

**TECHNICAL ISSUES IN CHARITY
LAW
SUPPLEMENTARY CONSULTATION**

RESPONSE FORM

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

You can download the supplementary consultation paper free of charge from our website at <http://www.lawcom.gov.uk> (under "Find a Project", search "charity law").

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

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

We invite responses from 1 September 2016 to **31 October 2016**.

Please send your completed form:

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

or

by post to Daniel Robinson, Law Commission, 1st Floor, Tower, Post Point
1.53, 52 Queen Anne's Gate, London SW1H 9AG

If you send your comments by post, it would be helpful if, wherever possible, you could also send them electronically (for example, by email to the above address, in any commonly-used format).

Freedom of information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

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The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

YOUR DETAILS

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CHANGING A CHARITY'S PURPOSES

We provisionally propose that, if powers of amendment are aligned:

1. trustees of an unincorporated charity should have a power – with the consent of the Charity Commission – to change the charity's purposes without having to establish a section 62 cy-près occasion; and
2. the section 67 similarity considerations should apply when the Charity Commission decides whether or not to give its consent.

Do consultees agree?

Chapter 2, paragraph 2.31

1. No.

1.1 For the reasons given in SCP 2.17 ("SCP" is used in these responses to mean the Supplementary Consultation Paper): (1) need for some limitation; (2) importance of respecting wishes of donors/founders; (3) s.62 provides a clear regime; (4) familiarity with current regime. Ss.62 and 67 together strike the appropriate balance between allowing charities to remain effective and respecting the wishes of founders and donors.

1.2 We do not agree with the statement at SCP 2.27(3) that "In any event, cy-près problems can often be worked around by an unincorporated charity transferring to the regime for companies". Prima facie if an unincorporated charity transferred its assets to a corporate charity for the purpose of circumventing the cy-près restrictions, that would be an abuse (fraud) on the power. The purported exercise of the power would be void, and if assets had been transferred pursuant to the purported exercise of the power, the trustees of the unincorporated charity would be liable to compensate the unincorporated charity for its loss. Usually the power exercised for the purpose of transferring an unincorporated charity's assets to a corporate charity would be the general power to advance the unincorporated charity's objects (sometimes there will be an express power to transfer assets to charities with the same or similar objects). If that power was exercised for the purpose of advancing new, different, objects, that is to say the objects of the corporate charity as they would or might be changed to outside the cy-près jurisdiction, the power would not be being exercised for the purpose for which it was given.

2. Yes. For the same reasons as given in paragraph 1.1 above. If the balance is not to be struck by retaining the s.62 cy-près occasions, then, as per SCP 2.30, it should be struck by at least retaining the s.67 similarity considerations.

We invite the views of consultees as to whether the section 67 similarity considerations are appropriate in their application to a new amendment power for unincorporated charities.

Chapter 2, paragraph 2.35

Yes, if there is to be a new amendment power for unincorporated charities, then the s.67 similarity considerations are appropriate in their application to that power. This is for the same reasons as given in the answers to the immediately foregoing response.

We invite the views of consultees as to whether the Charity Commission should be required to have regard to the section 67 similarity considerations when it decides whether to consent to a company or CIO changing its purposes (as well as when it decides whether to consent to an unincorporated charity changing its purposes under a new aligned amendment power).

Chapter 2, paragraph 2.41

Yes, for the following reasons:

1. So that the position in relation to companies and CIOs is aligned with that of unincorporated charities.
2. It is unsatisfactory that the considerations which the Commission should have regard to in deciding whether to give its consent to changes in the purposes of charitable companies are not defined otherwise than in the Commission's practice.
3. The Commission's practice as to the considerations which it has regard to is, itself, unsatisfactory. This is exemplified by the following:

3.1 In SCP 2.12 and in the bottom left quadrant of SCP 2.23 it is stated that the Commission's discretion in this regard is "exercised [in the light of][in accordance with] case law and other relevant legislation". Except for the Catholic Care/Farther Hudson's Society appeals which touch on the question (para.24 of Charity Tribunal decision of 13th March 2009), we are not aware of any relevant case law or other relevant legislation which confirms or otherwise that the three considerations which the Commission should have regard to in deciding whether to give its consent to changes in the purposes of charitable companies are those set out in SCP 2.12 and Commission OG 518.

