principle to the proposed amendment, before the resolution is put to a vote of the charity's membership.
- 52 Unlike amending a Royal Charter under section 68 of the Charities Act, the new power under section 280C will not require a Charity Commission scheme. Once the resolution has been approved by Order in Council the resolution itself will serve to modify the Royal Charter.
- 53 Schedule 2, paragraph 44 amends the description of Royal Charter charities in section 292B(4)(b) to reflect the definition used in section 68 of the Charities Act and in the new section 280C.

#### Clause 5: Orders under section 73 of the Charities Act 2011: parliamentary procedure

- 54 Section 73 of the Charities Act provides a mechanism for amending a statute establishing or regulating a charity by secondary legislation. Clause 5 amends section 73 of the Charities Act so that any scheme will be subject to the negative procedure, regardless of whether it is amending a private or public general Act. This is the effect of section 347 of the Charities Act, pursuant to which the negative resolution procedure applies by default.

#### Clause 6: Cy-près powers

- 55 Section 61 of the Charities Act imposes a duty on trustees, where the case permits and requires that property or some part of it be applied cy-près, to secure the effective use of the property for charity by taking steps to enable it to be so applied. Section 62 sets out the occasions on which the original purposes of a charitable gift can be altered to allow it to be applied cy-près.
- 56 When donors respond to a fundraising appeal by a charity for a particular purpose (such as a fund for the victims of a particular natural disaster, or a fund for building a new church hall), and those purposes cannot be carried out, there is an "initial failure" of the charitable purposes. That is to be contrasted with a "subsequent failure", which arises where a surplus remains after the particular purposes of the fundraising appeal have been achieved. In the case of an initial failure of the charitable purposes for which a gift is given, the gift is only applicable for other purposes (that is, applicable "cy-près") if the donor had a "general charitable intention". When a gift is given for particular charitable purposes in response to a fundraising appeal, the donor will not have a general charitable intention. The default position, therefore, is that the donations must be returned to the donors
- 57 Clause 6(1) inserts section 63A into the Charities Act to replace the current regime (in sections 63 to 65) that allows certain donations given for particular purposes which have failed to be applied cy-près rather than having to be returned to the donors (or paid in to court if the

donors cannot be found). Provisions concerning particular forms of “disclaimer” to be executed by donors, and concerning particular statements to be included in fundraising literature by charities, are repealed. They are replaced by four circumstances in which a donation to a failed appeal can be applied cy-près.

**First case: unreasonable to incur expense to return the donation, or unreasonable for donors to expect donation to be returned**

58 Section 63A(1)(a) and (2) re-state section 64(2), allowing donations to be applied cy-près if the court or Charity Commission decides that it would be unreasonable to incur expense in taking steps to return the donation, or it would be unreasonable for the donors to expect the donation to be returned.

**Second case: donations of £120 or less**

59 Under section 63A(3), if a donor has given a total of £120 or less in one financial year (whether in a single donation, or cumulatively over the year), that donation can be applied cy-près. Accordingly, charities will not need to take steps to contact donors of relatively small sums to offer the return of their donations. A donor can, however, prevent this provision from operating by expressly stating that he or she wishes the donation to be returned in the event of the fundraising appeal failing. If such a declaration has been made, then the property is not applicable cy-près under 63A(3). But that does not prevent the property from being applicable cy-près by reason of the other conditions in section 63A, which apply regardless of a donor’s stated wishes.

60 Section 63A(3) works by looking at each individual gift and ascertaining, first, whether it is a gift of £120 or less, and second, whether the total gifts given by the donor in the financial year exceeded £120. For example:

- a. A donor has given £10 per month during the financial year, totalling £120. No individual donation exceeded £120, and the total given by the donor did not exceed £120. All 12 donations of £10 would therefore fall within section 63A.
- b. A donor has given two separate gifts of £50 and £20. No individual donation exceeded £120, and the total given by the donor (£70) did not exceed £120. Both donations will therefore fall within section 63A.
- c. A donor has given two separate gifts of £80 and £100. No individual donation exceeded £120, but the total given by the donor (£180) exceeded £120. Neither donation will fall within section 63A(3).

61 The condition in section 63A(3)(b) is that the charity trustees “reasonably believe” that the total gifts given by a donor in the financial year do not exceed £120. Therefore, the trustees will be required to take reasonable steps to ascertain whether or not this is the case, what is “reasonable” being a question of fact in each case.

62 The provision applies to donations made by any means, including standing order, bank transfer or cheque. The threshold of £120 applies to the amount given by the donor, so would not include any Gift Aid that the charity might claim on the donation.

63 Where a donation is made by two or more parties, whether they are treated as an individual donor or separate donors for the purposes of section 63A(3)(b) is a question of fact to be determined in each case.

**Third case: donors who cannot be identified or found**

64 Section 63A(4) and (5) allows the charity to agree with the Charity Commission the reasonable steps that it should take to attempt to identify and find donors to a failed fundraising appeal,

in order to offer them a refund of their donation. Donations can then be applied cy-près if, after taking those steps, the donor cannot be identified or found. This power to agree steps that are tailored to the charity and the particular fundraising appeal replaces the rigid and detailed requirements for prescribed advertisements and inquiries set out in the Charities (Failed Appeals) Regulations 2008, which are repealed by clause 6(2).

#### **Fourth case: unidentifiable donors**

- 65 Section 63A(6) re-states section 64(1), allowing donations from unidentifiable donors to be applied cy-près.
- 66 Clause 6(3) provides that the new section 63A operates from the date of commencement, even if the donations to the fundraising appeal were given before commencement and even if the fundraising appeal failed before commencement.

#### **Clause 7: Proceeds of fund-raising: power of charity trustees to apply cy-près**

- 67 Where the proceeds of a failed fundraising appeal are applicable cy-près, those funds can only be used for other charitable purposes if the Charity Commission makes a cy-près scheme. Clause 7 inserts a new section 67A into the Charities Act, which allows charity trustees to apply the proceeds of a failed fundraising appeal to other purposes, without the need to obtain a cy-près scheme. Where the proceeds exceed £1,000, the charity trustees must obtain the consent of the Charity Commission.
- 68 The power is available whenever proceeds from a fundraising appeal are applicable cy-près (section 67A(1)).
  - a. In the case of an initial failure of the appeal (typically where insufficient funds have been raised so the purpose of the appeal cannot be achieved), the default position is that the requirement for, and absence of, a general charitable intention prevents the proceeds from being applicable cy-près. That default position is ameliorated by section 63A (inserted by clause 6(1)). The proceeds will therefore only be applicable cy-près if a condition in section 63A is satisfied.
  - b. In the case of a subsequent failure of the appeal (where there is a surplus after achieving the purpose of the appeal), there is no requirement for a general charitable intention and the proceeds are therefore applicable cy-près without the need to consider section 63A. Such proceeds will be applicable cy-près by virtue of section 62(1)(a) or (b).
- 69 The section 67A power is exercisable by the charity trustees passing a resolution that the proceeds should be used for different charitable purposes. In making that decision, the trustees must have regard to two matters in section 63A(2), which broadly mirror the considerations that must be taken into account by the Charity Commission when it is deciding (i) whether to consent to an unincorporated charity changing its purposes under section 280A (see clause 3), (ii) whether to consent to a charitable company or CIO changing its purposes under sections 198 and 226 (see clauses 1 and 2), and (iii) whether to make a cy-près scheme (see section 67).
- 70 If the proceeds do not exceed £1,000, the resolution of the trustees under section 67A takes effect immediately. If the proceeds exceed £1,000, the resolution takes effect when the Charity Commission consents to it: section 67A(4). To ascertain whether a resolution can take effect without Charity Commission consent based on the value of the proceeds not exceeding £1,000, it is necessary to calculate the total value of all the donations to a single appeal that are applicable cy-près. If a fund comprises two donations of £5,000 (which are not applicable cy-près because s63A does not operate) and 90 donations of £10 (which are applicable cy-près because s63A(3) operates), the total value of donations in the fund that are applicable cy-près

is £900 (i.e. 90 x £10). The section 67A resolution in respect of those donations totalling £900 would not require the consent of the Charity Commission. The fact that the fund also includes £10,000 which is not applicable cy-près does not mean that the trustees need Charity Commission consent in respect of their resolution to use the £900 (which is applicable cy-près) for other purposes.

- 71 The amendment to section 337 of the Charities Act by clause 37 would give the Charity Commission a discretion to require the trustees to publicise the resolution (or to publicise it itself) and seek representations on it before consenting to it.

