CHARITIES BILL

Memorandum from the Department for Digital, Culture, Media and Sport to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Charities Bill ("the Bill"). The Bill was introduced in the House of Lords on 26 May 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The Bill contains 7 Parts and 2 Schedules.

Background and summary of the Bill

3. 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 ("CA 2011"), 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.

4. 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 their regulation of the sector.

5. Specifically, the Bill will:

   (1) Give charities wider or additional powers and flexibility: (a) to amend their governing documents; (b) to decide on how they procure goods and services; (c) to make "ex gratia" payments (which charities have a moral obligation, but no legal power, to make).

(2) Clarify when property can be applied cy-près, including the proceeds of failed fundraising appeals.

(3) Produce a clearer and less administratively burdensome legal framework for buying, selling, leasing and mortgaging charity land.

(4) Clarify and expand the statutory regime that applies to permanent endowment.

(5) Introduce a power – with appropriate safeguards – for charities to borrow from their permanent endowment and to make certain social investments using permanent endowment.

(6) Facilitate, where appropriate, charity mergers and incorporations.

(7) Confer additional powers on the Charity Commission: (a) to authorise charities to pay an equitable allowance; (b) to require charities to change or stop using inappropriate names; and (c) to ratify the appointment or election of charity trustees where there is uncertainty concerning the validity of their appointment or election.

(8) Improve and clarify certain powers of the Charity Tribunal.

6. The benefits that the Bill is designed to bring to the charities sector is critically dependent upon the ability of the Charity Commission and of the Secretary of State to make changes as swiftly and readily as the proposed delegated powers allow for.

C. DELEGATED POWERS

7. The Bill contains/amends 22 individual provisions containing delegated powers including:

   i. One "Henry VIII" power, subject to affirmative resolution procedure, which provides the Secretary of State with the power to amend the definition of "Connected Person" within the CA 2011;

   ii. Four new "Henry VIII" powers subject to the negative procedure;

   iii. Amendment to the parliamentary procedure of an existing "Henry VIII" power in the CA 2011 from affirmative to negative procedure;

iv. Amendments to existing statutory powers of the Secretary of State, both limiting and extending the powers in different cases;

v. Amendment to the existing statutory power of the Charity Commission to authorise ex gratia payments, whilst placing the Attorney General's and High Court's existing prerogative powers to authorise ex gratia payments on the same statutory footing;

vi. New or extended powers for the Charity Commission to issue directions and orders to charities, to provide written consent or agreement to certain actions of charities and to make regulations;

vii. A new power for the Charity Tribunal to make an 'authorised costs' order;

viii. A standard power in relation to commencement of measures (and allowing related consequential, transitional and saving provisions); and

ix. Consequential amendments to the scope of an existing "Henry VIII" power in the CA 2011.

PART 1: PURPOSES, POWERS AND GOVERNING DOCUMENTS

Clause 1 [j402]: Power to consent to an alteration of a charitable company's purposes

Power conferred on: *The Charity Commission*

Power exercised by: *Written consent*

Parliamentary Procedure: *None*

Context and Purpose

8. Clause 1(2) amends section 198(2)(a) of the CA 2011 so that an amendment to a charitable company's articles of association which alters the *charitable purposes* of that company will now constitute a "regulated alteration" instead of an amendment to a charitable company's articles of association which alters a charitable company's *statement of objects*. Under section 198(1) of the CA 2011 regulated alterations by a charitable company require the Charity Commission's prior written consent in order to take effect.

9. Clause 1(3) inserts new section 198(2A) into the CA 2011, which prescribes that the Charity Commission, in considering whether to consent to a regulated alteration which amends the purposes of a charitable company, must have regard to: i) the purposes of the company when it was established, if and so far as they are reasonably ascertainable, ii) the desirability of securing that the purposes of the company are, so far as reasonably practicable, similar to the purposes being altered, and iii) the need for the company to have purposes which are suitable and effective in the light of current social and economic circumstances.

Justification for taking the power

10. Clause 1 amends the scope of matters for which the Charity Commission's consent is presently required under 198(1) of the CA 2011, and prescribes how the Charity Commission should exercise its consent where a regulated alteration amends the purposes of a charitable company. The amendments made by Clause 1 (along with clauses 2 and 3) create 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, charitable incorporated organisation ("CIO"), or unincorporated charity.

Justification for the procedure

11. The ability of the Charity Commission to provide written consent in order for regulated alterations to have effect is provided for within the CA 2011, as a regulatory safeguard, where it is not possible to legislate definitively to take into account all individual factual circumstances as to where regulated alterations should or should not have legal effect. The Charity Commission as the regulator of registered charities within England and Wales is best placed to determine when consent should be provided, and it would not be proportionate to subject the authorisation of regulated alterations to parliamentary procedure.

12. Where the Commission gives written consent under section 198, clause 37 of the Bill provides that the Charity Commission may give public notice as it thinks fit of the giving or contents of its consent, or require public notice to be given by any person on whose application the consent is given, or any charity affected by the giving of consent.

Clause 2 [j401]: Power to consent to an alteration of a charitable incorporated organisation's (CIO) purposes

Power conferred on: *The Charity Commission*

Power exercised by: *Written consent*

Parliamentary Procedure: *None*

Context and Purpose

13. Clause 2(2)(b) inserts new section 226(2A) into the CA 2011 which prescribes that the Charity Commission when considering whether to consent to an alteration of a CIO's purposes (which is a regulated alteration under current section 226(2)(a) of the CA 2011) must have regard to: i) the purposes of the CIO when it was established, if and so far as they are reasonably ascertainable, ii) the desirability of securing that the purposes of the CIO are, so far as reasonably practicable, similar to the purposes being altered, and iii)

the need for the CIO to have purposes which are suitable and effective in the light of current social and economic circumstances. The further amendments made by Clause 2(3) allow for CIOs to pass conditional resolutions to make regulated alterations, which are not expressed to take effect until the Charity Commission has given its consent and registered the regulated alteration. This is in line with the ability of charitable companies to pass conditional resolutions.

<u>Justification for taking the power</u>

14. Clause 2 does not create a new power for the Charity Commission to provide written consent, and instead prescribes how the Charity Commission should exercise its discretion when considering whether to consent to a regulated alteration which amends the purposes of a CIO specifically. This is in order to achieve 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. The provision is therefore included here simply to assist with the Committee's scrutiny of the Bill as a whole.

<u>Justification for the procedure</u>

15. The ability of the Charity Commission to provide written consent in order for regulated alterations to have effect is provided for within the CA 2011 as a regulatory safeguard where it is not possible to legislate definitively to take into account all individual factual circumstances as to where regulated alterations should or should not have legal effect. The Charity Commission as the regulator of registered charities within England and Wales is best placed to determine when written consent should be provided, and it would not be proportionate to subject the authorisation of regulated alterations to parliamentary procedure.

16. Where the Commission gives written consent under section 226, clause 37 of the Bill provides that the Charity Commission may give public notice as it thinks fit of the giving or contents of its consent, or require public notice to be given by any person on whose application the consent is given, or any charity affected by the giving of consent.

Clause 3 [j403]: Power to consent to regulated alterations of provisions within unincorporated charities' governing documents

Power conferred on: *The Charity Commission*

Power exercised by: *Written consent*

Parliamentary Procedure: *None*

Context and Purpose

17. Clause 3 replaces the power under current sections 275 to 279 of the CA 2011 for a small unincorporated charity (with an income of £10,000 or less and no designated land) to alter its purposes, and the power under section 280 of the CA 2011 for any unincorporated charity to modify administrative provisions in its governing document, with a new general power to amend the governing documents of an unincorporated charity under new section 280A of the CA 2011. New section 280A(7) provides that certain amendments to an incorporated charity's governing documents are regulated alterations, in that the written consent of the Charity Commission is required for such alterations to have effect. New section 280A(8)(a) to (g) outlines where amendments are regulated alterations, and so require the Charity Commission's consent.

