

Charities Bill [HL] Special Public Bill Committee

Charity Law Association Working Party and Executive Committee

Call for Evidence – Response

1 This response

Thank you for the opportunity to respond to the Call for Evidence announced on 8 September and closing on 13 September 2021. This submission is intended to explain the role of the Charity Law Association (**CLA**) in the process leading to the Charities Bill and to offer further assistance as required.

2 About the CLA

- 2.1 The CLA has approximately 1,050 members, mostly lawyers but also accountants and other charity professionals. It is concerned with all aspects of the law relating to charities.
- 2.2 As part of its work, the CLA forms Working Parties to consider and respond to relevant consultations. It also engages with relevant regulators, such as the Charity Commission, and other bodies. The CLA is managed by its Executive Committee, elected by the members. Working Parties are made up from its membership (in response to a call for volunteers) and, usually, chaired by a member of the Executive Committee. Where required following a consultation, a Working Party and its chair will engage in further liaison and consultation.
- 2.3 Members of a Working Party serve in a personal capacity and views expressed in responses or evidence should not be taken as the formal views of the organisations for which they work, nor of the CLA or its membership as a whole.

3 The CLA's involvement in this case

- 3.1 The CLA, through its members, has had involvement throughout the process leading to the current Charities Bill.
- 3.2 That involvement has included input into consultations and reviews which preceded commencement of the Law Commission's charity law project (such as Lord Hodgson's Review of the operation of the Charities Act 2006, the Public Administration Select Committee inquiry of 2012-13 on Regulation of the Charitable Sector and the Charities Act 2006 and a 2010 Cabinet Office consultation on making it easier for charities to dispose of land).
- 3.3 CLA Working Parties also responded to all the consultations held as part of the Law Commission's charity law project and hosted and/or helped facilitate and took part in consultation events during the process.
- 3.4 Following the 2015 consultation, Technical Issues in Charity Law, Working Party and Executive Committee members have taken part in ongoing liaison and consultation with the Law

Commission team, included commenting on a draft of the Charities Bill in 2017, prior to publication of the Law Commission's 2017 Report, and again in 2021, prior to the Government's response to the 2017 Report. Comments from this process have, we understand, been taken into account by the Bill team in preparation of the Bill as it now appears.

- 3.5 Annexed to this response, as an example of our involvement and setting out what we hope would be some useful context, is a document of consolidated comments on the (then) draft Charities Bill made to the Law Commission prior to the Government's response to the 2017 Report.

4 Support for the Bill and further assistance

- 4.1 In responding to the 2015 consultation, the Working Party developed and kept in mind a number of principles to assist in responding. These were:

- 4.1.1 Think "charity" first, rather than legal form (where possible) – being mindful that many of the inconsistencies in, and difficulties in applying, charity law derive from the many different legal forms they may take.
- 4.1.2 To achieve, wherever possible, consistency – believing that a more consistent legal regime should be easier to understand and regulate.
- 4.1.3 "Think small first" – that regulation of charities needs to work for smaller charities, which may have limited or no access to legal advice and tend to be run entirely by volunteers.
- 4.1.4 To ensure better regulation which is proportionate and fair and in line with the limits on resources of both the Charity Commission and the sector.
- 4.1.5 To make it easier to run a charity, while still maintaining proper oversight and accountability.
- 4.1.6 To provide flexibility for the future – recognising that primary legislation designed for charities is relatively rare and takes time to develop, while charity administration tends to evolve quickly in many areas.

- 4.2 The Working Party also recognised the need to aim for a proper balance between competing interests in a number of areas, e.g.:

- 4.2.1 proper recognition of the historical position v proposing a new approach;
- 4.2.2 smaller charities v bigger charities;
- 4.2.3 regulation v deregulation;
- 4.2.4 regulation v resources;
- 4.2.5 third party rights v charity autonomy and/or consistency.

- 4.3 Overall, taking in to account the principles above, our understanding is that the Working Party and Executive Party members who have contributed across the various consultations support the Bill and hope to see it enacted and implemented as soon as possible. (We also understand the Bill to have broad support across the charity sector).
- 4.4 Naturally, we would expect that not all members support all provisions and there are recommendations which the Working Parties have made over the process which have not been taken forward in the Bill. As indicated in the principles and “balance” points above, it is understood that a number of areas of the Bill represent an element of compromise and that it is for the legislators to determine whether the compromise is the right one and achieves the right balance in the circumstances.
- 4.5 We should also note that there are further recommendations we could make but which we think are probably not for this Bill (because, for example, we expect they would need further consultation), but would hope to see taken forward in the near future.
- 4.6 We should be pleased to offer further assistance as may be required.

13 September 2021

Draft Charities Bill

Comments on proposed changes to Charities Act 2011 from members of the Charity Law Association

Introduction:

CLA members generally have indicated strong support for the progress of the Bill given that from a practitioner's view the Bill will bring much needed changes to charity law.

This submission sets out a response to the Law Commission's request for comments on whether the Bill's clauses make sense and whether they achieve what they are intended to achieve. The Law Commission also asked us to consider whether any amendments to the draft Bill are necessary in the light of changes in the overall landscape (in particular new legislation or case law) since the draft Bill was published in 2017.

We have also included as a schedule to this submission points which the original CLA working party had suggested but have not been implemented. That information, whilst not part of the formal comments provided should be useful in terms of the Government's response since it demonstrates points that people felt should nevertheless be mentioned.