#### Clause 8: Power of the court and the Commission to make schemes

- 72 The court and the Charity Commission can make “schemes” in respect of charities. Schemes are legal arrangements that change or supplement the provisions that would otherwise apply in respect of a charity or a gift to charity. In response to doubts as to whether the scheme-making power extends to corporate charities, clause 8 inserts a new section 75ZA into the Charities Act. Section 75ZA confirms that any power to make schemes in respect of a charitable trust extends to charitable companies, CIOs or any other charity. The section is subject to the other provisions of the Charities Act, so the special scheme-making procedures for charities established or regulated by Royal Charter (in section 68) and by statute (in section 73) will continue to govern schemes made in respect of those charities.
- 73 This power is treated as always having had effect so as not to cast doubt on the validity of any scheme made before commencement. The new section does not restrict or curtail any existing powers of the court or the Charity Commission to make schemes under the Act or otherwise.

#### Clause 9: Definition of “permanent endowment”

- 74 Clause 9 replaces the definition of “permanent endowment” in section 353(3) of the Charities Act with a new, simplified definition. The new definition:
- a. removes the redundant definition of a charity which is treated as having permanent endowment, and retains a definition of what permanent endowment means;
  - b. removes any presumption that a charity holds permanent endowment; and
  - c. removes superfluous and confusing words from the definition.
- 75 It defines when property will be considered permanent endowment for the purposes of the Charities Act, namely if it is subject to a restriction on expenditure which distinguishes between income and capital.
- 76 Examples of permanent endowment under this definition could include the following types of asset.
- a. A gift of shares subject to a restriction that only the income from the shares (i.e. dividends) can be spent to further the purposes of the charity.
  - b. A gift of property subject to a restriction that the property itself cannot be sold and the proceeds applied for the purposes of the charity, but the rental income may be spent on those purposes.
  - c. A property that can only be used for carrying out the charity’s purposes, for example, to house beneficiaries at below market rent (sometimes referred to as “functional endowment”). The rental income could be spent but it is not possible to sell the property and spend the proceeds.
- 77 Under this definition a fund restricted to being spent for a particular purpose (for example, to repair the roof of the village hall) is not permanent endowment unless there is a restriction on

the capital of that fund being spent for that purpose. Such a fund would, however, amount to a “special trust” under section 353(4) (as inserted by clause 14(2); see paragraph 96 below).

### **Clause 10: Amendment of powers to release restrictions on spending capital**

78 Sections 281 and 282 of the Charities Act allow charities to release the restrictions on spending permanent endowment capital. The power in section 281 can be exercised by the charity trustees alone and exercise of the power in section 282 is subject to the oversight of the Charity Commission.

#### **Availability of sections 281 and 282 to corporate charities**

79 Both section 281 and 282 are expressed to be limited to charities which are not companies or other bodies corporate. However, it is often assumed that a corporate charity’s permanent endowment is always held on trust and that it is itself a separate (unincorporated) charity. Accordingly, sections 281 and 282 are generally considered to be available in respect of the permanent endowment of a corporate charity, despite the legislation stating that it is not available to corporate charities. Clause 10(2)(a) (in respect of section 281) and clause 10(3)(b) (in respect of section 282) remove the ambiguity by omitting any words limiting the powers to unincorporated charities. Accordingly, the statutory power to release restrictions on spending permanent endowment under sections 281 and 282 is available to corporate charities.

#### **Circumstances in which Charity Commission oversight is required under section 282**

- 80 Clause 10(3) changes the circumstances in which Charity Commission consent is required to release permanent endowment by amending section 282 of the Charities Act in two respects.
- a. First, it makes section 282 applicable to funds even if they do not consist entirely of property given by a particular person (or persons) for a particular purpose. Accordingly, the mere fact that a permanent endowment fund comprises some capital that originates from accumulated income (as opposed to a donation of capital by a donor) does not enable the charity trustees to use the section 281 power and therefore avoid oversight by the Charity Commission. Instead, the sole criterion which determines the availability of the section 281 or 282 powers (and thus the need for Charity Commission oversight) is the value of the permanent endowment fund.
  - b. Second, it raises the market value of funds to which the section applies to funds exceeding £25,000. The gross income of the charity in question will no longer be relevant to determining whether the section 281 or section 282 power can be exercised as the new threshold focuses solely on the market value of the fund.

#### **Exercising the power to release restrictions on spending capital where there is outstanding borrowing from permanent endowment**

- 81 Clause 10(2), (3) and (4) make provision for how the power to release permanent endowment restrictions (under sections 281 and 282) operates where the trustees have already borrowed money from a permanent endowment fund and some or all of that borrowing remains outstanding (see further clause 12 which creates a power for trustees to borrow from permanent endowment). Two changes are made:
- a. First, clause 10(3)(b) amends section 282(1), clause 10(3)(c) inserts a new section 282(1A), and clause 10(3)(f) inserts a new definition in section 282(5). The effect of those provisions is to ensure that the amount of any outstanding borrowing from permanent endowment is taken into account when determining whether the fund falls above or below the £25,000 threshold and therefore whether Charity Commission consent is required. The value of the fund is to be calculated by including the amount of any outstanding borrowing. Accordingly, if the trustees have borrowed £6,000 from

a permanent endowment fund of £30,000, then the fund comprises assets of £24,000 plus the benefit of the obligation to repay the £6,000 borrowing. The “adjusted market value” of the fund (under section 282(5)) would be £30,000, namely the current fund value of £24,000 plus the outstanding borrowing of £6,000. Since that adjusted market value of the fund is over £25,000, it would be necessary to obtain Charity Commission consent to any release of the permanent endowment restrictions under section 282.

- b. Second, clause 10(2)(b) inserts new sections 281(6A)-(6D), clause 10(3)(d) inserts new sections 282(3A)-(3B), and clause 10(4) supplements section 284. The effect of those provisions is to allow the trustees to use the powers under section 281 and 282 in order to release permanent endowment restrictions in respect of outstanding borrowing from the permanent endowment.
  - i. In the example above, there is outstanding borrowing of £6,000 from the permanent endowment fund. If the trustees subsequently decide that that sum should be permanently released from the permanent endowment fund, the trustees would not be required artificially first to repay the £6,000 outstanding borrowing and then to pass a resolution under section 282 to release that same £6,000 from the permanent endowment restrictions. Instead, the trustees can pass a resolution under section 282(3A) (or, if the fund does not exceed £25,000, under section 281(6A)), in which case the obligation to repay the outstanding borrowing will be extinguished.
  - ii. The legal test is the same for both (a) releasing a fund and (b) extinguishing an obligation to repay borrowing to a fund, namely that the trustees are satisfied that the purposes of the fund could be carried out more effectively.
  - iii. The new subsections are needed because outstanding borrowing has, strictly speaking, already been released (and replaced by an obligation on the trustees to repay the borrowing), so it is the obligation to repay that is being extinguished, rather than the permanent endowment restriction that is being released. If there are other obligations on the trustees that were imposed because the trustees had borrowed from the permanent endowment, then new sections 281(6D) and 284(6) provide that those obligations also cease to have effect at the same time that the obligation to repay the outstanding borrowing ceases to have effect.
  - iv. The new subsections apply where the trustees could repay the outstanding borrowing but have made a positive decision that they should not do so (pursuant to the legal test summarised in sub-paragraph (ii) above). The new subsections are not intended to apply where the trustees are unable to repay the outstanding borrowing, or are facing difficulties doing so. For those situations (and in cases where the borrowing was under the new power in section 284A, inserted by clause 12), specific provision is made requiring the trustees to seek an order from the Charity Commission directing them how to proceed: see the new section 284D, inserted by clause 12.

### **Consequential amendments**

82 Various consequential amendments are made, including:

- a. Schedule 2, paragraph 17 amends section 284 of the Charities Act in consequence of the removal by clause 10 of the reference to capital that is entirely given by a particular individual or individuals for a common purpose. Section 284, as amended,

requires the Charity Commission, in determining whether or not to concur with a section 282 resolution, to consider the wishes of any donor(s) to the permanent endowment fund (if evidence of such wishes is made available to it). Where property has been identified as having been given by a particular person or persons with particular wishes, these wishes should be taken into account. Sub-paragraph (3) amends section 284(1)(b) so that the inquiry into any change of circumstances is based on changes since the fund was established, rather than since the date of individual gifts to the fund.

- b. Schedule 2, paragraph 18 amends section 285 of the Charities Act, which grants the Secretary of State the power to alter sums specified in Part 13 by order, to account for changes made by clause 10 to section 282(1) of the Charities Act.

### Clause 11: Taking effect of resolution under section 282 of the Charities Act 2011

83 Clause 11 amends the time limit (in section 284 of the Charities Act) for the Charity Commission to respond to a section 282 resolution to the “relevant period”, defined in substituted subsection (4). The starting point is that the “relevant period” is 60 days from the date on which the Commission received the copy of the resolution. This time period is suspended in cases where the Commission directs the charity trustees to give public notice of a resolution or to provide information or explanations in accordance with new subsections (4A) and (4B).

84 For example, Charity X passes a resolution under section 282 and sends a copy of the resolution together with a statement of the reasons for passing it to the Charity Commission on 1 January. The Commission receives the resolution on 2 January. The Commission must notify the trustees of whether or not it concurs with the resolution before the end of the “relevant period”.