18. New section 280A(10) prescribes that the Charity Commission in considering whether to consent to a regulated alteration which alters the purposes of an unincorporated charity must have regard to: i) the purposes of the charity when it was established, if and so far as they are reasonably ascertainable, ii) the desirability of securing that the purposes of the charity are, so far as reasonably practicable, similar to the purposes being altered, and iii) the need for the charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

Justification for taking the power

19. Clause 3 creates a new power under section 280A(7) for the Charity Commission to consent to regulated alterations of unincorporated charities, which is in line with the Commission's existing power to consent to regulated alterations of charitable companies under section 198 of the CA 2011 and the Commission's existing power to consent to regulated alterations of CIOs under

section 226 of the CA 2011. New section 280A(10), in prescribing the matters which the Charity Commission must have regard to when deciding whether to provide its consent to a regulated alteration which alters the purposes of an unincorporated charity, also achieves consistency with the matters which the Charity Commission must consider when deciding whether to consent to a regulated alteration which alters the purposes of a charitable company or CIO.

Justification for the procedure

20. The ability of the Charity Commission to provide written consent in order for regulated alterations to have effect is provided for within the CA 2011 as a regulatory safeguard where it is not possible to legislate definitively to take into account all individual factual circumstances as to where regulated alterations should or should not have legal effect. The Charity Commission as the regulator of registered charities within England and Wales is best placed to determine when written consent should be provided, and it would not be proportionate to subject the authorisation of regulated alterations to parliamentary procedure.

21. Where the Commission gives written consent under section 280A, clause 37 of the Bill provides that the Charity Commission may give public notice as it thinks fit of the giving or contents of its consent, or require public notice to be given by any person on whose application the consent is given, or any charity affected by the giving of consent.

Clause 4 [j502]: Power to approve resolutions to amend Royal Charters

Power conferred on: *Her Majesty*

Power exercised by: *Order in Council*

Parliamentary Procedure: *None*

Context and Purpose

22. Clause 4 inserts new section 280C into the CA 2011, which under section 280C(1) and (2) provides trustees of Royal Charter charities with a new power, by resolution, to amend their charity's Royal Charter, where they are satisfied

that it is expedient in the interests of the charity to do so, and provided there is no express power within the charity's Royal Charter to make proposed amendments. Section 280C(4) sets out the process for passing a resolution to amend a charity's Royal Charter where a charity has a membership body which has a decision making role under its Charter, whereas section 280C(5) sets out the resolution process for all other Royal Charter charities.

23. Clause 4 is intended to assist charities governed by Royal Charter which are not able to rely on an express power of amendment as such a power is not provided for within the Royal Charter. Presently where an express power of amendment is not provided for, Royal Charter charities are able to petition the Queen in Council for a supplemental Royal Charter which may amend provisions of the charity's original Charter or replace the charity's original Royal Charter entirely. Charities are however often dissuaded from proceeding with required amendments under the supplemental Charter procedure, which led to the Law Commission's recommendation that a new default amendment power should be created to be exercisable with the consent of the Privy Council.

24. Section 280C(6) provides Her Majesty with the delegated power by Order in Council to approve, and allow a resolution under section 280C(4) or (5) which amends a charity's Royal Charter to take effect.

<u>Justification for taking the power</u>

25. Given the Queen's overarching prerogative powers in relation to the creation, alteration and revocation of Royal Charter charities, it is considered appropriate that the Queen has the power to approve the proposed amendment of a charity's Royal Charter under new section 280C, before such an amendment is to have effect.

26. The Bill's explanatory notes will recommend early engagement with the Privy Council Office where a proposed amendment under section 280C is being considered, so that approval in principle can be indicated, before charities incur potentially wasted costs in putting any proposed amendment to a

membership vote, given the potential risk that a proposed amendment is not then approved by her Majesty.

Justification for the procedure

27. The ability of Her Majesty to approve an amendment under section 280C is in keeping with Her Majesty's overarching prerogative powers in relation to the amendment of Royal Charter charities. It is not considered proportionate to subject the approval of charities' resolutions to amend their Royal Charters to parliamentary scrutiny, nor would that be consistent with Her Majesty's powers to amend Royal Charters through the supplemental Charter procedure, which is not subject to parliamentary procedure.

Clause 5 [j501]: Power to make schemes altering provisions made by Acts establishing or regulating charities

Power conferred on: *The Secretary of State*

Power exercised by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

28. Clause 5 amends section 73 of the CA 2011 so that all orders under section 73(2) of the CA 2011 giving effect to section 73 schemes will be subject to the negative procedure, regardless of whether a section 73 scheme is amending a private or public general act.

29. Section 73(1) of the CA 2011 allows the Charity Commission to make a section 73 scheme where necessary or desirable to alter the provision made by an act establishing or regulating a charity (section 73(1)(a)(i)) or to make any other provision which goes or might go beyond the scheme making powers exercisable by the Charity Commission outside of section 73 (section 73(1)(a)(ii)); or if it is for any reason proper for a scheme to be subject to parliamentary review (section 73(1)(b)). Under section 73(2), a section 73 scheme settled by the Charity Commission is then given effect by an order of the Secretary of State.

30. Presently, an order made under section 73(2) of the CA 2011 is subject to negative procedure under current section 73(3), unless current section 73(4) applies, which would be where a scheme goes beyond the powers exercisable outside of section 73 in altering a statutory provision contained in or having effect under any public general act, in which case affirmative procedure should be adopted.[1] The current effect of sections 73(3) and (4) therefore is to allow all orders under section 73(2) which give effect to a section 73 scheme amending a public general act, to be subject to affirmative procedure, whilst allowing all other orders under section 73(2) including those amending a private act by default to be subject to negative procedure.

31. Clause 5 removes the present distinction between the amendment of a public general act and private act by section 73 orders so that negative procedure only is always adopted. With the removal of affirmative procedure, the ability currently provided for under current section 73(6) CA 2011, for section 73 orders subject to affirmative procedure to direct that any provision of the section 73 scheme given effect to by that order must not be modified other than by a further section 73 scheme or a further section 73 scheme subject to affirmative procedure, is also removed by clause 5.

<u>Justification for taking the power</u>

32. Although clause 5 does not create a new legislative power, it is included here given the effect of the clause is to amend the existing parliamentary procedure for orders made under section 73(2) of the CA 2011.

<u>Justification for the procedure</u>

33. Clause 5 originates from recommendation nine within the Law Commission's report on Technical issues in Charity Law,[2] that all section 73 schemes should be subject to the negative procedure, regardless of whether the governing document is contained in a private Act or a public general Act.

[1] Or under section 73(6)(b) of the CA 2011 where a section 73 order (subject to affirmative procedure under section 73(4)) directs that section 73(4) is to apply to any scheme modifying or superseding the scheme to which the order gives effect.

[2] See 5.118 of the Law Commission's Report: Technical Issues in Charity Law (Law Com No 375).

34. The current distinction between the requirement for orders under section 73(2) to adopt affirmative procedure if giving effect to a section 73 scheme which amends a general public act, and for all other orders under section 73(2) to adopt negative procedure, including those that amend private acts, is not currently justified on any clear basis. It is not the case that charities founded by public general act are by definition larger or have a greater impact on public life, which would possibly justify the need for amendments to public general acts governing charities to be subject to greater parliamentary scrutiny. The Law Commission's report provides the National Trust as an example of a large well known charity founded by a private act, contrasted against the Incorporated Church Building Society which is a lesser known and smaller charity, incorporated by a public general act.

35. Adopting a consistent parliamentary procedure for all orders under section 73(2) of the CA 2011 will avoid the need for charities to spend time and legal costs seeking advice as to the applicable parliamentary procedure for a section 73 order, in particular where it is not clear whether a charity's governing act to be amended by a section 73 scheme is a public general act or private act.[3]

36. In adopting a single parliamentary procedure, negative procedure is considered to offer sufficient parliamentary scrutiny. All consultees who responded to the Law Commission's proposal that all section 73(2) orders giving effect to section 73 schemes should be subject to negative procedure, agreed with the proposal, with the Charity Law Association notably of the opinion that negative procedure provided sufficient parliamentary oversight.[4] Negative procedure is considered to provide sufficient parliamentary oversight, given that the power for section 73(2) orders to amend primary legislation, extends only to giving effect to schemes first settled by the Charity Commission, which provides a separate regulatory safeguard to parliamentary oversight. Although section 73 orders have the ability to amend primary legislation, negative procedure is also considered sufficient, as the ability of section 73 orders to amend primary legislation extends to a specific and

[3] See 5.115 footnote 313 of the Law Commission's Report: Technical Issues in Charity Law (Law Com No 375) and the example provided of uncertainty as to whether the Church Building Society Act 1828, governing the Incorporated Church Building Society, was a public general Act, which delayed the process of making the amending scheme under s 73.