	Section of Charities Act 2011 (tracked changes version)	Comments
1.	Names and working names (42- 45B)	
1.1	42(1)(a), 43(1)(b) and 45	Is the intention behind s42(1)(a), s43(1)(b) and (where applicable) s45 that the trustees of a charity which receives a s42 direction would, in giving effect to the direction, have the power to override any naming rights of members or other third parties? If so, can this be clarified in the wording of the Bill or Explanatory Notes to mitigate the risk of disputes arising? The extension to working name was not consulted upon in TICL (or the supplementary consultations), which was explicit that the proposals applied to "main name" only. There has not, therefore, been the opportunity for the potential full ramifications to be considered or for the support (or otherwise) within the charity sector to be assessed. The proposal is a result of comments made spontaneously by 2 respondents to the consultation. The stated rationale for proceeding (paragraphs 13.30 – 13.34 in the TICL report) predates, and should be reviewed in light of, the decisions in the Cambridge Islamic College/Cambridge Muslim College case (Upper Tribunal and First-tier Tribunal). Government should be aware of this in deciding whether or not to accept the recommendations. There appear to be some practical difficulties that would need to be addressed, for example: The Commission's registration form now asks "<i>Is the organisation known by any other names?</i>" The form does not define such names as "working names" and it is not clear if that description corresponds with the definition at s42(4).

		It is not clear if all names entered in the registration form are then entered on the register as “working names”. Charities registered under older application processes may have “working names” which are not registered; unregistered (excepted or exempt) charities’ working names would not be registered anyway. It is not clear how new and existing charities will be able to find out if there is a similar “working name” in use. It appears to be potentially resource-heavy for the Commission, which would need to be satisfied that it had sufficient information about a name to determine that the jurisdiction is engaged and then to apply the statutory test. Does “working name” equate to “business name”?
1.2	42(1)(b)	We suggest changing “its working name” to “a working name” as some charities have multiple working names.
1.3	42(2)(c)	The word “regulations” should be inserted between “in” and “by” (or alternatively delete “in”).
1.4	42(4)	Is “working name” intended to include the charity’s projects, events and campaigns (e.g. Sports Relief (the event run by Comic Relief) as well as alternative names used by the charity (in this example, Comic Relief, the working name of Charity Projects)? If so, can this be clarified in the Explanatory Notes? It could alternatively be inferred from the current definition that “working name” means a name or names given to the charity’s projects, events and campaigns and does not include an alternative name which is used to describe the charity itself (i.e. other than the charity’s official or formal name). The following wording in bold or equivalent wording could be inserted: “<i>a reference to a name that is not the official name of the charity</i>” and a sub-section added to clarify the term “official” e.g. the name by which the charity is known under the trusts of the charity or for registered charities, the name which is entered on the register in accordance with s29 Charities Act 2011.
1.5	43(1)(a)	The period during which the charity must give effect to the s42 direction should be subject to a criterion of reasonableness given the time it can take to change a charity’s name, notify relevant stakeholders and reflect the change on its website, stationery, publications and so on. The report, at paragraph 13.32, dismisses this point as being something which can be “raised in a challenge to the direction at the Charity Tribunal”. It is not clear why that would be a satisfactory basis for not including a requirement to be reasonable. The trustees need to meet, almost certainly take legal (including IP) advice and consider the ramifications of a potentially hugely expensive exercise (either rebranding or litigation). (The Charity Commission’s guidance on decision-making provides (among other things), quite rightly, that the charity trustees “should take time to stand back from their decision and consider” a number of factors including “have they given enough time and consideration to this decision” and that “the extent to which they need to do this depends on

		the significance and potential impact of the decision for the charity”). If they cannot do this within the time, they are automatically in breach of a direction.
1.6	43(2)	It is presumably deliberate to apply this only to changing name, not a working name as there is a requirement to change that, but for the working name it is that it is no longer used (rather than a new working name adopted).
1.7	43(3)	Should the cross-reference be s35(3)(a) or, alternatively, should the wording in brackets be “duty of charity trustees to notify and supply changes in registered particulars”.
1.8	44	Does this apply to any obligations to seek consent from a third party before changing the name?
1.9	Sch 6, s319/321	Is there an appeal against a s42 direction to change a working name? The reference in Sch 6 has not been amended to reflect the change, which could be interpreted restrictively.
1.10	45A	Remove full stop in title for consistency with the title of s43. Is there a missing step here and/or contradiction with s30? The Charity Commission can only make s42 determination in relation to a “charity” and so to make a s42 determination, it must have determined that the applicant is a “charity”. S30(1) provides that “Every charity must be registered in the register unless subsection (2) applies to it.” s30(2) does not provide for a s42 direction. The explanatory notes state that the “<i>power removes the requirement for the Commission to register the charity while there is an unresolved problem with the charity’s name</i>”; however, that is not apparent from the duty in s30. The better approach, consistent with s30 and the decision that the applicant is a charity, would be to register it with its charity registered number, omitting the name until the s42 direction has been addressed. This is the approach proposed in relation to similar powers being considered by BEIS in relation to Companies House (see Consultation: Corporate transparency and register reform: powers of the registrar at, e.g., paragraph 38). It seems the registrars/regulators should take a consistent approach where possible (consistent with the respective regimes). As proposed, the applicant would be left in limbo when a registration decision has in fact been made.
1.11	S45A(2)(b) and s45A(3)-(5)	The power to delay registration appears to extend beyond the period of a successful appeal against the s42 direction. If charity trustees successfully challenge a s42 direction, the Tribunal has power to quash the direction. In that event, the drafting suggests that the Charity Commission would still have power to delay registration after the time for appeal had expired, notwithstanding that the s42 direction was quashed. Same point as above re s45(2)(b) – power to delay should not extend beyond end of proceedings in which s42 direction is quashed.