3.2 The Commission's practice confuses the powers and duties of trustees and members of a charitable company. Thus the second of the Commission's three considerations (set out at SCP 2.12) is whether "the trustees' decision to make the change a rational one in the circumstances of the charity". Generally the persons who are the "charity trustees" of a charitable company within the meaning of s.177 Charities Act 2011 are its directors, not its members. But, generally, it is the members not the directors of a charitable company who, subject to the constraints of s.198 Charities Act 2011, have the power under s.21(1) Companies Act 2006 to amend the company's articles, including its objects. In some cases the members might have good reason to change the objects without any

assistance from or, indeed, against the opposition of the persons who happened to be the directors / charity trustees of the charitable company.

3.3 As a matter of company law, the members of a company can, subject in the case of a resolution which involves the alteration of the company's articles, to the constraint that the resolution must be passed in good faith for the benefit of the members as a whole, exercise their rights as members in their own selfish interests (*Greenhalgh v. Arderne Cinemas Ltd* [1951] Ch 286). It may well be that subject to the s.197 and 198 Charities Act 2011 restrictions on and on the effect of changes to the articles, charity law does not impinge on those principles, and that the powers of the members of a charitable company to change its objects are, at least generally, not fiduciary or not fully fiduciary powers. This is contrary to the expressed view of the Charity Commission, but is supported by authority. For more detail on this, please see Tudor on Charities 10th ed at paras. 17-003 – 17-005; in particular the references to s.30(2) Charities Act 1960 and to *Girls' Public Day School Trust Ltd v. Minister of Town and Country Planning* [1951] Ch 400 where Roxburgh J held that the preference shareholders in a company with charitable objects limited by shares might exercise their voting rights so as to put it into liquidation and take the surplus assets for themselves.

We provisionally propose that the section 62 cy-près occasions should be retained as pre-conditions to the Charity Commission making a cy-près scheme.

Do consultees agree?

Chapter 2, paragraph 2.49

Yes. For the reasons given above.

TRUST CORPORATION STATUS

We provisionally propose that:

1. any charitable company and CIO should have a power, by resolution of its directors or charity trustees, to acquire trust corporation status in relation to any charitable trust of which the corporate charity is trustee; and
2. the conferral of trust corporation status on CIOs by regulation 61 should be repealed.

Do consultees agree?

Chapter 3, paragraph 3.46

1 and 2: we are ambivalent on these.

A. The rationale for requiring the recipients of the proceeds of sale of land to be a trust corporation or at least two individuals was to increase the probability that they would be dealt with properly in accordance with the relevant trusts. The requirement that generally in order to be a trust corporation, a company limited by guarantee had to be authorised by the Lord Chancellor was intended to give some comfort as to the trustworthiness of the corporation. Similarly a trustee appointed by the court or the Commission should have only have been appointed if the court or Commission was satisfied as to their fitness to act. To make any charitable company or CIO able to become a trust corporation without any form of check as to its fitness would go against that rationale

On the other hand:

B.1 The protection given by the need for the Lord Chancellor's authorisation or court or Commission appointment is far from complete because the probity of a corporation might be lost subsequent to its authorisation or appointment.

B.2 The use of route (C) as described in SCP 3.19-3.23 with a CIO has already opened (by reason of Reg.61 of the CIO regs) a crack in the pre-existing protection, and the provisional proposal would only make clear that that protection was non-existent.

We invite the views of consultees as to whether trust corporation status:

1. should be made available to non-charitable corporations;
2. should be conferred automatically, rather than being available by resolution.

1. Please see our answers and discussion to the immediately foregoing proposals.
2. If the status of “trust corporation” is going to be available without the existing protections, then we suggest that it ought to arise automatically, otherwise its absence in some cases may become a trap for the unwary.