[4] See 5.115 of the Law Commission's Report: Technical Issues in Charity Law (Law Com No 375).

narrow category of primary legislation only with a limited scope of application, that is acts regulating or governing a particular charity only. The amendment of governing instruments for statutory charities' equivalent non-statutory counterparts is not subject to any form of parliamentary scrutiny.

37. In adopting a single parliamentary procedure for all section 73 orders, negative procedure should be preferred. The majority of section 73 schemes are presently already subject to negative procedure, given the majority of statutory charities are governed by a private act. Requiring all section 73 schemes to adopt affirmative procedure would place further constraints on parliamentary time, and lead to further delays in charities seeking to amend their governing act under section 73. Smaller statutory charities in particular may also struggle to navigate affirmative procedure (including briefing ministers in both Houses, and advising on speeches and debate questions).

Clause 6 [j701]: Power to amend the maximum single donation amount and maximum amount of cumulative donations made within a financial year for small donations to be applicable cy-près

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

38. Clause 6(1) inserts section 63A into the CA 2011 to replace current sections 63 to 65 of the CA 2011. The effect of new section 63A is to make changes to the conditions to be met in order for donations to be applicable cy-près where a fundraising appeal for specific charitable purposes fails on the basis it is not possible to carry out those specific purposes, and fundraising appeal literature has not addressed what will happen to donations in the event of that appeal failing so as to give rise to a general charitable intention on the part of donors.

39. New section 63A(3) allows small gifts to be applicable cy-près, where property is a single gift of £120 or less (section 63A(3)(a)) and the charity trustees reasonably believe that during the financial year of the charity in which it is

given the total amount given by the donor to the charity for the specific charitable purposes is £120 or less (section 63A(3)(b)).

40. New section 63A(7) of the CA 2011 as inserted by clause 6, provides the Secretary of State with the power by regulations to amend section 63A(3)(a) or section 63A(3)(b) by substituting a different sum for the time being specified there.

<u>Justification for taking the power</u>

41. The power under section 63A(7) is narrow in scope and confined to only allow for amendment of two specific financial thresholds within primary legislation, that is the maximum value of a single gift, and the maximum total amount reasonably believed to have been given by a donor for specific charitable purposes within a single financial year. As these thresholds apply in conjunction, in order for small gifts to be applicable cy-près under new section 63A(3), the single power under section 63A(7) allows for amendment of both financial thresholds.

42. The CA 2011 already contains a number of powers for the Secretary of State to amend financial thresholds within primary legislation by secondary legislation. By way of example, section 128 of the CA 2011 provides the Secretary of State with the power by order to substitute the sum within section 127(2), that is the maximum payment to be received as consideration for releasing a rentcharge, where costs incurred by a charity in connection with proving its title to the rentcharge are recoverable by the charity from the person or persons in whose favour the rentcharge is being released. By way of further example, the power under section 285(1) of the CA 2011[5] which allows the Secretary of State by order to amend the "market value of fund" financial threshold under section 282(1), originates from the Charities Act 2006 and so has been subject to the committee's previous scrutiny.

[5] Current section 285(1) of the CA 2011 provides the power to amend two further financial thresholds within sections 267(1) and 275(1), provisions which are however removed by this bill. Consequential amendments made by clause 10 of this Bill to the scope of the power under current section 285(1) to amend section 282(1) are considered in paragraph [151] below.

43. The power under section 63A(7) to amend the current financial thresholds under section 63A(3)(a) and (b) will allow for both sums to be adjusted in line with inflation. The Law Commission within its report on Technical Issues in Charity Law considered whether an automatic inflation adjustment mechanism should be built into the CA 2011 for financial thresholds, however concluded that regular changes to thresholds in line with inflation could cause confusion, unnecessary complexity, and increased compliance and administration costs (particularly if thresholds with regulatory implications changed often and to exact rather than round figures). The Law Commission instead recommended[6] that the Government periodically review all financial thresholds within the CA 2011, with a view to increasing them by secondary legislation, in line with inflation. The government in its response to the Law Commission's report has agreed with this recommendation and that such a review should take place at least every ten years.[7]

44. In addition, section 63A provides a new power to apply small gifts cy-près, which has not yet been tested. The financial thresholds under section 63A(3)(a) and (b) have been selected on the presumption that donors would not expect charities to incur costs in contacting donors as to whether they would wish for donations of such small values to be returned. The ability to amend the financial thresholds for section 63A to apply, provides the opportunity in future to assess and review the operation of both financial thresholds in practice, in particular whether the current thresholds achieve the intended balance between donor intention and the ease of charities to apply donations for other charitable purposes, or whether thresholds should be increased or decreased in order to achieve the right balance.

Justification for the procedure

45. Given that the narrow scope of the power under section 63A(7) allows for the amendment of two financial thresholds only, negative procedure is considered to be sufficient in offering a proportionate amount of parliamentary scrutiny. Existing powers under the CA 2011 to amend financial thresholds within

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6 See 3.17 of the Law Commission's Report: Technical Issues in Charity Law (Law Com No 375).

7 Government response to the Law Commission report 'Technical Issues in Charity Law'

primary legislation, such as current powers under section 285 of the CA 2011, also adopt negative rather than affirmative procedure.

Clause 6 [j701]: Power to agree reasonable actions to be taken to identify and find donors before donations are applicable cy-près on the basis that a donor cannot be identified or found

Power conferred on: *The Charity Commission*

Power exercised by: *Agreement in writing*

Parliamentary Procedure: *None*

Context and Purpose

46. The insertion of new section 63A(4) of the CA 2011 by clause 6(1) allows for property to be applicable cy-près on the basis that a donor cannot be identified or found, where "agreed actions" have been taken. New section 63A(5) provides the Charity Commission with the power to agree in writing with charity trustees what actions are reasonable in all the circumstances to be taken to identify and find donors. Section 63A(5) replaces current section 63 of the CA 2011 and the advertising and inquiry requirements which charity trustees must comply with before property is applicable cy-près on the basis that a donor cannot be identified or found. Present advertising and inquiry requirements are prescribed within the Charities (Failed Appeals) Regulations 2008 (repealed by clause 6(2)) made by the Charity Commission under its regulation making powers within the Charities Act 1993 (powers which are presently contained within sections 66(4) to (6) of the CA 2011 but repealed by this bill).

Justification for taking the power

47. Although section 63A(5) provides a new power for the Charity Commission to agree in writing what actions are reasonable in all the circumstances to be taken to identify donors before property can be applied cy-près on the basis that a donor cannot be identified or found, the power replaces the existing regulation making power of the Charity to Commission to prescribe advertising and inquiry requirements which must be complied with before property can be applied cy-près on the basis that a donor cannot be identified or found.

48. Compared with the Commission's previous regulation making power, the new power of the Commission under section 63A(5) to agree steps to be taken to find donors in individual circumstances is intended to replace current outdated prescribed advertising and inquiry requirements (including publishing advertisements in newspapers and fixing advertisements to public notice boards) with the flexibility and scope for steps to contact donors to be tailored to suit the particular means by which a fundraising appeal has been conducted. For example, if a fundraising appeal has been conducted through a charity's website, steps to contact donors may be taken through that same website.

<u>Justification for the procedure</u>

49. The Charity Commission as the regulator of registered charities within England and Wales is best placed to agree with charity trustees reasonable steps to be taken to identify and find donors before funds are applicable cy-près. It would not be proportionate to subject the agreement of reasonable steps to contact donors in individual circumstances to parliamentary scrutiny. The new power under section 63A(5) replaces the Commission's existing regulation making powers under sections 66(4) to (6) of the CA 2011, which are also notably not subject to any form of parliamentary scrutiny.

Clause 7 [j702]: Power to amend the maximum amount of failed fundraising appeal proceeds which can be applied cy-près by a resolution of trustees without the Charity Commission's consent

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative procedure*

<u>Context and Purpose</u>

50. Clause 7 inserts a new section 67A into the CA 2011, which allows charity trustees to apply the proceeds of a failed fundraising appeal by resolution without the need for a cy-près scheme. The power under new section 67A is available whenever proceeds from a failed fundraising appeal are applicable cy-près, either in instances of initial failure where a condition under section 63A is satisfied, or in instances of subsequent failure (surplus of funds) by virtue of section 62(1)(a) or (b) of the CA 2011.