1.12	45A(3)	s42 does not require the direction to specify a period, although s43(1)(a) indicates that it will do. We suggest making it explicit that the direction must specify a reasonable period for giving effect to the direction.
1.13	45A(5)(d)	This necessitates consequential amendments to the list of orders in s336.
1.14	45A(6)	Is the language “application, claim form or other process is made or issued for the purpose of commencing the proceedings” correct?
1.15	S208 – refusing registration of CIOs due to working name S231 re conversion to CIO S237 amalgamation of CIOs	See above re objections to the extension to working name when expressly not consulted on. There is an additional problem (and expense) for charity here in that the registration (or conversion or amalgamation) application would be refused – i.e. the charity would have to start the process all over again. It raises the prospect of the application being refused due to the working name of another charity which does not even appear on the register (so would not appear on the application search).
2. Cy-près powers and failed fundraising appeals (63A, 66, 67A, 75ZA)		
2.1	s.63A(1)	Wording has not been changed to address this previous CLA comment: s63A(1): Query is “fail” the right word here? The purposes have not failed but cannot be achieved? It would be helpful for further explanation to be given in the ENs giving an overview of these provisions (ss61 – 67A) and the extent to which they interact.
2.2	s.63A(3)	Previous CLA submission suggested that the drafting was not clear and that it was not clear that the £100 may be made of a single gift or multiple gifts within the same financial year. Suggest that the helpful example given at para 1.52 of the Explanatory Notes on the draft Charities Bill are included in explanatory notes on the final revised Charities Act 2011. Previous CLA submission suggested that further guidance should be given on what is a ‘reasonable belief’, this does not appear in the Explanatory Notes. Para 1.53 of the Explanatory Notes is helpful (and addresses points raised previously by the CLA about clarification about the manner in which the gift is given and gift aid) and could be included in explanatory notes on the final revised Charities Act 2011. Where a husband and wife donate; are they treated as one donor or two? What about interest?
2.3	s.63A(5)	For consistency with sub-section (4) should sub-section (5) refer to ‘find a donor’ rather than ‘find donors’.

2.4	s.63A(7)	Should this be (3)(a) <i>and/or</i> (3)(b)? Or at least <i>and</i> ?
2.5	s.67A	In the title, should “trustees” be “charity trustees”? It was not immediately obvious why sections 62(1)(a) or (b) are the only grounds referenced in this section, as opposed to also including section 62(1)(e)(i). The Explanatory Notes at para 1.58(2) suggest that ‘in the case of a subsequent failure of the appeal (where there is a surplus after achieving the purposes of the appeal).....Such proceeds will be applicable cy-pres by virtue of section 62(1)(a) or (b).’ Section 62(1)(e)(i) is ‘where the original purposes, in whole or in part, have, since they were laid down, been adequately provided by other means’ Section 62(1)(e)(i) is more commonly used where, for example, the original purposes are now carried out by a public authority under its statutory services e.g. a charity for the upkeep of a bridge. However, is it possible that this could also encompass a failed fundraising appeal which generates a surplus? e.g. a disaster appeal where there is more than one charity fundraising for the same purpose, sufficient funds are raised to meet the need, and there is a surplus? Perhaps it is because typically in a surplus situation (a) or (b) could be relied on and it is not required to also refer to s.62(1)(e)(i)? It would be helpful to explain the rationale behind including those particular sections 62(1)(a) and (b), in the ENs on the final revised Charities Act 2011, which might also provide some helpful clarification on a complicated area to practitioners. Is the intention here that if there are, say, twelve trustees, at least seven of them must take part in the decision? Is it intended that this be limited to <i>solicited</i> funds? The recommendation refers to failed appeals and surplus cases, so it may be that the answer is ‘yes’, but this appears to create an inconsistency between funds which the charity asked for and those it didn’t. How do s67A and s63A interact, given that they have different thresholds. Which takes precedence? Where both sections are relevant e.g. suppose Charity A has a failed appeal which raises in excess of £1,000 but it is entirely or largely made up of gifts of £120 or under. Can Charity A re-purpose all of the donations of £120 or less under s63A on the basis that they fall within the parameters of that section, or does the fact that the total raised by the appeal is over £1,000 mean that s63A is no longer available? If the former, then what if the total value of the individual gifts which are over £120 is under £1,000? s67A(2) suggests that the value of the property applicable cy près under s63A should be taken into account in assessing whether the £1,000 threshold has been reached. But it could be argued that the s67A and the s63 resolution are two separate resolutions.
3.	Section 73 schemes (73)	
3.1	73(3)	Does negative resolution apply by default without a positive statement (i.e. please confirm that subsection (3) is not necessary)?
	Part 1 – Purposes, powers and governing documents	

3.2	The existing s.67 and s.226 of the 2011 Act and the proposed amendments to s.198 and new s.280A refer to changing <i>purposes</i>, rather than objects or the statement of a charity's objects (as in the existing s.198 of the 2011 Act). The ENs explain that companies have "objects" under the Companies Act 2006, whereas charities have "purposes" under the Charities Act, and state that the two terms are synonymous. However, charities of various legal structures commonly have an "objects" clause in their governing document. Regulated alterations relating to CIO's refer to changes to their purposes requiring CC consent. Using the term "purposes" (particularly 'charitable purposes' in s198(2)(a)) in the context of regulated alterations could be interpreted as enabling changes to a charity's objects clause without the Commission's consent in certain circumstances, particularly when cross-referencing with s.2 and s.3 of the 2011 Act. The new provisions relating to regulated alterations could therefore be interpreted to mean that a charity can amend its objects clause without the Commission's consent provided the wording falls within the same charitable purpose (as described in s.3(1) of the 2011 Act). This could enable a charity to make significant changes to the charity's objects including its beneficial class if, for example, the objects refer to residents of a specific geographical area or particular age group. A charity with a small local area of benefit could change to a national geographical reach without the Commission's involvement. This is not what was intended.
4. Total return investment (104AA, 104B)	
The new definition of permanent endowment refers to a fund being subject to a restriction on being expended (amended s353(3)). It would be helpful to clarify how the amended definition interacts with s104A(1)(b) which provides that when total return is adopted, the fund is freed from the restrictions with respect to expenditure of capital. It could be clarified that the fund is no longer held as a permanent endowment fund (is this intended?), and the interaction with use of capital/trust for investment. It is not clear why s104AA and s104B uses different terminology to the other total return provisions; "total return fund" instead of "relevant fund", "returns from investment" rather than "unapplied total return". "Returns on investment" is unhelpful as it does not make clear this captures capital and income returns. In addition, we note that the terminology also does not match that used in the proposed amendments to the Charities (Total Return) Regulations 2013 at Appendix 6. This is already a jargon-heavy area. Shouldn't clause 104AA(2) also refer to s292C (the duties when making social investments)? Or is this intended to be covered by the Charity Commission's Regulations under s104B? It would be helpful to clarify the applicable duties. Charities cannot generally use permanent endowment to make social investments under s292B (save where the proviso to s292B(2) applies. It is a pity that the amendments in the Charities Bill are limited to permitting social investment when total return has been adopted. The draft amendments to the Regulations appear to suggest that social investments could be made from the trust for investment (without limitation and without any obligation to recoup) as the relevant fund is defined as the fund less any unapplied total return (which is the trust for investment?), noting that 5A refers to using the relevant fund to make social investments rather than referring to the unapplied total return. Is this intended? Under the existing total return regs, only 10% of the trust for investment may be spent, subject to recoupment. It is not clear how this is offset by the total return from the relevant fund (5A(4)) as there is no obligation to repay any loss to the relevant fund/trust for investment.	
5. Power to authorise ex gratia payments etc (106) See also 20. below. We would suggest that the ex gratia payment provisions are grouped together and that ss331 and 331A are inserted as 106A and 106B. This would make it easier to read and to navigate particularly for smaller charities without access to legal advice. We would agree that the trustees should be able to delegate this power and the notes (1.93 and 1.94) confirm that the intention of s106(1)(b) is to enable the trustees to do this. The wording of the	