- a. In a straightforward case the relevant period would end on 3 March, namely 60 days after the Commission received the resolution on 2 January.
- b. However, the Commission decides to exercise its power under section 283(1)(a) and on 5 January directs the charity trustees to give public notice of the resolution, which they do on 10 January. The relevant period runs for 3 days, from 2 January when the Commission received the resolution, to 5 January when it gave the direction to the trustees, causing the relevant period to be suspended with 57 days remaining. The relevant period will begin to run again from 21 February, namely 42 days from 10 January when the trustees give public notice of the resolution, for the remaining 57 days. The relevant period would end on 19 April.
- c. The Commission then decides, on 1 April, to exercise its power under section 283(2), and direct the charity trustees to provide it with additional information regarding the circumstances in which they have decided to act under section 282. The trustees provide this information on 10 April. The relevant period will have run for 3 days, from 2 January when the Commission received the resolution, to 5 January when it was suspended by the 283(1) direction; and then for a further 39 days, from 21 February to 1 April, when it is suspended by the 283(2) direction; meaning that 18 days remain. The period will begin to run again from 10 April when the information is provided to the Commission. The relevant period will therefore end on 28 April.

85 If the Commission exercises its power under both sections 283(1) and (2) at the same time, the relevant period would be suspended until the later of:

- a. 42 days from the date on which the charity trustees give public notice of the resolution; or

- b. the date on which the trustees provide the information or explanations required by the Commission.

## Clause 12: Power to borrow from permanent endowment

- 86 Trustees can borrow from permanent endowment by seeking an order from the Charity Commission under section 105 of the Charities Act. Clause 12 creates a new statutory power for a charity to borrow from its permanent endowment without having to seek an order from the Charity Commission under sections 284A, 284B and 284C. There is some overlap between this power and the powers under sections 281 and 282 to release permanent endowment. However, the power to borrow is more restrictive; it enables trustees to borrow a limited amount from the fund, subject to repayment. Trustees could therefore opt to use this power where they do not think it would be appropriate, or in the best interests of the charity, to release the restrictions on spending completely.
- 87 The new power can be exercised in relation to any “available endowment fund” of the charity, meaning the entirety of the charity’s permanent endowment if it is subject to the same trusts or any part of it subject to particular trusts: see section 284A(9). The trustees can exercise the power if they are satisfied that it is expedient for the amount to be borrowed, taking into account the purposes of both the permanent endowment fund and (if different) the charity: section 284A(2). Borrowing is limited to the “permitted amount” as defined in section 284B and must be repaid within 20 years of being borrowed. The effect of exercising the power is to release the amount borrowed from the restrictions on spending capital which applied to it when it was part of the permanent endowment fund.

### Example (1a): Borrowing from permanent endowment

Charity X holds an investment portfolio worth £100,000 subject to a restriction that only income from those investments can be spent in furtherance of the charity’s purposes. The charity has no other permanent endowment. The investment assets constitute the entirety of the “available endowment fund”. The trustees of Charity X resolve to borrow £20,000 from the permanent endowment fund. The effect is to release £20,000 worth of assets from the restriction so that they can be sold and the proceeds of that sale used to further the purposes of the charity. The trustees of Charity X will need to make arrangements for the £20,000 to be repaid within 20 years. This requires Charity X to increase the value of the capital in the endowment fund (now reduced to £80,000 worth of assets) by £20,000 within that time. The £20,000 paid back into the endowment fund will be subject to the same restriction on the spending of capital as the rest of the fund.

- 88 Section 284A(10) clarifies how the power operates where a charity has opted in to investing on a “total return” basis by passing a resolution under section 104A(2). The effect of subsection (10) is to limit the “available endowment fund” – from which the trustees may resolve to borrow – to the value of the fund representing the capital of the permanent endowment in respect of which the section 104A(2) resolution was passed (which the Charities (Total Return) Regulations 2013 refer to as the “trust for investment”). This excludes any returns from the investment of that fund which have not been accumulated to it (the “unapplied total return” in the 2013 Regulations).

### Example (1b): Borrowing from permanent endowment which is invested on a “total return” basis

Charity X decided to invest its £100,000 permanent endowment on a total return basis. It is invested in a variety of shares. The trustees passed a section 104A(2) resolution in respect of that fund. On the date on which the resolution took effect the capital of the fund was valued by the trustees at £100,000 and this forms the trust for investment. A year later the capital value of the shares has increased to £110,000 and they have paid a dividend of £5,000, providing a total return of £15,000. Charity X has not yet applied any of this return to the trust for investment nor has it spent it on furthering its purposes. Charity X wants to borrow from its permanent endowment under section 284A. The “available endowment fund” from which it can borrow is £100,000, the value of the initial investment fund excluding the £15,000 unapplied total return on that investment. If, however, Charity X decides to apply £2,000 of the investment return to the investment fund, the “available endowment fund” from which it can borrow increases to £102,000.

- 89 Section 284B provides the formula for calculating the “permitted amount” which can be borrowed under section 284A. It is designed to ensure that a charity cannot borrow more than 25% of the total capital value of the available endowment fund (although if the value of the remaining capital subsequently falls, the result might be that the charity’s outstanding borrowing exceeds 25% of the total capital value of the endowment fund). In calculating the permitted amount, “V” is the value of the available endowment fund from which the trustees are seeking to borrow. It does not include the value of any other permanent endowment that is subject to separate trusts, for example functional permanent endowment. “V” is defined as the value of the available endowment fund on the “relevant date”, namely, the date on which the trustees resolve to borrow from the fund. This does not require the trustees to seek a valuation on the same day that they pass the resolution but it will require them to use a fairly recent valuation, and if the trustees have reason to believe that the valuation is out of date by the time they pass the resolution they should obtain a fresh valuation.

### Example (2a): Calculating the amount that can be borrowed from permanent endowment

On 1 January, Charity Y had permanent endowment valued at £100,000. On 30 January the charity trustees resolved for the first time to borrow £10,000 from the fund. On 1 June the trustees want to calculate how much more money they could borrow from the fund under section 284A if they passed a resolution that day. To calculate the available amount they must first identify “V”, the value of the charity’s permanent endowment on the relevant date. The relevant date is 1 June and, assuming the value of the fund has remained static since the initial borrowing on 30 January, “V” is £90,000. They must then identify “B”, the total outstanding borrowing from permanent endowment on that date. “B” is £10,000. The available amount is therefore  $(0.25 \times (£90,000 + £10,000)) - £10,000 = £15,000$ .

### Example (2b): Calculating the amount that can be borrowed from permanent endowment

On 1 January 2021 Charity Z had permanent endowment valued at £100,000 comprising £50,000 worth of shares and an investment property worth £50,000. On 30 January the trustees resolved to borrow £5,000, selling shares to realise that sum. On 1 June the trustees resolved to borrow a further £10,000, again selling shares to realise that sum. On 1 September the trustees repaid £5,000 of their borrowing by purchasing £5,000 worth of shares to be held subject to the same restrictions as the rest of the permanent endowment fund. On 1 January 2022 the trustees want to calculate the maximum amount they can borrow from the fund. The investment property is now valued at £55,000 but the shares have remained at the same value. The total value of the shares is therefore £40,000. "V" is therefore £95,000 (the value of the property plus the shares on 1 January 2022). "B" is £10,000 (the total borrowing of £15,000 minus the £5,000 repaid). The permitted amount is therefore  $(0.25 \times (£95,000 + £10,000)) - £10,000 = £16,250$ .

- 90 Example (2b) assumes that Charity Z's investment property is held within the same "available endowment fund" as the £50,000 worth of shares. The calculation would be different if the property were held on separate trusts, or if it were held subject to a restriction that it be used solely for the purposes of housing beneficiaries of the charity (that is, functional permanent endowment). In that case the permitted amount calculation would be based on an available endowment fund of £50,000, the value of the shares alone.
- 91 Section 284A(2)(b) requires charity trustees exercising the power to put in place appropriate arrangements for the amount borrowed to be repaid within 20 years of being borrowed. That 20-year period runs from the date on which the borrowing is drawn-down, and not from the date of the trustees' resolution to borrow (if that date is different). The charity's compliance with that plan will need to be accounted for in whatever form of accounts the charity in question is required to prepare.
- 92 Section 284A(5) allows the trustees, when re-paying an amount borrowed from permanent endowment, to pay an additional sum (the "maximum estimated capital appreciation"). That additional sum reflects the fact that, had the trustees not borrowed from permanent endowment, the capital value of the permanent endowment might have increased (for example, in Example (2b) above, the capital value of the shares might have increased). The decision whether to pay an additional sum must be made in the light of the trustees' general duty of even-handedness, that is, to balance the interests of current and future beneficiaries. If, for example, the amount borrowed would otherwise have been placed in an interest-bearing bank account (as part of a mix of investments across the portfolio as a whole), the capital value of that sum would have remained unchanged, so the trustees are unlikely to pay an additional sum. If, by contrast, the remaining permanent endowment fund is invested in assets which yield an income but no capital appreciation, the trustees might decide that they should pay an additional sum in an attempt to maintain the capital value of the permanent endowment in real terms. The maximum estimated capital appreciation is capped in line with an inflation index to be chosen by the trustees: section 284C.
- 93 Section 284D requires trustees to seek an order from the Charity Commission providing directions as to how to proceed if at any time they do not think they will be able to repay the borrowing as required under section 284A. Subsection (2) lists, non-exhaustively, some suggestions as to what such directions could include.