51. Under section 67A(4) if proceeds to be applied cy-près under new section 67A exceed £1000, then charity trustees must send a copy of the resolution to the Charity Commission, together with a statement of their reasons for passing it. The resolution will then not have effect until the date on which the Charity Commission consents to it in writing. New section 67A(5) of the CA 2011 as inserted by clause 7, provides the Secretary of State with the power by regulations to amend new section 67A(4) by substituting a different sum for the time being specified there.

Justification for taking the power

52. The power under section 67A(5) is narrow in scope and confined to allowing for amendment of the financial threshold within new section 67A(4) only. The CA 2011 already contains a number of powers for the Secretary of State to amend financial thresholds within primary legislation by secondary legislation. As set out within paragraph [42] above the powers within section 128 and 285(1) CA 2011 are examples of existing delegated powers for the Secretary of State to amend financial thresholds within the CA 2011.

53. The power under section 67A(5) to amend the financial threshold under section 67A(4) will allow the current sum under section 67A(4) to be adjusted in line with inflation, at points of periodic government review. As noted within paragraph [43] above the government has proposed to review financial thresholds within the CA 2011 at least every ten years, with a view to increasing financial thresholds within the CA 2011 by secondary legislation, in line with inflation.

54. In addition, the financial threshold of £1000 within section 67A(4) CA 2011 (over which the Charity Commission's written consent is required to give effect to a resolution applying property cy-près) is intended to achieve the correct balance between the need for the Charity Commission to have regulatory oversight where funds are applied for charitable purposes which differ to the purposes for which donations were originally provided, and the benefit of charities being able to apply funds where fundraising appeals have failed with administrative ease. As the new power under section 67A has not yet been tested, it is not known whether the current threshold of £1000 achieves the

correct balance however. The power under section 67A(5) to amend the financial threshold within section 67A(4) by secondary legislation, provides the opportunity in future to assess and review the operation of the current £1000 threshold within section 67A(4) and will allow the ability to increase the current threshold to allow for additional administrative ease for charities, or to decrease the current threshold to allow for additional regulatory oversight if required.

Justification for the procedure

55. Given the narrow scope of the power under section 67A(5) which allows for the amendment of a single financial threshold only, negative procedure is considered to be sufficient in offering a proportionate amount of parliamentary scrutiny. Existing powers under the CA 2011 to amend financial thresholds within primary legislation, such as current powers under section 285 of the CA 2011 and the power under section 128 also adopt negative rather than affirmative procedure.

Clause 7 [j702]: Power to consent to a resolution of charity trustees to apply failed fundraising appeal proceeds cy-près

Power conferred on: *The Charity Commission*

Power exercised by: *Consent in writing*

Parliamentary Procedure: *None*

Context and Purpose

56. Clause 7 inserts new section 67A(4) which provides that if failed fundraising appeal proceeds to be applied cy-près under new section 67A exceed £1000, then charity trustees must send a copy of the resolution to the Charity Commission, together with a statement of their reasons for passing it, and that such a resolution does not have effect until the date on which the Charity Commission consents to it in writing.

Justification for taking the power

57. The power of the Charity Commission under section 67A(4) to consent to a resolution of charity trustees for failed fundraising appeal proceeds over £1000

to be applied cy-près, as with other powers of the Charity Commission within the CA 2011 to provide written consent, provides a regulatory safeguard. In this instance section 67A(4) ensures that there remains a level of regulatory oversight for the cy-près application of higher amounts of failed fundraising appeal proceeds, which at present would require a cy-près scheme in order to be applied for charitable purposes different to those to which a donation was originally made for.

Justification for the procedure

58. Section 67A(4) offers an alternative route for property to be applied cy-près, other than a cy-près scheme, which are similarly not subject to parliamentary scrutiny. The Charity Commission as the regulator of registered charities within England and Wales is best placed to determine when written consent should be provided, and it would not be proportionate to subject the individual approval of resolutions to apply property cy-près to parliamentary procedure.

Clause 12 [j906]: Power to amend the time frame for charity trustees to repay sums borrowed from a charity's endowment and the multiplier used to to calculate the maximum sum which can be borrowed from an endowment

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

59. Clause 12 inserts new sections 284A to 284D to the CA 2011. Section 284A provides charities with the power to borrow an amount from any available endowment fund of their charity. Section 284A(2) provides charity trustees may resolve to borrow an amount not exceeding the "permitted amount" from the available endowment fund if they are satisfied that it is expedient for the amount to be borrowed (section 284A(2)(a)) and that arrangements are in place for the amount to be repaid within 20 years of being borrowed (section 284A(2)(b)). Section 284B(1) provides the formula for calculating the "permitted amount." which relies on a multiplier of 0.25 to ensure that a charity

cannot borrow more than 25% of the total capital value of the available endowment fund.

60. Clause 12(3) inserts new sections 285(3)(a) and (b) into the CA 2011. New sections 285(3)(a) and (b) provide the Secretary of State with the power by regulations to amend the period of time (specified in new section 284A(2)(b)) to pay back an amount borrowed from an available permanent endowment, or the multiplier in the formula set out in new section 284B(1) so as to substitute a different time period or multiplier (as the case may be) for the time period or multiplier currently specified.

Justification for taking the power

61. The power under section 285(3) is narrow in scope and confined to only allow for the amendment of two threshold values, that is the period of time in which to pay back an amount borrowed from an available permanent endowment, and the multiplier which sets the percentage of the total capital value of an available endowment fund which can be borrowed.

62. The new power under section 284A for charities to borrow from an available endowment fund, has not yet been tested. The time period in which to pay back the amount borrowed from a permanent endowment, and the limit as to the maximum amount which can be borrowed from a permanent endowment, are intended to act as regulatory safeguards in the absence of charities requiring the Charity Commission's approval in order to make use of the power under section 284A. The Law Commission in recommending 20 years as the time period in which charities should pay back an amount borrowed from an available endowment fund, and in recommending that the maximum amount which can be borrowed from an available endowment fund should be 25% of its total capital value, tried to achieve a balance between the different views expressed by consultees whilst trying to ensure that thresholds are sufficient as safeguards. As the procedural safeguards within section 284A(2)(b) and section 284B(1) have not been tested in practice however, it is necessary to allow for the ability to amend both thresholds by secondary legislation, in order to respond to the practical use of the new power within 284A. The power under section 285(3) provides the flexibility to increase or decrease the thresholds

within sections 284A(2)(b) and 284B(1) as may prove appropriate based on evidence of the use of section 284A in practice, for instance evidence from charity accounts on the use of section 284A, or information from the Charity Commission regarding any difficulties encountered by trustees using section 284A.

Justification for the procedure

63. Given the narrow scope of the power under section 285(3) allows for the amendment of two linked threshold values only, negative procedure is considered to be sufficient in offering a proportionate amount of parliamentary scrutiny. Existing powers under the CA 2011 to amend financial thresholds within primary legislation, such as current powers under section 285 of the CA 2011 and the power under section 128 also adopt negative rather than affirmative procedure.

64. There are existing delegated powers within the CA 2011 which adopt negative procedure, the purpose behind which is at least in part to allow for adjusted provision to be made once it could be seen how new provisions within primary legislation operated in practice. The Charities Act 2006 created CIOs as a new legal entity and at the same time created a number of new delegated powers adopting negative procedure, in order to make further detailed provision in respect of CIOs, but also to allow for adjustments to be made once it could be seen how CIOs were developing and the types of charities that were making use of this new form of organisation. Section 221(3) of the CA 2011 (power to permit a CIO's constitution to disapply the duty of care under section 221(2) of a charity trustee of a CIO) and section 246 (power to make further provision about CIOs)[8] are provided by way of example. As both powers originate from the Charities Act 2006, they have previously been subject to the committee's scrutiny.