subsection says, 'the Commission, the Attorney General or the court may authorise the 'charity trustees of a charity' to take action – but query whether this causes some ambiguity and should be re-phrased.

S106(1) - Typo in clause 16 of the draft Bill:

New s106(1B) refers to "legislation" in "subsection (1)" – it should refer to "subsection (1A)".

6. Charity land (117, 118, 119, deletion of 121, 122, 123, 124, 125, 126, 128A, 128B)

Clause 17 - "land is held by or in trust for a charity only if ..." – the "only" appears to be extraneous. It does not appear in the phrase anywhere else in the relevant provisions.

Is it appropriate to speak of a charity holding land for its own benefit as opposed to its own charitable purposes?

General comment on s117 – having a series of negatives makes the section harder to read/understand – (1) "No land"... (2) "Subsection (1) does not apply... if" ... (a) the disposition is made to a person who is not..."

Would suggest checking that no adjustment is needed here to take account of **David Roberts Art Foundation v Riedweg [2019] EWHC 1358 (Ch)**.

- They appear to be consistent with each other. However, s122(5) provides for it being enforceable in favour of the purchaser. In the David Roberts Art Foundation case, the would-be purchaser pulled out of the purchase and then sought to claim (unsuccessfully) that the contract was unenforceable against it on the basis of the charity's partial non-compliance with part 7.
- It may also be useful to add reference to this decision in the Explanatory Notes (e.g. alongside references to *Bayoumi*).

The ENs state that the proposed wording of s.117(3)(c) removes the requirement under the existing provision that the disposition be authorised by the trusts of the charity. This 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. It is not intended to permit charities to make dispositions which they would not be authorised to make under the trusts of the charity. However, this intention is not sufficiently clear particularly when juxtaposed against the wording of s.117(3)(d) which *does* refer to the power being exercised by the charity "in accordance with its trusts".

- It is suggested that the proposed wording of s.117(3)(c)(ii) is changed to: "any disposition of land held by or in trust for a charity which is made to another charity in accordance with its trusts unless—..."

This would be particularly helpful given that many non-charity law specialists deal with disposals of charity land and may be less cognisant of the broader legal framework relating to charities.

128B – Notification of disposal to wholly-owned company.

We are not clear that the notification provisions work. It is not clear what the consequences are of a failure to notify and what is the purpose of providing a copy of the advice obtained, but not a copy of the disposal documents? There is also a concern as to whether such a notification procedure, with copy documents also submitted, will be administratively feasible. Will the Charity Commission want those documents sent to it?

ENs should clarify effect of failure to give notice (presumably the effect is that it is a breach of duty by the charity trustees, but that the transaction is not, for that reason alone, set aside).

7. Power to confirm trustee appointments (184B)		
7.1	184B(1)(a)	Could the wording “intends to act” be improved on?
7.2	184B(3) and (4)	It might be easier to read this provision if these sub-sections appeared at the beginning of the clause. And could (3) and (4) be run together? Should the definition of “qualifying position” be confined to this section?
7.3	184B(5)(b)	“notwithstanding that there was not at the time the act was carried out a valid appointment or election” - Query is this wide enough to cover the situation reflected s184B(1)(b) where it is not clear (“or might not be”) if there was a valid appointment/election or not?
7.4		The section doesn’t specify who can make the application.
7.5		The section doesn’t specify who will receive notice of the order, and this doesn’t seem to be covered in the other provisions of the draft Bill.
8. Remuneration of charity trustees (185, 186A, 187, 188)		
8.1	185	Should the drafting say ‘goods and/or services’ as both may be supplied together?
8.2	186A(2)	Is there a reason why a distinction is made between the ‘remuneration’ which the Commission may authorise trustees to pay under s186A(2)(a) and a ‘benefit’ which the Commission can retrospectively authorise under s186A(2)(b)? The definition of ‘remuneration’ in s187 already includes ‘any benefit in kind’ and so it is unclear why ‘remuneration’ is not used in both instances for consistency. The same distinction is made in 186A(4)(d). It is suggested that this should include connected persons. s185 includes connected persons and surely the intention can’t be that a connected person who had absolutely no say or involvement in the decision-making process (and is therefore not in any way to blame for the fact that payments to them were not properly authorised) is treated less favourably than a trustee? (The ENs refer only to charity trustees here).
8.3	186A(4)(a)	We suggest substituting ‘paid’ for ‘employed’, noting that <i>employed</i> is quite narrow, certainly narrower than the full range of possible paid arrangements which might be in place.
8.4	186A(4)(b)	skill <u>and expertise</u>
8.5	186A(4)	Should the Charity Commission also have regard to ‘whether the trustee acted “openly and above board”’ (see para 9.15 of the Law Commission’s report)?