## Clause 13: Total return investment

- 94 Permanent endowment can be used to make social investments (within the meaning of section 292A), provided those social investments do not contravene the restriction on expenditure of capital that applies to the permanent endowment. Accordingly, social investments with an anticipated negative financial return (where the trustees expect to receive back less than the initial capital outlay) cannot generally be made using permanent endowment. Clause 13 creates a new power, by inserting section 104AA into the Charities Act, to use permanent endowment to make social investments that trustees could not otherwise make. The new power is limited to charities that have already opted in to investing on a total return basis under section 104A(2). The power will enable charities to use the fund to make social investments which they would not otherwise be able to make because they are expected to produce a loss. New regulations governing the use of the fund to make social investments will apply to the fund. Clause 13(3) amends section 104B of the Charities Act to enable the Charity Commission to make these regulations.

### Example (3): Making loss-making social investments using permanent endowment

Charity Z is a housing charity which has permanent endowment with a capital value of £100,000 when it passes a section 104A resolution in respect of the fund. The trust for investment is valued at £100,000. The trustees want to use £50,000 to purchase Property A to be occupied by its beneficiaries at a low rent. The trustees know that the capital value of the property is likely to decrease over time and that the modest income from rent is unlikely to cover this depreciation in value. However, the trustees wish to use the money in this way because it will both further the charity's purposes and make some financial return (within the meaning of section 292A). They also believe that they can recoup any loss over time through investing the remaining £50,000 in shares which they believe will appreciate in value and pay dividends. They cannot currently purchase Property A using permanent endowment because section 104A of the Charities Act and the Charities (Total Return) Regulations 2013 ("the TRI Regulations") require trustees to invest the trust for investment (and the unapplied total return) to produce a return. Making a social investment which is expected to produce a negative financial return does not constitute an investment for the purposes of section 104A or the TRI Regulations. However, Charity Z can pass a resolution under section 104AA enabling it to use the trust for investment (and the unapplied total return) to make social investments. The charity can choose to pass the resolution in respect of the entirety of the fund (£100,000) or only in respect of the £50,000 part of it that they wish to use to make the social investment.

- 95 The power in section 292B of the Charities Act to make social investments cannot be used in respect of permanent endowment if making the social investment would contravene the restriction on spending capital. Schedule 2, paragraph 22 amends section 292B to make clear that the trustees have a power to use permanent endowment to make social investments that would contravene the restriction on spending capital (i.e. social investments with a negative financial return), if they have opted in to the power in section 104AA.

## Clause 14: Special trusts

96 Clause 14 repeals Part 14 of the Charities Act which deals with special trusts. Subsection (2) inserts a new subsection into section 353 of the Charities Act to define a “special trust”. The definition replicates the existing section 287. All other provisions in Part 14 (sections 288 to 292) are redundant since they replicate the power under sections 281 and 282.

## Clause 15: Small ex gratia payments

97 Clause 15 confers on charity trustees a power to make ex gratia payments up to a certain level without requiring authorisation from the Charity Commission under section 106. The test for whether an ex gratia payment can be made is the same as under section 106 (as amended by clause 16), namely whether there is a moral obligation but no legal power to make the payment (as established in *Re Snowden*).<sup>8</sup>

98 The quantum of an ex gratia payment that the charity trustees can make without the Commission’s oversight is set by reference to the charity’s gross income in its last financial year: section 331A(3)(a) and (6)). The threshold applies per payment, not per financial year. So the maximum ex gratia payment that could be made by a charity with a gross income of £200,000 in its last financial year would be £2,500, and if the charity wished to make two separate ex gratia payments in one year of £2,000 each, it would be able to do so using the new power.

99 The financial thresholds can be amended by regulations: section 331B. The power can be excluded in the charity’s governing document: section 331A(4).

100 It had been decided that the Attorney General had no power to authorise ex gratia payments by a statutory charity, where to do so would involve the contravention of a statutory prohibition on the disposal of the charity’s assets.<sup>9</sup> Clause 15 operates by conferring a stand-alone statutory power on charity trustees to make small ex gratia payments, and will therefore allow statutory charities to make small ex gratia payments even if the governing Act contains a general prohibition on the charity’s assets being used otherwise than for the charity’s purposes. The power will also be capable of use in respect of Royal Charter charities whose governing documents include a similar prohibition on using the charity’s assets otherwise than for the charity’s purposes, since a statute takes precedence over a Charter. Nevertheless, to put the matter beyond doubt in respect of statutory charities, section 331A(5) makes clear that the existence of such a prohibition of itself should not be treated as an exclusion of the power.

## Clause 16: Power of Commission etc to authorise ex gratia payments etc

101 Clause 16(a) inserts new subsections 106(1), (1A) and (1B) into the Charities Act, codifying the test for making ex gratia payments to put it on a statutory basis.

102 Under new section 106(1)(b), an ex gratia payment can be made if the charity trustees “could reasonably be regarded” as being under a moral obligation. The test is based on the decision in *Re Snowden*<sup>10</sup> but confirms that the charity trustees need not personally decide whether to make an ex gratia payment, but can delegate that function as part of the general delegation of functions in the charity’s governance structure.

103 Ex gratia payments are unusual, and the power to make such payments “is not to be exercised lightly or on slender grounds”.<sup>11</sup> The new test introduces an element of objectivity, so as to enable trustees (should they wish to do so) to delegate the decision. It remains the case that

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<sup>8</sup> [1970] Ch 700.

<sup>9</sup> *Attorney General v Trustees of the British Museum* [2005] EWHC 1089 (Ch), [2005] Ch 397.

<sup>10</sup> *Re Snowden* [1970] Ch 700.

<sup>11</sup> *Re Snowden* (above), at p 710.

charities have a power, not an obligation, to make ex gratia payments. Accordingly, even if the trustees could reasonably be regarded as being under a moral obligation to make such a payment, there is no legal obligation to make the payment and no automatic expectation that a payment will be made.

104 Overall responsibility for the decision to make ex gratia payments (as with any other decision made by a charity) still lies with the charity trustees. It will be for trustees to decide whether they wish to decide all ex gratia payments personally, or whether they wish to delegate the decision to make some or all ex gratia payments. Similarly, the charity's governance structure may allow for delegation of the making of an ex gratia payment following authorisation by the Commission or the Attorney General.

105 As noted in paragraph 100 above, it had been decided that the Attorney General had no power to authorise ex gratia payments by a statutory charity.<sup>12</sup> The new section 106(1) creates a stand-alone statutory power for the Commission, court and Attorney General to authorise ex gratia payments. The power can therefore be exercised in relation to any charity, including a charity established and regulated by statute whose governing Act contains a general prohibition on the charity's assets being used otherwise than for the charity's purposes. The power will also be capable of use in respect of Royal Charter charities whose governing documents might include a similar prohibition on using the charity's assets otherwise than for the charity's purposes, since a statute takes precedence over a Charter. Nevertheless, to put the matter beyond doubt in respect of statutory charities, the new section 106(1A) makes clear that the section 106(1) power to authorise ex gratia payments is not limited if an Act contains such a general prohibition.

## Part 2: Charity Land

### Clause 17: Scope of Part 7 of the Charities Act 2011

106 Part 7 of the Charities Act imposes restrictions on disposals of charity land to ensure that charities obtain the best terms before disposing of land. The regime can only sensibly operate when the decision to dispose of the land lies with the charity, as opposed to (say) a trustee holding the land on trust for multiple beneficiaries, only one of which is a charity. Clause 17 amends section 117 of the Charities Act to clarify the meaning of land held "by or in trust for a charity". New section 117(1A) confirms that the restrictions on dispositions of land only apply to land where the whole of the land which is being disposed of is held beneficially by a charity solely for its own benefit (if it is a corporate charity) or in trust solely for that charity (if it is an unincorporated charity). "A charity" means a single charity and "land" includes an interest in land. Accordingly, the restrictions will apply:

- a. where a charity owns land both legally and beneficially;
- b. where a trustee holds land on bare trust for a single charity;
- c. where land is left to a charity in a will and the executor has appropriated the land to the charity; or
- d. where a charity owns land as one of several tenants in common but is disposing of only its share.

107 However, the restrictions would not apply:

- a. where a charity is one of several beneficial joint tenants of land and the entirety of the land is being disposed of by the trustee of the land;

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<sup>12</sup> *Attorney General v Trustees of the British Museum* [2005] EWHC 1089 (Ch), [2005] Ch 397.