65. There are also existing powers under the CA 2011 which provide the power to amend provisions within the CA 2011 (other than financial thresholds) but are

[8] Although the power under section 246 of the CA 2011 adopts negative procedure, section 348(4)(b) of the CA 2011 provides that the Secretary of State before making regulations under section 246 must consult such persons or bodies of persons as the Secretary of State considers appropriate.

similarly to the power within section 285(3) narrow in scope and therefore adopt negative procedure. An example is the power under section 145(6) of the CA 2011 which provides the power of the Secretary of State by order to add or remove persons under section 145(3) or bodies under section 145(4) which determine who qualifies as an independent examiner and is able to examine the accounts of a charity with an annual gross income in excess of £250,000. The power under section 145(6) of the CA 2011 was also introduced within the Charities 2006, and accordingly has previously been subject to the committee's scrutiny.

Clause 12 [j906]: Power to direct charity trustees how to proceed where trustees are unable to repay sums borrowed from a permanent endowment

Power conferred on: *The Charity Commission*

Power exercised by: *Order*

Parliamentary Procedure: *None*

<u>Context and Purpose</u>

66. Clause 12(2) inserts new section 284D into the CA 2011. Section 284D(1) provides that charity trustees must apply to the Charity Commission for an order directing them how to proceed if (at any time) it appears to the charity trustees that they are either unable to fulfil the arrangements in place to repay an amount borrowed from a permanent endowment under new section 284A, or those arrangements are not sufficient to ensure that the amount borrowed is repaid.

67. New section 284D(2) provides the Charity Commission with the power (where trustees have applied for an order under section 284D(1)) to make an order giving directions as the Commission thinks fit, including; that the relevant amount may be repaid over a longer period, that the charity trustees put in place arrangements as specified within the Commission's order, or that the charity trustees need not repay an amount borrowed.

Justification for taking the power

68. The new power of the Charity Commission to make an order under section 284D(1) giving directions to charity trustees, is required as a regulatory safeguard for the new power under section 284A CA 2011 for charities to borrow an amount from any available endowment fund, where it appears to trustees that it is not possible to repay the amount borrowed under arrangements in place.

69. Under the CA 2011, the Charity Commission has a number of existing order making powers, see for example section 105 of the CA 2011 which provides the Commission with much broader powers than section 284D(1). Section 105 enables the Commission to make an order to authorise a charity's trustees to carry out an action that the Commission considers is expedient in the interests of the charity, but which a charity's trustees would not otherwise be empowered to carry out.

Justification for the procedure

70. It is not considered possible to legislate definitively to take into account all the individual factual circumstances as to what steps trustees must take where it appears that it is not possible to repay an amount borrowed from an available endowment fund under arrangements in place. The Charity Commission as the regulator of registered charities within England and Wales is best placed to determine what steps trustees should be directed to take in individual circumstances. It would not be proportionate to subject the direction of steps to be taken by trustees in individual circumstances to parliamentary procedure. Order making powers of the Commission more widely, including powers which go further than section 284D(1) in empowering trustees to take action which they would not otherwise be empowered to take, such as the power under section 105 CA 2011, are equally not subject to parliamentary procedure.

71. Section 337(1) of the CA 2011 provides that the Charity Commission may give public notice as it thinks fit of the making or contents of an order, or require public notice to be given by any person on whose application the order is made, or any charity affected by the order.

Clause 13 [j907]: Power to make provision about the use of a total return fund to make social investments

Power conferred on: *The Charity Commission*

Power exercised by: *Regulations*

Parliamentary Procedure: *None*

Context and Purpose

72. Clause 13 inserts new section 104AA into the CA 2011 which provides for charities that have already opted to invest an endowment fund on a total return basis under section 104A(2) of the CA 2011, the power to resolve that a total return fund and its investment returns may be used to make social investments (within the meaning of section 292A of the CA 2011) which could not otherwise be made because they are expected to produce a loss.

73. In order to account for the new power under section 104AA for charities to resolve that a total return fund and its investment returns may be used to make social investments, clause 13(3) expands upon the Charity Commission's existing regulation making powers under section 104B. The expansion of the Commission's existing regulation making powers under section 104B allows the Commision to make provision about the use of a total return fund to make social investments and resolutions under new section 104AA(2) also.

74. Clause 13(3) amends section 104B(1)(a) and (c) of the CA 2011 (total return investment: regulations) to extend the Charity Commission's existing powers to make regulations, to allow the Charity Commission to make regulations which make provision about resolutions under section 104AA(2) and the steps to be taken by charity trustees in the event that a resolution under section 104AA(2) ceases to have effect.

75. Clause 13(3) also inserts new section 104B(1)(ba) into the CA 2011 which provides the Charity Commission with the power by regulations to make provision about the use of a total return fund to make social investments.

76. New section 104AA(3) provides that once a resolution under new section 104AA(2) has effect, regulations under new section 104B(1)(ba) and existing section 104B(1)(b) will apply to the total return fund and any returns from it.

Justification for taking the power

77. The CA 2011 provides the Charity Commission with a number of existing regulation making powers. This includes the existing power under section 104B for the Charity Commission to make regulations which make provision about the investment of an endowment fund on a total return basis.[9]

78. The Law Commission's Report on Technical Issues in Charity Law, produced draft regulations[10] which amend The Charities (Total Return) Regulations 2013, and demonstrate how the expanded regulation making powers of the Charity Commission within amended section 104B of the CA 2011 are intended to be exercised in practice.

Justification for the procedure

79. Regulation making powers of the Charity Commission under section 104B of the CA 2011 and more widely, are not subject to parliamentary procedure. This is given that regulation making powers of the Commission are concerned with detailed administrative provision, which it would not be proportionate to subject to parliamentary scrutiny.

80. Under section 104B(5) any regulations made by the Commission under section 104B must be published by the Commission in such manner as it thinks fit.

Clause 15 [j1101]: Power to amend relevant income thresholds for small ex gratia payments

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative procedure*

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[9] The Charities (Total Return) Regulations 2013 were made by the Charity Commission in exercise of the powers conferred on it by section 104B of the CA 2011.

[10] See Appendix 6 of the Law Commission's Report: Technical Issues in Charity Law (Law Com No 375).

Context and Purpose

81. Clause 15 provides a new statutory power under new section 331A of the CA 2011, for charity trustees to make small ex gratia payments without authorisation from the Attorney General, Court or Charity Commission under section 106 of the CA 2011. Section 331A(3)(a) provides amongst other conditions that in order for charity trustees to make an ex gratia payment under section 331A (by making an application of charity property or waiving any entitlement to receive property) that the value of the property must not exceed the "relevant threshold".

82. Section 331A(6)(a) to (d) sets four separate maximum relevant thresholds (per payment) for payments to be made under section 331A ((a) £1000, (b) £2,500, (c) £10,000 and (d) £20,000) which apply respectively when a charity's gross income in its last financial year is within four specified income threshold ranges ((a) up to but not exceeding £25,000 (b) exceeding £25,000 but not £250,000, (c) exceeding £250,000 but not £1 million, (d) exceeding £1 million).

83. New section 331B of the CA 2011 as inserted by clause 15 provides the Secretary of State with the power by regulations to amend new section 331A(6) (relevant income thresholds) by substituting a different sum for any sum for the time being specified in that provision.

Justification for taking the power

84. The power under section 331B is narrow in scope and is confined to allow for amendment of the relevant income financial thresholds contained within new section 331A(6) only. The CA 2011 already contains a number of powers for the Secretary of State to amend financial thresholds within primary legislation by secondary legislation, such as the powers contained within sections 128 and 285(1) of the CA 2011, provided as examples within paragraph [42] above.

85. The power under section 331B to amend the gross annual income thresholds under section 331A(6) will allow those thresholds to be adjusted in line with inflation, at points of periodic government review. As noted within paragraph [43] above the government has proposed to review financial thresholds within

the CA 2011 at least every ten years, with a view to increasing the financial thresholds within the CA 2011 by secondary legislation, in line with inflation.

86. In addition, the condition under section 331A(3)(a) that the value of a single ex gratia payment must not exceed the relevant maximum payment amount is intended to protect charities from the financial damage which could be caused by making an inappropriate ex gratia payment. On the basis that the financial damage that would be caused by an inappropriate ex gratia payment is proportionate to the size of a charity, the relevant maximum payment amounts set under section 331A(6) are relative to which income threshold a charity's gross annual income for the previous financial year exceeds. At present it is not known in practice whether the four income thresholds within section 331A(6) are set so as to sufficiently protect charities falling within each threshold range, from the potential financial damage of making an inappropriate ex gratia payment up to the relevant set maximum payment amounts. The power under section 331B to amend the income thresholds within section 331A(6) by secondary legislation, provides the opportunity in future to assess and review the operation of current income thresholds, and will allow the ability to increase or decrease as appropriate, the four current income thresholds under section 331A(6).