9. Charitable companies: alteration of objects (197, 198, 199, 200)		
9.1	198(2)(a)	As the CLA pointed out in May 2017, the new wording is not exactly the same as the corresponding wording for CIOs, although the CIO wording has now been altered, and there is an explanation of the difference between objects and purposes in the explanatory notes. As the CLA pointed out previously, is “charitable” redundant here?
9.2	198(2A)(a)	This refers to the “purposes of the company when it was established”. This doesn’t reflect the fact that the purposes may already have changed a great deal since the company was established. It would be a more worthwhile exercise to consider the objects prior to the proposed change. From a practical perspective, it may not always be that easy to establish what the original objects of the charity were: not all Companies House records are available via the Companies House website – older companies will need to contact Companies House directly to obtain a copy of their original Memorandum and Articles. In relation to cy-près schemes, s 62(4) and s 67(7) make it clear that references to “the original purposes” of a gift are to be read as referring to the current purposes, where they have been changed over time. A similar approach could be adopted here – although is sub-section (a) really necessary given that sub-section (b) already refers to the purposes being altered? As drafted, while this provision is meant to ensure consistency between unincorporated charities and charitable companies, it does so at the expense of risking additional complexity for charitable companies which is not really warranted.
10. CIOs: amendment of constitution (208, 224, 226 deletion of 227) <u>Section 224</u> – this amendment in effect moves what is currently s227(1). Should there be a cross-reference between s224(3) and s226(2B) and (2C) to flag that the date on which the <i>resolution</i> takes effect and the date on which the <i>amendment</i> takes effect may be different? 226(2A) – The comments above on s.198(2A)(a) regarding the formulation “the purposes of the company when it was established” also apply to s.226(2A)(a) in relation to CIOs.		
11. CIOs: amalgamation (231, 237, 239, 244, 248) 231 and 237 - The power of the Commission to refuse applications to register (or convert to) a CIO If the proposed name is the same as, or too like, the working name of another charity: as working names may not be registered, will this cause practical difficulties for charities attempting to check a name is not in use? See comments above about the scope of working names under s.42(4).		

12. Powers to amend trusts (deletion of 267-280, 280A, 280B)

268

Some noted that, whilst the new s280A power would permit trustees to amend the governing document of an unincorporated charity in order to confer a power to transfer property and then subsequently approve any transfer, this will necessitate a 'two stage' resolution for asset transfers which will be more complex and costly.

Further, under s268 trustees are able to exercise the power to transfer assets where the purposes (or any of the purposes) of the transferee charity are substantially similar to the purposes of the transferor charity. It does not appear that the new regime will facilitate such a flexible approach and s268 can be a useful tool for small unincorporated charities which have limited funds.

The repeal of s268 does therefore seem to run counter to the objective to reform the law so that it is less burdensome for charities and we would suggest that there might remain a role for it in an amended Charities Act.

The ENs could/should perhaps expand on the pros/cons here to explain the decision made.

280A

Whilst the clarification of s280 by way of introduction of a new s280A is welcomed, some concerns remain about the effect of the new power on smaller charities: the repeal of s275 combined with the requirement for active Commission consent (and the regard they must have to the considerations in s280A(10)), will make this more restrictive for these smaller organisations (and in relation to the amendments of purposes of special trusts for which the s275 power is often used). Again, the ENs could/should expand on the pros/cons which emerged during the consultation process to explain the decision.

s280A(4) – it is unhelpful that the charity is now described as a body, or is this intended to refer to the 'body of members'? Is using the words 'a body of members distinct from the charity trustees' intended to catch unincorporated associations or only those with open membership (i.e. where the trustees and members do not entirely overlap)? What would an unincorporated association with closed membership (i.e. where the trustees are the only members) be expected to do? (Again, this could be drawn out in the ENs).

S280A(5) and (6) require that in the case of unincorporated charities with a separate membership, a simple trustee majority will be sufficient to pass a resolution but where there is no separate membership a 75% majority is required. We note that there is an overarching aim to align the regimes for CLGs, CIOs and unincorporated charities, and the 75% majority required for a members' special resolution to amend the articles (which, in a Foundation CLG without a separate membership would in practice require the agreement of 75% of the trustees). Nevertheless, here we would suggest that the distinction be deleted so a simple majority is sufficient for all trustee resolutions whether there are members or not. Raising to 75% for a trustee resolution is a higher level than in current s280 and runs counter to the principle of consistency.

We are conscious that the introduction of a new statutory power for unincorporated charities that will allow them to amend their purposes, with Charity Commission consent, will impact on donors who have historically enshrined the purposes of their gifts (in so far as possible) in the trusts by which the gift is made. Whilst charities will broadly welcome this flexibility, there will be greater complexity involved in drafting deeds of gift (in many cases) in order to accommodate donor wishes. (Again, this could be drawn out in the ENs).

s280A(8) (g) – Ought this to say 'confer power on the charity trustees *or members* to make an amendment falling with any of paragraphs (a) to (f)'. For an unincorporated association, any constitutional amendments would be made by members.

s280A(9) – should this read subsections? Do the Law Commission wish to allow for where the person has lost capacity or cannot be found or are they envisaging that would be a situation requiring regulated alteration consent? Perhaps this could be covered in the ENs?