- b. where a charity is one of several tenants in common of the land and the entirety of the land is being disposed of by the trustee of the land;
- c. where land which is being disposed of is left to, and has been appropriated or assented to, multiple beneficiaries under a will, one or more of which is a charity; or
- d. where a trustee holds land on trust for multiple beneficiaries, one or more of which is a charity.

## Clause 18: Exceptions to restrictions on dispositions or mortgages of charity land

- 108 Clause 18 amends the exceptions to the general restrictions on dispositions and mortgages of charity land set out in sections 117(3) and 124(9) of the Charities Act.
- 109 Subsections (2)(a) and (3)(a) insert a new subsection (aa) into sections 117(3) and 124(9) of the Charities Act which provides that a disposition or mortgage of charity land by a liquidator, provisional liquidator, receiver, mortgagee or administrator is not subject to the restriction under section 117(1) or 124(1) respectively. Obtaining the best terms for the proposed disposition or mortgage is secured by the general duties of the liquidator, provisional liquidator, receiver, mortgagee or administrator, rather than by requiring the charity trustees (who have no decision-making role in the transaction) to obtain particular advice.
- 110 Subsections (2)(b) and (3)(b) remove the exception for dispositions or mortgages which would have required the authorisation or consent of the Secretary of State under the Universities and College Estates Act 1925 (under sections 117(3)(b) and 124(9)(b)). This reflects the amendments to the UCEA 1925 which remove any involvement of the Secretary of State in approving such transactions (see clause 24 and paragraph 120 and following below).
- 111 Subsection (2)(c) substitutes section 117(3)(c) with a new subsection which clarifies when a disposition of charity land made to another charity will be excluded from the restriction in section 117(1). The exception as amended will apply where the disposition is neither (1) a commercial transaction (i.e. intended to achieve the best price that can reasonably be obtained); nor (2) a social investment (as defined in section 292A of the Charities Act). This will ensure that in cases where the price obtained as a result of the disposition is a motivating factor (even if only a partial one in the case of a social investment) charities will have to comply with the advice requirements in Part 7 which are designed to protect against disposals at an undervalue. The provision removes the requirement under the existing subsection (c)(ii) that the disposition be authorised by the trusts of the charity. The amendment is intended to clarify that no express provision in the trusts of the charity authorising the disposition is required in order for it to fall within the exception. But the amendment does not allow charities to make dispositions which they would not be permitted to make under the trusts of the charity.

### Example (4a): Exception to the requirement to obtain advice under section 117(3)(c)

Charities A and B have similar purposes. Charity A wishes to transfer its assets and operations to Charity B. The land owned by Charity A is to be transferred to Charity B for a nominal sum. In effect, the trustee of the land is changing from Charity A to Charity B; the charitable purposes for which the land is held remain the same. The section 117(3)(c) exception would apply to this disposition because the price paid by Charity B is not a motivating factor in Charity A's decision to dispose of the land.

### Example (4b): Exception to the requirement to obtain advice under section 117(3)(c)

Charity A, a homelessness charity, owns a long lease of a flat worth £100,000. It wants to sell the lease to Charity B, another homelessness charity, for £80,000 to be used for providing accommodation to homeless people at a low rent. The transaction is motivated by both the financial return (the purchase price of £80,000) and the direct furtherance of Charity A's purposes (the provision of accommodation for homeless people). It is therefore a social investment, and the section 117(3)(c) exception would not apply. Charity A will need to obtain advice in accordance with Part 7 in order to proceed with the transaction. Equally if Charity A was trying to sell the flat for the best price possible, perhaps because it wanted to liquidate the asset and spend the proceeds of sale on furthering its purposes, then the fact that it was selling to another charity would not be sufficient for the section 117(3)(c) exception to operate. Charity A would still need to obtain advice in accordance with Part 7.

### Clause 19: Advertising and report requirements for disposition of charity land

112 Clause 19(a) removes the automatic statutory requirement under section 119(1)(b) to advertise a proposed disposition as advised in the surveyor's report. The charity must consider any advice on advertising that is given by the surveyor (or other designated adviser), but there is no longer a statutory requirement to follow that advice. Clause 19(b) removes the superfluous requirement, in section 119(4), that a surveyor's report, must "contain such information" as may be prescribed by regulations made by the Secretary of State, leaving instead a general requirement that such reports "deal with such matters" as may be prescribed by regulations. These amendments reflect updated regulations recommended by the Law Commission prescribing the contents of reports under section 119(1).<sup>13</sup>

### Clause 20: Advice relating to the disposition of charity land

113 Regulations made under section 119(3)(a) can prescribe the requirements a person must satisfy in order to provide a charity with advice on disposals of charity land. The Law Commission recommended the implementation of regulations to expand the category of advisers under Part 7 of the Charities Act to include fellows of the National Association of Estate Agents and fellows of the Central Association of Agricultural Valuers.<sup>14</sup> Clause 20 amends section 119 to substitute references to "qualified surveyor" with "designated adviser". That term better reflects an expanded category of advisers who may not be members of the Royal Institution of Chartered Surveyors.

### Clause 21: Advice etc from charity trustees, officers and employees

114 Clause 21(2) inserts a new section 128A into the Charities Act to provide that charity trustees, officers and employees of a charity can provide a report or advice under sections 119(1)(a), 120(2)(a), 124(2) and 124(7), including if they do so in the course of their employment by the charity.

115 Subsection (3) repeals the second part of section 124(8) which states that advice under section 124 may be provided by a person in the course of their employment as an officer or employee

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<sup>13</sup> See draft Charities ([Designated Advisers'] Reports) Regulations at Appendix 5 to the Law Commission's report on Technical Issues in Charity Law.

<sup>14</sup> See draft Charities ([Designated Advisers]) Regulations at Appendix 5 to the Law Commission's report on Technical Issues in Charity Law.

of the charity or its trustees. That provision is rendered redundant by reason of the new section 128A, which applies also to advice provided under sections 119 and 120.

### Clause 22: Residential tenancies granted to employees

116 Employees of a charity fall within the definition of a connected person for the purposes of section 117(2). Disposals of charity land to an employee are therefore prohibited unless they are authorised by the Charity Commission. Clause 22 amends section 118 of the Charities Act to create an exception to the prohibition in the case of the grant of a short fixed-term or periodic tenancy to an employee of a charity to use as their home. It will still be necessary to obtain advice on the grant of such a lease, but there will no longer be a requirement for Charity Commission consent.

### Clause 23: Information to be included in certain instruments

117 Generally, there are two stages to land transactions. First, the seller and buyer enter into a contract, in which they agree that on a future date the seller will transfer the land to the buyer and the buyer will pay the purchase price (“the contract”). Second, on that future date, the parties complete the transfer by executing a conveyance and paying the purchase price (“the conveyance”).

118 Clause 23 amends the wording to be included in instruments concerning dispositions (both contracts and conveyances) and mortgages of charity land, and sets out protections for purchasers from charities. Some of the amendments substitute clearer wording with little substantive effect on how the provisions operate. There are two significant amendments. The first concerns the wording to be included in a contract. The effect of subsection (2) is to require a statement to be included in the contract stating, as applicable, that the requirements in Part 7 of the Charities Act (under section 117(1), 119(1) or 120(2)) have been complied with. That is, that the trustees have obtained and considered relevant advice, or the court or Charity Commission has authorised the transaction. This is in addition to the same statement which must be included in the conveyance effecting the disposition. The person responsible for providing these statements will be the same person responsible for executing the contract or conveyance.

119 The second amendment concerns the protection of purchasers. As is currently the case with the statement in the conveyance, the statement in the contract is now conclusively presumed to be true in favour of the person enforcing the contract. Also as is currently the case with a conveyance, where the statement is required but has been omitted, then, in favour of a person who has entered into the contract in good faith, the contract is enforceable as if the trustees had complied with the requirements in Part 7 of the Charities Act. Accordingly, a charity cannot rely on its failure to comply with Part 7 of the Charities Act in order to avoid completing a contract for the disposal of an interest in land (a problem that was highlighted in *Bayoumi v Women’s Total Abstinence Educational Union Ltd*).<sup>15</sup>

### Clause 24: Amendments of the Universities and College Estates Act 1925

120 Clause 24 replaces the numerous and complex powers which the Universities and College Estates Act 1925 (“the UCEA 1925”) confers on the institutions to which it applies<sup>16</sup> with a consolidated general statutory power in respect of land transactions. It also removes the requirement to obtain Ministerial consent (from Defra) prior to entering into certain types of transaction, and removes restrictions and powers in relation to dealing with capital money.

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<sup>15</sup> [2003] EWCA Civ 1548, [2004] Ch 46.

<sup>16</sup> The UCEA 1925 applies to the Universities of Oxford, Cambridge and Durham; the colleges and halls of those universities; Winchester College and Eton College.