Justification for the procedure

87. Given the narrow scope of the power under section 331B which allows for the amendment of financial thresholds only, negative procedure is considered to be sufficient in offering a proportionate amount of parliamentary scrutiny. Existing powers under the CA 2011 to amend financial thresholds within primary legislation, such as current powers under sections 128 and 285 of the CA 2011 also adopt negative rather than affirmative procedure.

Clause 16 [j1102]: Power to authorise ex gratia payments

Power conferred on: *The Charity Commission, Attorney General or High Court*

Power exercised by: *Authorisation*

Parliamentary Procedure: *None*

Context and Purpose

88. Clause 16 of the Charities Bill replaces current section 106(1) of the CA 2011 with new sections 106(1) to (1B). New section 106(1) replaces the current power of the Charity Commission to authorise ex gratia payments (which is framed by reference to the Attorney General's prerogative powers to allow the making of ex gratia payments) with a stand alone power for the Charity Commission to authorise charity trustees to make an ex gratia payment where there is a moral obligation to do so. New section 106(1) also places the High Court and the Attorney General's existing prerogative powers to authorise trustees to make ex gratia payments, on a statutory footing.

89. The effect of new sections 106(1) to (1B) of the CA 2011 compared with previous section 106(1) is to allow the Attorney General, the High Court and the Charity Commission to authorise ex gratia payments even where a provision exists within a statutory charity's governing act which prohibits a charity's assets from being used otherwise than for a charity's purposes. The new wording under section 106(1) allowing an ex gratia payment to be authorised where trustees "could reasonably be regarded" as being under a moral obligation to make such a payment, also allows for the decision of charity trustees to make an ex gratia payment (once authorised) to be delegated by trustees in accordance with a charity's governance structure.

Justification for taking the power

90. The need to place the Attorney General's and High Court's prerogative powers to authorise ex gratia payments on a statutory footing under new section 106(1) and to create a stand alone power for the Charity Commission to authorise ex gratia payments, stems from the decision in *Attorney General v Trustees of the British Museum* [2005] Ch. 397, which found that where a charity's governing act precluded that objects vested in trustees could be dealt with otherwise than in accordance with that act, the Attorney General would not be able to authorise an ex gratia payment.

91. Without the changes made by clause 16, where a charity's governing act contains provisions which prohibit a charity's assets being used otherwise than

for a charity's purposes, the Attorney General's, the High Court's, and the Commission's powers to authorise ex gratia payments cannot be exercised. As such provisions are commonplace, in the absence of new sections 106(1) to (1B) an unjustifiable discrepancy would remain where ex gratia payments cannot be authorised for the majority of statutory charities, but can be authorised for non-statutory counterparts in the same circumstances.

<u>Justification for the procedure</u>

92. The existing statutory power of the Charity Commission to authorise ex gratia payments under existing section 106(1) of the CA 2011, and existing prerogative powers of the Attorney General and High Court to authorise ex gratia payments are not subject to any form of parliamentary scrutiny. The amendment to the scope of Charity Commission's, Attorney General's, and High Court's powers to authorise ex gratia payments under new sections 106(1) to (1B) does not change the level of parliamentary scrutiny required. It would not be proportionate to subject individual authorisations of ex gratia payments to parliamentary procedure, nor appropriate in the case of the High Court given the need for judicial independence.

PART 2: CHARITY LAND

Clause 19 [j804]: Power to prescribe the matters which designated adviser reports must deal with

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument (under section 119(4) of the CA 2011)*

Parliamentary Procedure: *Negative procedure*

<u>Context and Purpose</u>

93. Section 119 of the CA 2011 forms part of the statutory framework applicable to the disposal of charity land (Part 7 of the CA 2011) and places restrictions on such disposals, other than the grant of a short lease (subject to section 117, which sets out disposals which do not fall within scope). Specifically, it sets out requirements in respect of advice that must be obtained before a disposal can take place (section 119(1)).

94. Section 119(4) allows the Secretary of State to prescribe within regulations, the information to be contained within and matters to be dealt within a qualified surveyor's report for the purposes of section 119(1) CA 2011.

95. Currently, the requirements contained in regulations made under this power (The Charities (Qualified Surveyors' Reports) Regulations 1992, SI 1992/2980) are very prescriptive.

96. Clause 19(b) makes amendments to section 119(4) to remove the superfluous requirement that a surveyor's report must "contain such information" as may be prescribed by regulations, instead leaving a general requirement that such reports "deal with such matters" as may be prescribed by regulations.

<u>Justification for taking the power</u>

97. This is a minor amendment to an existing power for the Secretary of State, which aims to remove a superfluous requirement. The current drafting of the power at section 119(4) is considered too prescriptive and the subsequent information requirements set out in the regulations are considered to increase costs of disposals, in many cases unnecessarily.

98. The proposals for reform to the details that a report provided in accordance with section 119(1) should include would see the report not containing information as such, being limited to: advice on whether (and, if so, how) the value of the land could be enhanced; advice on marketing the land (or, if an offer has already been made, any further marketing that would be desirable); and advice on what sum to expect (or, if an offer has already been made, whether the offer represents the market value of the land).

99. Retaining the advice requirements in secondary legislation, as opposed to placing the requirements in primary legislation, will allow for easier amendment to such requirements in the future. This will enable the Secretary of State to keep requirements under review and reflect changes in practice.

Justification for the procedure

100. Section 119(4) CA 2011 is currently subject to the negative procedure. The amendment to section 119(4), made by clause 19(b), seeks to limit the power of the Secretary of State to make the requirements in the regulations overly prescriptive and does not seek to amend the procedure applicable to section 119(4) currently. Given that the amendment is to the existing power, it is appropriate that no changes are made to the procedure that applies to the existing power.

PART 3: CHARITY NAMES

Clause 25 [j1401]: Power of the Charity Commission to issue a direction in relation to charity names
Clause 28 [j1404]: Power to direct a change of name of an exempt charity

Power conferred on: The Charity Commission

Power exercised by: Direction

Parliamentary Procedures: None

Context and Purpose

101. Section 42 CA 2011 provides the Charity Commission with the power to issue a direction to a registered charity to change its name in circumstances including where the name is the same as another registered charity's name or is too like a name of a registered charity (section 42(2)(a)), or in the opinion of the Commission the charity's name is likely to mislead the public (section 42(2)(b) - applicable to all charities, not just registered charities).

102. If a charity trustee fails to comply with a direction made under section 42, the Charity Commission may apply to the High Court, which can exercise the powers that would be available had the trustee failed to comply with a court order. Equally, it would be open to the Charity Commission to open an inquiry under section 46 CA 2011, which could lead to the suspension of trustees if it is found that there has been any misconduct or mismanagement in the administration of the charity.

103. Clause 25 makes various amendments to section 42, including replacing existing section 42 to extend the direction-making power to all charities in all circumstances, and so as to cover not only the name of the charity as set out in its governing documents ('the main name'), but also working names, a name that a charity may use for its convenience when it carries out its business, for example in fundraising, publicity, advertising and trading.

104. Clause 28 makes an amendment to Schedule 9 CA 2011 so as to ensure that all exempt charities fall within the direction-making power under the amended section 42.

Justification for taking the power

105. Clauses 25 and 28 seek to extend the current power of the Charity Commission to issue a direction to charities requiring them to change their name. This is a function of the Charity Commission's role as regulator of charities in England and Wales.

106. The primary purpose behind the ground in section 42(2)(a) is to avoid donors and the general public mistaking one charity for another. The risk of confusion will be particularly high where a charity seeks to adopt a name the same as, or similar to, the name of a highly prominent charity. This is not an issue relevant only to registered charities. In addition, the use of the power to direct a change of name may prevent disputes between two charities over the use of a particular name.

107. An inappropriate working name has the same potential to mislead the public as a main name for a charity - many well-known charities are known by the public by their working names (e.g. RSPCA - the Royal Society for the Prevention of Cruelty to Animals). Without the extension of the section 42 power to working names, a charity could continue to use an inappropriate working name even in circumstances where a section 42 direction had been issued in relation to a main name.