In s280A(10), the wording "*purposes of the charity when it was established*" may cause difficulties in the case of long established charitable trusts where the purposes have changed over time and potentially significant funds have been acquired since the purposes have changed. We note that in the case of endowments (and, in particular, the effect that the introduction of this new s280A might have on the ability of donor's to enshrine their wishes) the original intention of the gift will remain relevant but suggest it would be better to look to the current objects whilst noting the 'spirit of the original gift' (see the CLA comments at j402 of the original submission) than to doggedly look back to the purposes of the charity when it was established.

s280B(3) – these definitions align with those in section 200 (meaning of "connected person in s198) *except that* s199 starts '*For the purposes of* section 198(2)(c)' and s280B(2) starts '*In* section 280A(8)(c)'.

13. **Power to amend Royal Charters (280C)**

280C

The previous draft Bill which the CLA commented on provided for approval of 2/3rds of the trustees (where there are no separate members) or approval by 2/3rds of the members (where there are separate members). This has now been increased to a 75% majority. This is presumably to bring it in line with amendment of Articles of a charitable company but is a higher threshold than most Royal Charters we have seen which tend to require s 2/3rd majority of members. A majority of 75% seems high.

There remains a lack of consistency over majorities (please also see re s280A(5) and (6) above). It is not clear why amendments may be made by a simple majority of trustees where there are separate members (although noting that this would also mirror the decision of trustees which would usually precede putting a proposal to members of a CLG to amend Articles). While we appreciate that the separate approval of members provides a check and balance, in reality members will often be guided by the trustees. Some commentators suggested the thresholds for trustee approval ought to be the same and we would propose a 2/3rd majority which is in line with most Royal Charters and the current version of s280 Charities Act 2011 for charitable trusts. They do not see why these provisions need to be brought into line with those for charitable companies. Others would prefer consistency across all forms (as far as possible). Whatever majorities are chosen, the rationale (and any compromises) needs to be clear.

The Law Commission's original consultation document proposed introducing a power to amend Byelaws as well as Royal Charters, however the Law Commission's final report concluded that a power to make Byelaws already exists at common law. It would be helpful to extend this new provision to include an express provision to allow Royal charter bodies which do not have power to make Byelaws to make and amend Byelaws which are consistent with their Royal charter.

The power appears to be available where there is an express power in the Charter but it does not extend to the particular amendment sought to be made. This is not clear in the EN.

14. **Powers of charities to spend capital (281, 282, 283, 284)**

281/282

Is there any data on how many funds may move from the current s281 regime to the s282 regime with the changes to s282(1)? Concerns were raised that removing the income test albeit increasing the market value will mean that potentially many more endowment funds will be brought into s282 and so subject to Charity Commission consent than currently. If so, that would be an increased burden on those charities as well as the Charity Commission which would need to consider a larger number of resolutions and undermine the intentions behind the Charities Bill to reduce red tape. If there were figures to identify the effect that would be helpful.

Given the passage of time since the report, it may be appropriate to consider whether the proposed market value of £25,000 is too low - perhaps it should be raised to £50,000?

In S282(2) should “charity” be replaced with “fund”?

284(1)(a) – the inclusion of “any evidence made available to it as to the wishes of the any donor or donors....” [NB there is an errant “the” which has been left in] might be interpreted to suggest it is up to the charity to decide whether to provide any evidence about the wishes of donors.

In relation to the EN, as previously commented by the CLA, the EN suggests that the powers are being extended to corporate charities but in fact the sections have always been treated as applying to endowment held by a corporate charity, so this is a clarification.

s281(1) – what is intended by ‘available’? A more accurate description might be ‘permanent endowment fund’.

s281 – general comment: the defined phrase is ‘available endowment fund’, but then the phrase ‘fund’ is mainly used. This is carried over from the existing s281

15. **Power to borrow from permanent endowment (284A, 284B, 284C, 284D)**

15.1	284A	It is difficult to see how this power can be reconciled with the interests of the endowment fund and the trustees’ duty of even-handedness, particularly as it is optional as to whether the real value of the fund should be maintained through repayments.
15.2	284A(2)(a)	‘Expedient’ in whose interest – the interest of the charity or the endowment fund or both? If the interests of both are to be taken into account, should this be expressly stated so that trustees do not inadvertently disregard the interests of the fund?
15.3	284A(2)(b)	What if the loan is drawn down in tranches?
15.4	284A(2)(b)	that appropriate arrangements [c.f. 307(3)(b) Charities Act 2011]
15.5	284D	Should provision be made for a situation where, in the 20 year repayment period, the trustees would like to exercise their power (at s281 or 282) to release the fund from the permanent endowment restrictions which apply to it?

16. **Social investments (292B)**

It is suggested that the drafting of the amendment in s292B(2) could be made clearer.

17. **Charity mergers (306, 310, 311)**

Vesting Declarations

The intention is to revoke regulation 61 of the CIO General Regulations 2012. This may not be entirely helpful without a further amendment to s.306(2).

The provisions relating to mergers and vesting declarations recognise that a charity may be transferring both unrestricted property and permanent endowment (PE). The proposed amendment to s.306(2) is helpful, as it recognises that property may be held as PE but with a conditional dissolution provision or power of sale which would enable the PE charity to be closed at some point in the future. Although the Law Commission has highlighted two effects of regulation 61 and the implications of revoking this it is felt that the draft Bill does not adequately address how special trust property that is *not* PE will be regarded if regulation 61 is revoked.

If you do not have a reference to special trust property in s.306(2) then presumably it does not fall within the exception provided for in s.306(3). This creates ambiguity about whether special trust property that is to continue to be held on trust, can be included in a vesting declaration. This is because it will not meet the condition of s.306(1) of ceasing to exist following the transfer.

It would be possible for the special trust property to be transferred by other means, such as a Deed of Appointment, but this would undermine the benefits of the simpler regime which s.310 provides.