- 121 Subsection (2) inserts a new section 1A, “General power over land” into the UCEA 1925. This confers on a university or college to which the UCEA 1925 applies all the powers of an absolute owner in relation to its land. The new section 1A(2) states that the exercise of this general power is subject to restrictions imposed by statute, common law, equity or the institution’s own governing documents. The fact that the new power is set out in statute does not, therefore, mean that the transaction is excepted from Part 7 of the Charities Act 2011 by virtue of section 117(3)(a). Instead, the general power is subject to the requirements in Part 7 concerning disposals of land by charities as amended by clauses 17 to 23 (unless the requirements in Part 7 do not apply for other reasons, for example, if the institution is an exempt charity).
- 122 Subsection (3) omits the numerous existing powers and restrictions contained in the UCEA 1925 which are replaced by the new general power.
- 123 Subsection (4) removes the requirement to obtain Ministerial consent prior to the transfer to a university or college of lands vested in individual members thereof.
- 124 Subsection (5) removes unnecessary wording from section 42, the remainder of which is retained to maintain the position that powers conferred under the UCEA 1925, now consolidated in the general power, are in addition to any existing powers.
- 125 Subsection (6) omits from the definitions in section 43 terms which have now been omitted from the UCEA 1925 by subsection (3).
- 126 Finally, subsection (7) gives effect to Schedule 1 containing amendments to other enactments consequential upon the amendments to the UCEA 1925 under clause 24.

## Part 3: Charity Names

### Clause 25: Working names etc

- 127 Clause 25 confers enhanced powers on the Charity Commission to require charities to change, or stop using, unsuitable names.
- 128 The clause distinguishes between a “name” (the charity’s formal name, which will usually be set out in its governing document), and a “working name” (a name under which a charity carries out its activities). A working name is a name which is used to label the charity itself and not the name of specific projects, events and campaigns carried out by the charity. For example, the charity Charity Projects uses the name Comic Relief to run an event known as Sports Relief. “Charity Projects” is the formal name and “Comic Relief” is a working name but “Sports Relief” is not.
- 129 The Commission can issue a direction under section 42 requiring a charity to change its formal name in five situations. Clause 25 extends the scope of those directions to working names, so that a section 42 direction can both (a) require a charity to change its formal name, and (b) require a charity to stop using a working name (the charity could still use one or more different working names instead). The clause includes a requirement that the Commission specify a period in the direction within which compliance is to be achieved.
- 130 The first basis on which the Commission can issue a direction under section 42 is if the charity’s formal name (or, as a result of the amendments mentioned above, its working name) is the same as, or too like, the formal name of another charity. The direction can only be given on this ground if the first charity is registered and provided that the direction is given within 12 months of registration of its name. Clause 25(c)(i) amends that provision in two ways. First, it allows such a direction to be given to a charity even if it is not registered (and, if it is registered, regardless of whether the direction is given within 12 months of registration of its

name), therefore creating consistency between all five situations in which a section 42 direction can be issued. Second, it allows a direction to be given if the similarity is with another charity's working name.

131 Paragraphs 32 to 34 of Schedule 2 make equivalent changes to the provisions concerning the power of the Commission to refuse applications to register a CIO, to convert to a CIO, and to amalgamate CIOs; registration can be refused if the proposed name is the same as, or too like, not just the formal name but also the working name of another charity.

132 A section 42 direction confers on charity trustees the power to make the change required by the direction regardless of any restrictions on making such changes contained in the charity's governing documents (for example, naming rights of members or third parties).

133 Paragraph 35 of Schedule 2 amends Schedule 6 to the Charities Act to confer on charities a right of appeal against a direction by the Commission that a working name no longer be used.

134 Paragraph 45 of Schedule 2 amends the Companies Act 2006 to make clear that, when a section 42 direction has been issued to a charitable company, the name of the company can be changed by a resolution of the directors (rather than requiring a resolution of the members, as is usually the case for a change of name by a company).

### Clause 26: Power to delay registration of unsuitably named charity

135 Clause 26 inserts section 45A into the Charities Act, which confers on the Charity Commission a discretion to delay the registration of a charity if it has issued a direction under section 42 requiring the charity's name to be changed. The power is a discretionary one to delay registration while the section 42 process runs its course.

136 The delay cannot, however, last indefinitely. The delay may last until the earlier of (1) the charity trustees complying with the section 42 direction and notifying the Charity Commission that they have done so, or (2) the "maximum postponement period" expiring (section 45A(2)). Since the power to delay registration is a discretionary power for the Commission, the stay can also end on an earlier date if the Commission so decides. The maximum postponement period is a longstop. The stay will come to an end before the expiry of the maximum postponement period if the charity trustees notify the Commission that they have complied with the direction. But if they do not comply with the direction the power to delay registration will come to an end on the expiry of the maximum postponement period. The maximum postponement period is 60 days from the expiry of the date for compliance under the section 42 direction (section 45A(3)).

137 The 60-day clock stops running if "relevant proceedings" have been started and are ongoing (section 45A(4) to (7)). Relevant proceedings are defined to include challenges that might be made to the Commission's decision to issue the section 42 direction or to other enforcement action taken by the Commission in respect of the section 42 direction. Relevant proceedings also include proceedings for contempt of court under section 336. The maximum postponement period is suspended during this period since the Commission has no control over the timescale for such proceedings; the duration of the proceedings will depend on the timetable set by the Tribunal or court (and, in the case of challenges to the section 42 direction or other enforcement action, will also depend on the actions of the complainant). The 60-day clock starts running again once the relevant proceedings have been concluded and the time limit for any appeal has passed (section 45A(7)).

138 In summary, therefore, following expiry of the deadline for compliance set out in the section 42 direction, the Commission has 60 days to take enforcement action in order to compel the charity to change its name. If enforcement action is not taken (or does not result in the charity's name being changed) within that 60-day period, the stay expires and the

Commission must register the charity. But the 60-day period is suspended for the duration of any legal challenges to the section 42 direction or to any associated enforcement action.

#### Clause 27: Power to delay entry of unsuitable name in register

139 Clause 27 inserts section 45B into the Charities Act, which permits the Charity Commission to delay the registration of a change of name by a charity if it has issued a direction under section 42 requiring the charity's new name to be changed. The clause makes equivalent provision to clause 26 concerning the maximum length of the delay and the suspension of that maximum period when relevant proceedings are ongoing.

#### Clause 28: Power to direct change of name of exempt charity

140 Clause 28 allows the Commission to issue a section 42 direction to an exempt charity. Before doing so, section 28 requires the Commission to consult with the exempt charity's principal regulator.

## Part 4: Charity Trustees

#### Clause 29: Powers relating to appointments of trustees

141 Clause 29 inserts a new section 184B into the Charities Act, which allows the Commission to resolve uncertainties or defects in the appointment or election of charity trustees.

142 The Charities Act contains a functional test to ascertain who, in any particular charity, is a "charity trustee". If a person has "general control and management of the administration of a charity" then he or she is a "charity trustee": section 177. "Charity trustee" is therefore a description of some underlying role, the performance of which amounts to control and management. The definition would include, for example, the directors of a charitable company, the trustees of a charitable trust, and the members of the management committee of an unincorporated association. Since there is no definitive list of the different roles that fall within the definition of "charity trustee", clause 29 introduces the concept of a "qualifying position", which is any position that results in the holder being a "charity trustee" under section 177: section 184B(3). Section 184B(4) provides that the qualifying position need not be a position in the charity itself. So if a charity's governing document provides that its board of governors (who are the "charity trustees" under section 177) is to include the vicar of a particular parish, that underlying role of vicar would be a "qualifying position".

143 If there is uncertainty as to whether a person has been appointed or elected to a qualifying position, or if there has been a defect in such an appointment or election, section 184B allows the Commission to ratify – prospectively – the appointment or election. An order can only be sought with the consent of the person who would be the subject of the ratification order. Section 184B is a stand-alone power which is designed for cases where there is uncertainty about the validity of an appointment or election (or it is known that the appointment or election was invalid), so as to avoid the need to repeat the appointment or election process. The Commission does not have to decide the question of whether or not there was in fact a valid election or appointment before exercising the power; it is enough that the election or appointment might not be valid. In some cases, it might be that the Charity Commission's existing powers to appoint trustees (under sections 69 and 80 of the Charities Act) could be used instead of section 184B.

144 If the Commission makes an order under section 184B(2), then the Commission can in appropriate cases also make an order vesting or transferring property, as it could on the appointment or removal of a trustee under section 69 of the Charities Act: section 184B(5)(a). In addition, it can confirm the validity of acts done by that person before the order was made: section 184B(5)(b).