108. It is therefore appropriate that the Charity Commission's current power to issue directions under section 42 should be extended to cover all charity names, both of all types of charities and main and working names. It is in the public interest that the general public is not misled by charity names, with the result that charities generally are brought into disrepute or that public trust in charities is undermined. The powers provided to the Charity Commission are an extension of existing powers to protect the public and charities alike.

109. Section 337(1) of the CA 2011, which provides that the Charity Commission may give public notice as it thinks fit of the making or contents of an order, or require public notice to be given by any person on whose application the order is made, or any charity affected by the order, applies to directions made under section 42 by virtue of section 338(2) CA 2011.

Justification for the Procedure

110. The Charity Commission is best placed to make decisions as to the need to issue directions in relation to charity names due to its role as charity regulator for England and Wales. Parliament has previously approved that the power to issue directions in relation to charity names as it currently applies should not be subject to a parliamentary procedure, with the Charity Commission responsible for considering when to use the power to issue directions.

111. Given the need for the Charity Commission to be able to issue directions quickly when it becomes aware of issues relating to charity names, and the precedent in relation to the current power to issue directions in relation to charity names, it would not be appropriate nor proportionate for the power to issue directions to be subject to a parliamentary procedure. Direction making powers of the Commission more widely are equally not subject to parliamentary procedure.

PART 4: CHARITY TRUSTEES

Clause 29 [j1501]: Power of the Charity Commission to issue an order to confirm appointment of trustees

Power conferred on: The Charity Commission

Power exercised by: Order

Parliamentary Procedures: None

Context and Purpose

112. Clause 29 inserts a new section 184B into the CA 2011. This section will provide the Charity Commission with a power to issue an order confirming the appointment of an individual to act as a charity trustee, with the consent of the individual concerned.

113. The order may also include such provision as to the vesting or transfer of property as can currently be made by the Charity Commission under section 69 CA 2011 (Charity Commission's concurrent jurisdiction with the High Court for certain purposes). This would enable the Charity Commission to ensure that any property is vested or transferred to the charity trustee whose appointment or election has been ratified.

Justification for taking the power

114. Clause 29 provides the Charity Commission with the power to prospectively ratify the appointment or election of a charity trustee in circumstances where there are doubts as to the validity of the appointment or election. The order would clarify the position and provide practical reassurance to the trustee, the charity and third parties. In addition, it could help to avoid the costs and delay of repeating any election or appointment process.

115. Any order could only be issued in circumstances where the individual concerned agreed to the ratification of their appointment or election to the position as charity trustee of the charity concerned.

116. As per paragraph [69], the Charity Commission already has a number of order making powers bestowed on it through the CA 2011.

117. Section 337(1) of the CA 2011 provides that the Charity Commission may give public notice as it thinks fit of the making or contents of an order, or require public notice to be given by any person on whose application the order is made, or any charity affected by the order.

<u>Justification for the Procedure</u>

118. The Charity Commission is well placed to make decisions as to the ratification of appointment and election of trustees in circumstances where there is a lack of clarity due to its role as charity regulator for England and Wales. It is appropriate that the Charity Commission is responsible for considering when it would be appropriate to issue an order ratifying the appointment or election of a charity trustee so as to give clarity to trustees, charities and third parties.

119. The powers provided to the Charity Commission by new section 184B include a power to make provision similar to that which it can exercise under section 69 CA 2011 as to the vesting or transfer of property where a charity trustee has been removed or appointed. Parliament has previously approved the position that orders made under section 69 CA 2011 should not be subject to Parliamentary approval. As such, it is appropriate that no parliamentary procedure should apply to these new powers for the Charity Commission to make similar provision to that under section 69.

120. More generally, orders issued by the Charity Commission are not subject to a parliamentary procedure. Given the nature of this order making power, it would not be appropriate for the power to be subject to a parliamentary procedure.

Clause 31 [j1002]: Power of the Charity Commission to issue an order requiring a charity to pay an equitable allowance

Power conferred on: The Charity Commission

Power exercised by: Order

Parliamentary Procedures: None

Context and Purpose

121. Clause 31 inserts a new section 186A into the CA 2011. This provides the Charity Commission with the power to issue an order requiring a charity to pay an equitable allowance to a charity trustee for work the trustee has carried out for or on behalf of the charity where the Charity Commission considers it would be inequitable for the person not to be paid the remuneration or to retain the benefit.

122. Currently, in circumstances where a charity’s governing document does not provide it with the power to authorise transactions or benefits which would otherwise be considered a breach of fiduciary duty, the High Court has the power, under its inherent jurisdiction, to award equitable allowances where a trustee deserves a payment for his or her skill and effort in carrying out work for the charity.

123. This allows the High Court to authorise payments in circumstances where charity trustees are required to account for a benefit that they received in breach of fiduciary duty (an unauthorised benefit) or to allow a trustee to be remunerated for work already done on behalf of the charity.

124. Clause 31 to an extent replicates the powers exercised by the High Court in providing the Charity Commission with a discretionary power to award equitable allowances in situations equivalent to those in which the High Court is currently able to award an equitable allowance. As a result, a charity could be required, by order of the Charity Commission, to make such a payment from charitable funds.

Justification for taking the power

125. At present, trustees are able to apply to the High Court for an equitable allowance. This is a costly and time consuming process. As a result, such applications tend to be rare.

126. Alternatively, some trustees have taken an approach that a written indication from the Charity Commission that it will not pursue the trustee for the unauthorised benefit, or the charity for failing to take action against the trustee, would enable them to receive equitable allowances. However, legally such a written indication does not provide either the trustee or charity with certainty as liability for breach of fiduciary duty is strict, and it could be open to others (for example, beneficiaries of the charity) to take issue with the unauthorised benefit.

127. Given that questions in relation to equitable allowances already come before the Charity Commission, providing the Charity Commission with a power to award equitable allowances would reduce time and costs for trustees and charities, whilst providing more transparency around the Charity Commission's dealings with requests for such allowances. The power would be consistent with other quasi-judicial functions that the Charity Commission performs.

128. In addition, it is expected that the power is likely to be exercised where the trustee accepts liability for breach of fiduciary duty, and he or she and the charity agree to the retention of some or all of the profit obtained through the breach by way of an equitable allowance. It is therefore unlikely that the introduction of the new power will result in a large scale increase in the number of requests for trustees to be provided with equitable allowances or in circumstances where the charity is not content with making an equitable allowance to the trustee.

129. It is in the public interest that charities are able to recompense trustees in circumstances where they 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.

130. Section 337(1) CA 2011 provides that the Charity Commission may give public notice as it thinks fit of the making or contents of an order, or require public notice to be given by any person on whose application the order is made, or any charity affected by the order.

Justification for the Procedure

131. As stated above, it is normal practice for orders issued by the Charity Commission not to be subject to Parliamentary procedure. Given these orders are likely to deal with fairly minor matters, it would not be appropriate nor proportionate to take up Parliamentary time with the approval of such orders. Equally, providing that the orders should be subject to Parliamentary approval would cause delay in the Charity Commission issuing such orders.

PART 5: CHARITY MERGERS

132. There are no delegated powers in Part 5.

PART 6: LEGAL PROCEEDINGS

Clause 36 [j1602]: Power to allow charity funds to be used to pay costs incurred in relation to proceedings brought or proposed to be brought before the Charity Tribunal or on appeal from the Charity Tribunal

Power conferred on: The Charity Tribunal (the General Regulatory Chamber of the First Tier Tribunal and the Tax and Chancery Chamber of the Upper Tribunal)

Power exercised by: Order

Parliamentary Procedures: None

Context and Purpose

133. Clause 36 inserts a new section 324A into the CA 2011. It provides the Charity Tribunal with the power to make an order allowing charity funds to be used to pay costs incurred in relation to proceedings brought, or proposed to be brought, before the Charity Tribunal or on appeal from it. This can include payment of costs to third parties in circumstances where the charity trustees are ordered by the Charity Tribunal to make such payments.

134. The Charity Tribunal is intended to be a user-friendly forum where charities can represent themselves in challenging decisions of the Charity Commission (as an alternative to challenges being brought through the High Court).

However, in reality, many charities often instruct lawyers to represent them at the Charity Tribunal.