The Law Commission report discusses regulation 61 in more detail, and concludes that the effect of transferring special trust property, like PE, is the appointment of the CIO as trustee. But as also noted in the report, vesting declarations do not confer a *power* to transfer, simply a mechanism. Whilst the power being exercised may be to appoint a new trustee, in line with s.40 Trustee Act 1925, it can still be helpful to use a vesting declaration as the transfer mechanism. This is because transferring special trust property in a vesting declaration, perhaps alongside unrestricted property, can facilitate a simpler transfer process than producing a separate Deed of Appointment. For example, for churches that are incorporating and transferring both working funds and designated land (that is not necessarily functional PE) to the CIO.

s.306(2) could be amended to read as follows:

(2) In the case of a merger involving the transfer of property of any charity--(a) which has both permanent endowment, special trust property that will continue to be held on trust, and other property ("unrestricted property"), subsection (1)(a) or (b) applies subject to the modifications in subsection (3).

Reference to special trust property continuing to be held on trust is helpful as there may be a power for special trust property held by the transferor to be transferred free from trust.

18. The Tribunal (322, 324A, 325, 326, 328)

18.1	s324A	In section 324A(1), we query whether the reference to “charity trustees” (in the plural) could potentially cause confusion here – would this preclude a trustee from applying on behalf of the trustees? The same issue might arise in respect of the proposed wording in section 324A(3)(c).
18.2	s325	Should the requirement to give notice in section 325(2) be specified to be “written notice” or wording to that effect? Similarly, should section 325(2A) specify in what form the Attorney General must convey their consent (e.g. in writing)?
18.3	s326	Should the requirement for the Attorney General to give notice to the Commission of an intention to make a reference in section 326(1A) be

		clarified to make it clear that the Attorney General must give notice in writing? Similarly, should the Commission be required to give its agreement under section 326(1B) in writing?
19.	Power to make ex gratia payments [odd that this is not situated next to the power for the CC to authorise ex gratia payments at s106] (331A) We would suggest that s331A and s331B were inserted as s106A and s106B. This would be easier to read and to navigate particularly for smaller charities without access to legal advice.	
20.	Trust corporation status (334A) The ENs suggest that this provision is only useful where a land is held on charitable trust. It's also useful where trustees of any charitable trust are wishing to be discharged under s 37 Trustee Act 1925. Could the explanatory notes be changed so that they do not only refer to trusts involving land? Could this section be moved so that the provisions of the 2011 Act dealing with trust corporations appear together? The ENs should explain why this provision does not extend to cover grants of representation. Should 'charitable trust' be defined? Should s3 of the Law of Property (Amendment) Act 1926 (being a provision dealing with trust corporation status) be included in s334A(2)?	
21.	Enforcement Powers of Commission (337) This seems to go further than the recommendation which relates only to where the Charity Commission provides consent to amendments (specifically in respect of new s280A). In any case, the s337(3) amendment goes far wider than the consent provision in s280 and was not the subject of consultation. It appears to raise resource issues for the Commission – there would need to be an additional step every time the Commission considers any written consent, to consider the need for public notice and decide whether or not it is needed. Presumably such decisions would be subject to challenge.	
22.	Interpretation (350, 351, 352, 352A, 353)	
22.1	353(3)	Definition of permanent endowment A query about the proposed definition of permanent endowment: an expendable endowment fund (e.g. a fund where the trustees have power to spend any part of the capital if they decide it is in the interests of the charity) is arguably "<i>subject to a restriction on being expended which distinguishes between capital and income</i>". Query – does the definition need to make clear that the capital must be retained?

Schedule of Additional points that the original CLA working party had suggested but have not been implemented

	Section of Charities Act 2011 (tracked changes version)	Comments
	45(5)	This sub-section repeats s80 Companies Act 2006 which applies when the registrar of companies receives notice of a change of name. Can it be deleted? It's the original wording, so query in scope? (It was presumably considered necessary at the time, possibly because it is a slight gloss on s80-81 CA 06 and the fact that the date of taking effect may be relevant in the context of compliance with the time period in the s42 direction).
	63A(1)(b)	Wording has not been changed to address this previous CLA comment: s63A(1)(b) – is there a reason why it does not just say “any of conditions (3) ...”?
	63A(2)(b)	Previous CLA submission seemed to suggest that the drafting should include 'and/or' to make it clear whether or not all of the factors are needed for the expectation to be unreasonable e.g. (b) that it would be unreasonable (i) having regard to the nature, circumstances and amounts of the gifts; and/or (ii) to the lapse of time since the gifts were made, for the donors to expect the property to be returned. Thus making it clear that e.g. it might still be unreasonable to expect that a recent gift be returned given the circumstances in which the gift was given. Another member comments: Why is this restricted to s62(1)(a) and s62(1)(b) and not the other cy près gateways? This doesn't seem in keeping with the spirit of the recommendation. What does the reference to s63A do? If property falls within s63A, it has already been re-purposed. Is the intention to place a cap on s63A where funds have been raised from a solicitation? And, if so, why are solicited funds being treated differently from unsolicited funds?
	63A(3)	Previous CLA submission included the following, which does not appear to have been addressed in the Bill or the Explanatory Notes: The proposed legislation does not set out the steps that the trustees should take in the event that the appeal fails and a donor has expressed a wish to have his or her donation returned in these circumstances. Further, the legislation does not deal with what would happen to funds in the event that a donor has requested a charity returns his or her funds where an appeal fails but is un-contactable when this event occurs (perhaps because he or she has moved or has new contact details). This should be addressed and the most straightforward way of doing this might be to insert an additional subsection in