## Clause 30: Remuneration of charity trustees etc providing goods or services to charity

- 145 Charity trustees are not permitted to make any gain from their position as trustees. The starting point, therefore, is that trustees – and persons connected with them – cannot be paid for the provision of services (such as building, cleaning, accountancy or legal services) or for the provision of goods (such as building supplies or stationery). Section 185 of the Charities Act provides charities with a default power to pay charity trustees, or persons connected with them, for the provision of services to the charity, if no other power is available to them.
- 146 Clause 30 amends that provision in two ways. First, clause 30(a) to (c) extends section 185 to the provision of goods, whether that is solely the provision of goods, or the provision of goods and services together. Accordingly, charities will be able to pay a trustee (1) to decorate the charity’s premises, (2) to supply paint that can be used to decorate the charity’s premises, or (3) to do both. Charities will no longer be required to seek Charity Commission authorisation for such payments. The same safeguards in section 185 that apply to payments for the provision of services will apply to payments for the provision of goods.
- 147 Second, clause 30(d) provides that the statutory power to pay for the provision of goods or services applies in addition to any other power that the charity might have to make such a payment. Charities can therefore choose whether to use the statutory power to make the payment or an express power (if available), but they will no longer be prevented from using the statutory power simply because the payment could be made under an express provision in the charity’s governing document (that is, the “trusts” of the charity: see the definition in section 353(1) of the Charities Act). Charities will not, therefore, need to scrutinise their governing document to assess whether the proposed payment can be made under an express provision. Rather, they can rely on the default statutory power (and the guidance issued by the Charity Commission concerning the exercise of the power), provided the proposed payment is not expressly prohibited by the charity’s governing document.
- 148 Section 185 does not currently permit trustees to be paid for the provision of services as a trustee, nor to be paid as an employee of the charity. That position is not changed by clause 30.

## Clause 31: Remuneration etc of charity trustees etc

- 149 The court has an inherent jurisdiction, in exceptional circumstances, to order the payment of remuneration to a trustee (or the retention of an unauthorised benefit received by the trustee) in connection with work that has been undertaken by the trustee for the benefit of the trust (“an equitable allowance”).<sup>17</sup> The court’s power applies to payments to charity trustees in respect of work that they have done for the charity. Clause 31 confers on the Charity Commission a power to order a charity to remunerate a trustee (or to authorise a trustee to retain a benefit already received) where:
- a. the trustee has done work for the charity; and
  - b. it would be inequitable for the trustee not to be remunerated for that work (or not to retain the benefit received in connection with that work).
- 150 The Commission’s power will prevent the need for an application to court to authorise the payment of an equitable allowance.
- 151 In deciding whether to exercise the power, the Commission is required to have regard to the matters in section 186A(4). One such factor is the existence of any express provision in the

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<sup>17</sup> *Re Duke of Norfolk’s Settlement Trust* [1982] Ch 61.

charity's governing document concerning remuneration. The governing documents of most charities will contain provisions prohibiting the remuneration of trustees (or setting out the circumstances in which they may be remunerated). Such express provisions would be a relevant consideration for the Commission in deciding whether to exercise the new power, but as one of many considerations it would not be decisive.

### Clause 32: Trustee of charitable trust: status as trust corporation

- 152 If land (or indeed any other property) is to be held on charitable trust by a sole trustee, that sole trustee must have “trust corporation status” in order for (a) the outgoing trustees to be discharged from their responsibilities as trustees, and (b) the sole trustee to be able to deal with the land by giving a valid receipt to a purchaser. Clause 32(1) inserts a new section 334A into the Charities Act which confers trust corporation status (for the purposes of the provisions listed in section 334A(2)) on any trustee of a charitable trust that is a body corporate and itself a charity, in its capacity as trustee of a charitable trust. Bodies corporate that are charities include charitable companies, CIOs, charities established by statute or Royal Charter, and certain community benefit societies. The provisions listed in section 334A(2) are the five existing statutory provisions which define, in the same terms, trust corporation status. The effect of section 334A will be to expand each of these definitions to include a body corporate that is both a charity and the trustee of a charitable trust.
- 153 Subsection (2) clarifies that trust corporation status will automatically be conferred on any trustee which meets the criteria under section 334A(1), even if that trustee became a trustee of the trust in question before the amendment came into force. This does not mean, however, that the trustee is treated as having had trust corporation status prior to the commencement of the section.

#### Example (5): trust corporation status

Trustees X and Y are the current trustees of charitable trust A. Charitable company Z is later appointed to be trustee of charitable trust A, replacing Trustees X and Y. Trustees X and Y are discharged from their responsibilities as there will be a trust corporation to act as trustee in their place.

## Part 5: Charity Mergers

### Clause 33: Gifts to merged charity

- 154 Clause 33(4) replaces the existing section 311(2) of the Charities Act with a new subsection (2) and (2A). The new subsection enables gifts to a charity which has since merged (as part of a “relevant charity merger” within the meaning of section 306) to take effect as a gift to the new charity. Under the new subsection this will be the case even where the gift specifies that it will only take effect if the charity continues to exist on the date the gift takes effect. The clause therefore overcomes the difficulty highlighted in *Berry v IBS-STL (UK) Ltd.*<sup>18</sup> The new section 311(2) and (2A) applies to any gift made after the clause is brought into force, even if the instrument which gives rise to the gift (typically a will) was executed before commencement: clause 35(5).

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<sup>18</sup> [2012] EWHC 666 (Ch), [2012] PTSR 1619.

### Example (6a): Gifts to a charity that has merged

In 2000 T makes a will containing a gift “to Charity A, if it continues to exist when I die”. In 2020 Charity A merges with Charity B to create a new Charity C. The merger is registered on 1 June 2020. T dies on 1 January 2022. Under the amended section 311(2) and (2A) it is necessary to consider whether the gift would have taken effect as a gift to Charity A (“the transferor”) had Charity A been in existence on the date the gift was intended to take effect. The date the gift was intended to take effect was the date of T’s death, 1 January 2022. Had Charity A still been in existence on that date the gift would have taken effect as a gift to Charity A. Therefore the new section 311(2) and (2A) operates and the gift takes effect as a gift to Charity C (“the transferee”).

### Example (6b): Gifts to a charity where there has been a chain of mergers

Taking Example (6a) above, Charity C subsequently transfers its operations to Charity D, following a merger, registered on 1 December 2021. Under the new section 311(2) and (2A) the gift to Charity A would still take effect as a gift to Charity D. It is necessary first to consider whether the gift would have taken effect as a gift to Charity C, had Charity C been in existence on the date the gift was intended to take effect. The answer is yes, because the gift which would have taken effect as a gift to Charity A, had it been in existence at the date of T’s death, would have taken effect as a gift to Charity C (by operation of section 311(2) and (2A)) had Charity C been in existence at the date of T’s death. Therefore because the gift would have taken effect as a gift to Charity C (now the transferor) it instead takes effect as a gift to Charity D (the new transferee).

155 Clause 33(2) and (3) make similar substitutions for sections 239(3) and 244(2) which apply where a CIO transfers its operations to another CIO, or where two or more CIOs amalgamate.

### Clause 34: Vesting declarations: exclusions

156 Clause 34 amends the types of property listed at section 310(3) of the Charities Act as being excluded from the transfer effected by a section 310 vesting declaration. Sub-paragraph (a) removes the first exclusion under section 310(3) which appears to refer to old (pre-1925) mortgages, which took effect by the borrower conveying the land to the lender. As mortgages are no longer granted in this way, the provision no longer serves any purpose.

157 Sub-paragraph (b) expressly excludes leases containing an absolute covenant against assignment (as well as leases containing a qualified covenant against assignment) from being transferred by a section 310 vesting declaration. However the requirement that the assignment would have given rise to “an actionable breach” is intended to exclude situations where the person with the benefit of the covenant (whether absolute or qualified) has consented to the assignment, agreed to release the covenant, or otherwise waived their right to enforce it.

### Clause 35: Vesting permanent endowment following a merger

158 Clause 35(a) changes the reference in section 306 to a charity which has “a permanent endowment” to a charity which has “permanent endowment” in order to create consistency with the revised definition of permanent endowment in clause 9.

159 Ordinarily, a merger will only be a “relevant charity merger” if all property of the merging charity is transferred to the new charity, and the original charity ceases to exist. Section 306(2) modifies the definition of a “relevant charity merger” in the case of a charity with permanent endowment (“limb (a)”), and “whose trusts do not contain provision for the termination of the charity” (“limb (b)”), such that permanent endowment does not have to be transferred to the new charity, and the original charity can continue to exist. Clause 35(b) removes limb (b) from the definition; the words are difficult to understand and are unnecessary. The result is that, in a rare case where the governing document of a charity with permanent endowment contains provision for the termination of the charity, a merger can still be a “relevant charity merger” even if the original charity continues to exist.