135. There is currently no power for trustees to obtain advance protection from the Charity Tribunal in relation to incurring costs as there is from the High Court by way of a Beddoe order[11] (an order from the court confirming that costs will have been properly incurred and therefore can be paid from a charity's funds). As such, charity trustees may be reluctant to pursue action against the Charity Commission and to raise genuine grievances.

<u>Justification for taking the power</u>

136. Whilst it would be possible for charity trustees to make an application to the High Court for a Beddoe order in relation to proceedings / proposed proceedings before the Charity Tribunal, this would appear to undermine the policy reasons for creating the Charity Tribunal, i.e. to avoid the need for charities to commence proceedings in the High Court. In addition, this would increase potential costs in relation to the proceedings.

137. Similarly, whilst there is an alternative available in terms of obtaining an order under section 105 CA 2011, or an opinion under section 110 CA 2011, from the Charity Commission, there would be a conflict of interest in that the Charity Commission would always be the other party in relation to the proceedings before the Charity Tribunal. Even if this could be managed internally by the Charity Commission, it would be preferable to provide the Charity Tribunal with the power to authorise costs by order. The Charity Tribunal is considered as being competent to assess whether litigation is an appropriate use of charity funds.

138. It is hoped that the creation of this power for the Charity Tribunal will lift a potential blocker to charities bringing proceedings before the Charity Tribunal against the Charity Commission, which charity trustees might otherwise be

[11] *Re Beddoe* [1893] 1 Ch 547

reluctant to bring due to concerns that they might not be able to pay for any costs in connection with those proceedings out of charity funds.

Justification for the procedure

139. Given that this is a power to be exercised by the Charity Tribunal as part of its functions of case management in relation to disputes between the Charity Commission and charities, it would not be appropriate for a Parliamentary procedure to be applied to the making of any orders under this new power. Any such Parliamentary procedure would interfere with the Tribunal's judicial independence.

PART 7: GENERAL

Clause 39 [j805]: Power to amend definition of "connected person"

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Affirmative procedure*

Context and Purpose

140. Clause 39 inserts a new section 352A into the CA 2011 providing the Secretary of State with the power to amend the CA 2011 to alter the definition of a "connected person" for the purposes of the Act. There are various definitions of "connected person" in the CA 2011, including for the purposes of disposal of land (section 118) and remuneration of trustees (section 157), to which this power would apply.

141. The power under section 352A is to be exercised by regulations which are subject to the affirmative procedure.

Justification for taking the power

142. The various definitions of connected persons contained in the CA 2011, applied for different purposes, are meant to be reflective of current societal expectations as to what a connected person is. The Law Commission identified

one aspect of the definition that required updating to remove outdated language - reference to an illegitimate child. Whilst this change is being made by the Bill (clause 38), the power to amend the definition by regulations would allow for similar updates to reflect changes to societal norms in the future.

143. In addition, the power to make amendments by regulations would provide the Secretary of State with the ability to undertake a broader review of the definitions, including identifying / correcting any potential gaps, and producing a more modern, comprehensive list of relevant family relationships. It would also allow the definition to be amended more easily were any particular problems with the definition identified.

Justification for the procedure

144. The affirmative procedure is considered appropriate as this would provide the highest level of Parliamentary scrutiny for any regulations seeking to amend the definition of connected person in the Charities Act 2011.

Clause 41 (4) and (5) [j0000]: Commencement

Power conferred on: *The Secretary of State*

Power exercised by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *None*

Context and Purpose

145. Clause 41(4) provides that, but for clause 41, all provisions of the Bill will come into force on whatever day the Secretary of State appoints by regulations. It also provides that regulations under clause 41(4) may appoint different days for different purposes. In addition, clause 41(5) provides that regulations made under clause 41(4) may make consequential, transitional or saving provision.

Justification for taking the power

146. The commencement power at subsections (4) and (5) will enable the Secretary of State to commence the provisions of the Bill at an appropriate time and to make any relevant consequential, transitional or savings provisions which are

not already covered by Schedules 1 or 2. The power to make transitional, transitory or saving provision in regulations ensures that, if necessary, provision can be made to ensure a smooth transition between the old and the new law. It is appropriate to take the power to ensure that any legal uncertainties or gaps can be addressed.

Justification for the procedure

147. It is common practice for commencement regulations, and regulations making transitional, or saving provision in connection with commencement, not to be subject to Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them: it is not necessary for their commencement, and any provision in consequence of their commencement, to be subject to further Parliamentary scrutiny.

Schedule 2 [J0001S]: Power to amend the adjusted market value of fund and market value of fund financial thresholds for purposes of resolution to spend larger fund

Power conferred on: *The Secretary of State*

Power exercised by: *Order made by Statutory Instrument (under section 285(1) of the CA 2011)*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

148. Schedule 2, Part 1 makes consequential amendments to section 285 of the CA 2011 which at present provides the power to amend financial thresholds within the following provisions within the CA 2011: section 267(1) (*income level for purposes of resolution to transfer property of unincorporated charity*), section 275(1) (*income level for purposes of resolution to replace purposes of unincorporated charity*), and section 282(1) (*income level and market value of fund for purposes of resolution to spend larger fund given for particular purpose*).

149. As a consequential amendment to clause 3 removing sections 267 and 275 from the CA 2011, Schedule 2, Part 1, paragraph 3 removes the power to amend section 267(1) and 275(1) from section 285 of the CA 2011.

150. In relation to the remaining power within section 285(1) to amend section 282(1), clause 10(3) amends section 282(1) of the CA 2011 by amending the requirements which determine that section 282 must be relied upon in order to release the restrictions on spending permanent endowment capital, rather than being able to rely upon the alternative power under section 281, which is not subject to the Charity Commission's oversight. Clause 10(3) removes the requirement under section 282(1)(a) for the capital of a fund to consist entirely of property given for a particular purpose, and the requirement under current section 282(1)(b) that a charity's gross income in its last financial year must exceed £1,000 ("gross income" financial threshold). Clause 10(3) however also creates a new "adjusted market value of fund" financial threshold under new section 282(1)(a) (set at £25,000) which applies where an amount has been borrowed from a permanent endowment and a part of that amount remains to be repaid. Section 282(5) provides that the adjusted market value of an endowment fund is determined by taking the current market value of the fund, reducing that value by the value of any benefit of the debt owed by the charity trustees, and increasing that value by the amount of the charity trustees' outstanding borrowing. Where an amount has not been borrowed from a permanent endowment, under new section 282(1)(b) the "market value of fund" financial threshold (which exists currently) will apply. The "market value of fund" financial threshold under new section 282(1)(b) has been drafted to cross refer to (and therefore mirror at all times) the sum (initially £25,000) which is set as the "adjusted market value of fund" financial threshold under new section 282(1)(a).

151. As a consequential amendment to clause 10(3) removing the "gross income" financial threshold from section 282(1)(b) and creating a new "adjusted market value of fund" financial threshold, schedule 2, part 1, paragraph 18 amends the existing power of the Secretary of State under section 285(1) to amend the financial thresholds under section 282(1) by narrowing that power to no longer allow for adjustment of a "gross income" financial threshold whilst also

widening that power to allow for amendment of the new “adjusted market value of fund” financial threshold at the same time as amendment of the “market value of fund” financial threshold. It is on the basis that Schedule 2, part 1, paragraph 18 in part widens the existing power under section 285(1) to amend section 282(1), that this power is mentioned here.

Justification for taking the power

152. It is not possible for the “adjusted market value of fund” and “market value of fund” financial thresholds to be adjusted separately, as the “market value of fund” financial threshold under section 282(1)(b) has been drafted to cross refer to (and therefore mirror at all times) the sum (initially £25,000) which is set as the “adjusted market value of fund” financial threshold under section 282(1)(a). It is therefore necessary for the power under section 285(1) to expand in scope in consequence, to allow for amendment of the new “adjusted market value of fund” financial threshold, at the same time as continuing to allow for amendment of the retained “market value of fund” financial threshold.

Justification for the procedure

153. The existing power under section 285(1) the CA 2011 to amend the “market value of fund” financial threshold within section 282(1) adopts negative rather than affirmative procedure. As the expanded power under section 285(1) to amend the “adjusted market value of fund” financial threshold in addition to the “market value of fund” financial threshold allows for amendment of a further parallel financial threshold only, negative procedure is still considered to be sufficient in offering a proportionate amount of parliamentary scrutiny.

Department for Digital, Culture, Media and Sport
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