		s63A which would set out that if the trustees have attempted to contact the donor but have not had a response within [3] months then the property is applicable cy-près. Or in such circumstances, does it fall within s63A(4)?
	63A(6)	Previous CLA submission suggested the following, which does not appear to have been addressed: 63A(6); Would this provision include donations made by contactless means? Or would those always be identifiable? Given the way in which people use money is changing, it may be helpful to consider providing that cash includes small contactless payments in a similar way to the recent amendment in relation to cash collections in the Small Charitable Donations and Childcare Payments Act 2017. Perhaps the ENs could clarify if this point is covered in 63A(6)(ii)?
	75ZA	Previous CLA submission raised this, which has not been addressed: Concerns were raised about the provision being in a separate clause – it would seem easier to follow (and possibly less likely to be overlooked) if it was inserted in s69 or s70. Section 75ZA – is there a reason why this section refers to charitable trusts rather than unincorporated charities? Or is charitable trusts intended to capture both? There might be a situation involving members where a scheme might be needed. As trusts don't have members, the Charity Commission wouldn't be able to make that sort of scheme in relation to a charitable trust.
	117	s117(3)(c)(i) refers to the “best price” that can reasonably be obtained rather than the “best terms” (as in s119(1)(c)). It is suggested that the sections would operate better and be better understood if the concept of the “best terms” were applied to both. The question should be whether it is a commercial deal on commercial principles or, on a sound legal basis, a deal that is in substance not commercial at all. Former s.117 (3)(c)(ii) - Some have raised a concern over removing the second limb of current s117(c)(ii), considering it may risk the implication that a charity can transfer property to another charity with different objects. Others are not concerned by the removal, as s117(c) is not a power, but rather excludes certain dispositions from the requirement for an order or the restrictions in ss119-121 (currently), and the statement required (currently certificate) refers to the charity having power to effect the disposition. Perhaps it should be made clear that there is no intention to remove the principle that a charity must only apply its property in furtherance of its objects. The deletion of section 121 does not seem to clarify how trustees are to treat designated land. The trustees will have to rely on Oldham and will still be expected to consult with stakeholders. Clarification of the power and the obligation to consult would be welcome but we suspect that the simple deletion of 121 will lead some to assume that there is no specific restriction in relation to designated land. Clause 27 - new s118(2A) (meaning of connected person in s117(2)) – it is possible that a tenancy may be granted at a nominal or subsidised rent in return for services. In such a case, it would be helpful for trustees to be able to grant such tenancies as being “in the best interests of the charity” rather than needing to comply with section 120.

	184B(2)	CLA pointed out in May 2017 that “there is to be treated as being” looks a bit awkward.
	198	Section 198 – Paragraphs 4.16 and 4.17 of the Report indicate that the intention is that amendments to the objects should not be caught where the substance of the purposes remains the same. This is a familiar concept in that we see it with amendments to trustee and member benefits – only those amendments which authorise a benefit are caught. But the phrase in s198(2)(a) “which alters the charitable purposes” is ambiguous, and could be read as requiring consent even if the substance of the purposes remains the same. Would something like this be clearer: <i>“any alteration of any provision of the company’s articles of association where the alteration would widen [or narrow]* the existing purposes”</i> * in the case of trustee and member benefits it is only widening which requires authority. So if the intention is to replicate that principle, the square bracketed wording could be deleted. There would of course be the practical question of what is widening or narrowing, but this is a question which charities and charity lawyers are used to considering when incorporating/merging/making grants/collaborating, etc. Given Recommendation 2 set out at 4.23(2) of the Report, why are s198(2)(a) and s226(2)(a) not identical (except for the words company/CIO and articles of association/CIO’s constitution). If continuing the principle to the dissolution clause, the Law Commission may wish to alter the wording of s198(2)(b) in a similar way so that only amendments of substance rather than form are caught e.g. if a charity moves from an open membership to a closed membership or vice versa, the procedure for dissolution may change, but this will not necessarily affect where the assets go on dissolution, merely the procedure for dissolving.
	284	The CLA made a number of suggestions and comments in relation to the previous version of the tracked Charities Act 2011 which have not been adopted or reflected we would argue these should be considered again
	292B	Given the added complications for statutory charities and Royal Charter Bodies to change their governing documents, it is a shame that the power to make social investments has not been extended to them.
	306, 310, 311	306 – The wording has not been changed to address this previous CLA comment: “Is it intentional to retain the requirement for “all” property to transfer? This limits the usefulness of this section and ss310 and 311. For example, one working group member reports having acted for an incorporating charity which had either failed to exercise a break clause or terminate a lease on time . They did not want the lease in the “new” charity

		and so kept it in the "old" one until the term ran out – this merger would not have fallen within the definition of "relevant charity merger". 310 – Previous CLA comments on this section, particularly in relation to which leases are caught by s.310(3)(b) have not been addressed in this draft. 311 – The wording seems to achieve what is intended here and is an improvement on the previous draft (as the wording "the date the gift was intended to take effect" has been deleted). There may still be the possibility of a gap if a transferor ceases to exist before a merger is registered, so it remains important that this process is dealt with promptly, as highlighted in the previous CLA comment.
	331	The CLA had previously queried whether the reference in s331A to charity trustee meant that this is intended to be a non-delegable function. The explanatory notes (at 1.92) make the point that trustees might delegate this power specifically in relation to the wording of s106(1)(b) but such express wording is not included in the explanatory notes to s331A(3)(c). The CLA previously commented on the possible unintended consequences of the inclusion of the wording "reasonably regarded" and our concerns here remain as to whether the inclusion of this wording (to indicate the function can be delegated) might lead to a situation as follows: • E.g. Someone claims from a charity for a "small" ex gratia payment (say up to £1,000); the charity trustees consider it and decide they feel no moral obligation and decline; in response, the claimant says that they should feel a moral obligation and would be "reasonably regarded" to have such and that they will go to the press and/or say as much on social media. • Query will the charity trustees feel they have to go to CC in such a situation in any event? The CLA previously suggested (in May 2017) wording that would more accurately reflect the intentions here and we would suggest that s331A(3)(c) be reworded along these lines.
	334A	The CLA previously suggested that there should be consultation with the Legal Office of the Church of England about this provision.