## Part 6: Legal proceedings

### Clause 36: Costs incurred in relation to Tribunal proceedings etc

160 Clause 36 inserts a new section 324A into the Charities Act. Section 324A confers on the Charity Tribunal (both the First-tier Tribunal and the Upper Tribunal) a power to make an “authorised costs order” (“ACO”). An ACO will provide charity trustees with advance assurance that any legal costs that they incur in proceedings before the Charity Tribunal are a proper use of the charity’s funds and will therefore be payable from the charity’s funds. An ACO will be equivalent to a “*Beddoe*” order<sup>19</sup> that can be obtained from the court in respect of costs that are proposed to be incurred on behalf of a trust. The principles to be applied by the Tribunal in deciding whether to grant an ACO will be the same as those applied by the court in respect of *Beddoe* applications. The procedure for applying for an ACO will be set out in Tribunal Procedure Rules.

161 An application to the Tribunal for an ACO will not constitute “charity proceedings” within the meaning of section 115 because it will not be an application to a “court”. It will not, therefore, be necessary to obtain permission from the court or Charity.

## Part 7: General

### Clause 37: Public notice of Commission consent

162 Before making an order under the Charities Act, the Charity Commission has a discretionary power under section 337(3) to give public notice of the proposed order, or to require the charity to give such notice. Clause 37 extends that discretionary power of the Commission so that it applies whenever the consent of the Charity Commission is required under sections 67A, 198, 226 or 280A. So, for example, before giving consent to a regulated alteration by a company or a CIO (under sections 198 and 226), the Commission can give public notice of the proposal, or require the charity to give public notice, before deciding whether to give consent.

### Clause 38: “Connected person”: illegitimate children

163 Clause 38 amends section 350(1) of the Charities Act to remove the reference to an illegitimate child. An illegitimate child is automatically included in the meaning of “child” by virtue of section 1 of the Family Law Reform Act 1987.

### Clause 39: “Connected person”: power to amend

164 Clause 39 inserts a new section 352A into the Charities Act which creates a power for the Secretary of State to make regulations amending the definition of a “connected person” for the purposes of the Act. Subsection (2) inserts references to the new power into section 348 meaning that the new power will be subject to the affirmative procedure.

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<sup>19</sup> *Re Beddoe* [1893] 1 Ch 547.

### Clause 40: Minor and consequential provision

165 Clause 40 gives effect to Schedule 2 which contains minor and consequential amendments.

### Clause 41: Extent, commencement and short title

166 Clause 41 makes provision about the coming into force of the Bill. Clause 41 will come into effect on the day on which the Act is passed. Other provisions will come into force on such day or days as the Secretary of State may by regulations made by statutory instrument appoint. The regulations may appoint different days for different purposes, and may make transitional, transitory or saving provisions.

167 The extent of the Bill is explained in paragraphs 9 to 19 above.

### Schedule 1: Amendments of the Universities and College Estates Act 1925: consequential amendments

168 Schedule 1 makes amendments that are consequential on the amendments to the Universities and College Estates Act 1925 in clause 24.

### Schedule 2: Minor and consequential amendments

169 Schedule 2 makes minor and consequential amendments resulting from the Bill. Where appropriate these amendments have been referred to and explained above under the clauses to which they relate.

## Commencement

170 Clause 41 will come into effect on the day on which the Act is passed. All other provisions of this Bill come into force through commencement regulations to be made by the Secretary of State, as provided for by clause 41.

## Financial implications of the Bill

171 There will be no cost to the government for the enactment of the Bill. There will be transitional costs to the Charity Commission associated with issuing and updating guidance. These are expected largely to be absorbed into the Commission's regular guidance updates. The Charity Commission will also need to consider costs in relation to updating its systems to support revised processes.

172 The additional cost to the Charity Commission of registering additional charity mergers, by charities which are more confident that they do not need to retain shell charities to capture bequests, will be £6,000 per year.

173 Through enactment of the Bill, charities will save at least £2.8 million per year from reduced time and legal costs required to comply with the current law to: amend governing documents, comply with overly prescriptive requirements when disposing of land, apply for consent to release, borrow from or invest permanent endowment, apply for permission to make small ex gratia payments, apply for trust corporation status to enable mergers, maintain shell charities and apply for a *Beddoe* order to authorise charity legal costs. Savings will also arise from trustees' ability to secure more favourable prices on goods supplied by trustees, which the law does not currently allow.

174 The Charity Commission, Defra, the Ministry of Justice and purchasers of certain charity land will also make savings, largely staff costs resulting from the reduction or elimination of approval processes in which they are involved. Monetised savings to these organisations are estimated to be £57,595 per year.

## Parliamentary approval for financial costs or for charges imposed

175 This section will be completed when the Bill reaches the House of Commons.

## Compatibility with the European Convention on Human Rights

176 Section 19 of the Human Rights Act 1998 requires the Minister in charge of the Bill in either House to make a statement about the compatibility of the Bill with Convention rights protected by the Human Rights Act 1998. Baroness Barran, Under Secretary of State for Digital, Culture, Media and Sport has made the following statement, "In my view, the provisions of the Charities Bill are compatible with the Convention rights."

177 The Bill, specifically clauses 6, 23, 25 and 31, potentially engages Article 1 of the First Protocol of the European Convention of Human Rights ("ECHR") (right to peaceful enjoyment of possessions), but is compatible with the right set out in that Article.

178 The removal of the need for charities to contact donors of small donations where the specific charitable purposes of a fundraising appeal have failed provided for by clause 6, offering the

opportunity for the return of donations, is considered to interfere with the right to the peaceful enjoyment of possessions. This interference is considered to be justified, in order to allow charities to use donations for other charitable purposes close to the original purposes for which a donation was provided, where it is not possible to carry out those original purposes, and otherwise contacting donors to offer the return of such relatively small donations would not appear to be a proportionate use of charities' funds.

179 Under clause 23, protections are provided to buyers in good faith of charity land. This may result in land being transferred from charities when statutory requirements for disposal of charity land have not been complied with. Any interference is justified, the new protections for buyers striking a balance between the rights of charities (likely to have agreed the disposal, but having failed to comply with the requirements around disposal) and those of the general public, in providing assurance to third parties that contracts for sale or lease entered into with charities will be honoured, enabling charities to dispose of land.

180 To the extent that a charity's name may be considered a possession for the purposes of Article 1 of the First Protocol and the exercise of the extended direction making power under clause 25 is an interference with the enjoyment of this possession, it is justified as being in the public interest, subject to conditions provided by law and proportionate. There is public interest that the general public is not misled by charity names, with the result that charities may suffer reputational damage due to the practices of another charity which has adopted the same or a similar name, that charities generally are brought into disrepute or that public trust in charities is undermined. It is considered that the powers provided to the Charity Commission, an extension of existing powers, to protect the public and charities alike, is a proportionate means of balancing the rights of the general public and the rights of charities.

181 Clause 31 provides the Charity Commission with a discretionary power to order a charity to pay an equitable allowance to a trustee, where it would be inequitable for the trustee not to be paid. In practice, the likelihood is that any application to the Charity Commission for such a payment would be supported by the charity in question. Any interference is considered justified as it is in the public interest that charities are able to recompense trustees in circumstances where the charities might otherwise have needed to obtain services from elsewhere and in recognition of the skill and effort of the trustee. It would be inequitable for the charity to receive the profit without making some payment to the trustee who produced it. As such, the potential interference is likely to be minimal and the provision of the power to the Charity Commission is considered a proportionate means of providing a simpler, less time consuming and less costly means of providing equitable allowances to trustees.

## Related documents

182 The following documents are relevant to the Bill and can be read at the stated locations:

- Law Commission report on Technical Issues in Charity Law (2017), and the consultation papers that preceded it, available at <https://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/>
- Government response to Law Commission report on Technical Issues in Charity Law (22 March 2021), available at <https://www.gov.uk/government/publications/government-response-to-law-commission-report-on-technical-issues-in-charity-law>
- A marked up version of the Charities Act 2011, showing all the amendments that would be made by the Bill, will be made available on the Law Commission's website at <https://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/>

*These Explanatory Notes relate to the Charities Bill [HL] as introduced in the House of Lords on 26 May 2021 (HL Bill 17)*

## Annex A – Territorial extent and application in the United Kingdom

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative Consent Motion sought?
1 Purposes, Powers and Governing Documents Clauses 1 - 16	Yes	Yes	No	No	No
2 Charity Land Clauses 17 - 23	Yes	Yes	No	No	No
Clause 24	Yes	In part	In part	In part	No
Schedule 1	Yes	In part	In part	In part	No
3 Charity Names Clauses 25 - 28	Yes	Yes	No	No	No
4 Charity Trustees Clauses 29 - 32	Yes	Yes	No	No	No
5 Charity Mergers Clauses 33 - 55	Yes	Yes	No	No	No
6 Legal Proceedings Clause 36	Yes	Yes	No	No	No
7 General Clauses 37 - 39	Yes	Yes	No	No	No
Clause 40	Yes	Yes	No	No	No
Clause 41	Yes	Yes	No	No	No
Schedule 2	Yes	Yes	No	No	No

# CHARITIES BILL [HL]

## EXPLANATORY NOTES

These Explanatory Notes relate to the Charities Bill [HL] as introduced in the House of Lords on 26 May 2021 (HL Bill 17).

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