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Joint Committee on the Draft
Charities Bill

The Draft Charities Bill

Volume I

Report, formal minutes and evidence

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The Joint Committee on the Draft Charities Bill

The Joint Committee on the Draft Charities Bill was appointed by the House of Commons and the House of Lords on 10 May 2004 to examine the draft Charities Bill and report to both Houses no later than four months after the presentation of the draft Bill.

Membership

Lord Best (Crossbench)
Lord Campbell-Savours (Labour)
Earl of Caithness (Conservative)
Baroness McIntosh of Hudnall (Labour)
Lord Phillips of Sudbury (Liberal Democrat)
Lord Sainsbury of Preston Candover (Conservative)

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Ms Sally Keeble MP (Labour) Northampton North
Mr Andrew Mitchell MP (Conservative) Sutton Coldfield
Bob Russell MP (Liberal Democrat) Colchester

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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet away from Westminster, to meet at any time (except when Parliament is prorogued or dissolved), to appoint specialist advisers, and to make Reports to the two Houses.

Publication

The Report and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Joint Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/jcdchb.cfm.

Committee staff

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1 Overview

Background

1. The Joint Committee was appointed on 10 May 2004 to “consider and report on any draft Charities Bill presented to both Houses by a Minister of the Crown” and to do so by the Government deadline of 30 September 2004. The deadline was not of our choosing, but within the time available we have been able to hold eight oral evidence sessions and have received over 350 pieces of written evidence. Lists of those who gave oral and written evidence appear on pages 173-5. We are grateful to all those who have shared their views with us. We were also ably assisted by our Specialist Advisers, Margaret Bolton and Professor Jean Warburton, to whom we record our thanks. Given our tight deadline, and in line with the nature of pre-legislative scrutiny, our report will concentrate on the key issues that we consider to be of most concern.

2. The charitable sector is a subset of the wider voluntary or not-for-profit sector. This wider sector encompasses mutual benefit organisations including cooperatives and credit unions and other non-profit distributing organisations which benefit only their members and not the wider public. It also encompasses organisations which are not eligible for charitable status because their primary purpose is to achieve a change in the law or public policy. The voluntary or not-for-profit sector is vast (comprising it is estimated over 500,000 organisations).¹ Some 569,000 people worked in the voluntary sector in Great Britain in 2002. This report is concerned solely with those voluntary or not-for-profit organisations which are charities and organisations with charitable, philanthropic and benevolent purposes, many of which raise funds from the public including campaign groups.

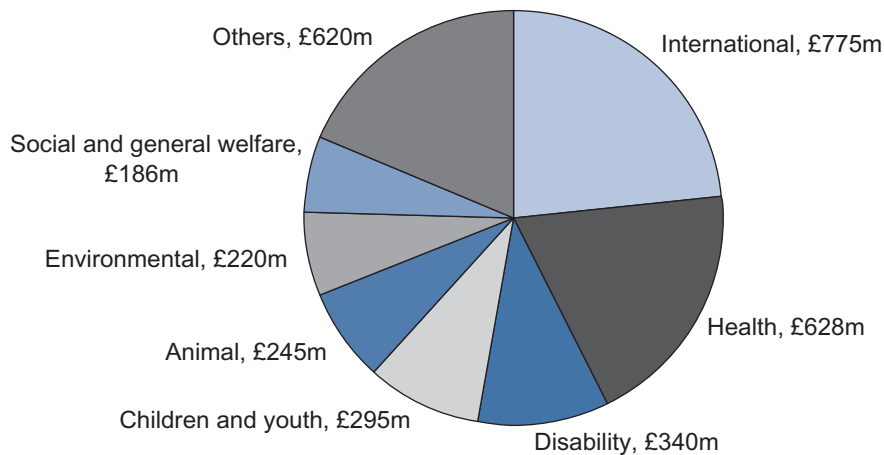
3. The charitable sector is vast and diverse, including grant-giving, grant-receiving and fund-raising charities of all sizes, and covering a huge range of issues and interests. There are an estimated 188,739 charities in England and Wales registered with the Charity Commission.² According to Charity Commission figures, the total annual income of ‘main’ registered charities exceeds £32 billion. Whilst the largest 471 charities (just 0.29% of those on the register) represent 45% of the total income, almost two thirds of charities actually have an income of £10,000 or less.³ The chart on the next page shows the range of subjects that just the top 500 fund-raising charities deal with.

1 Strategy Unit Private Action, Public Benefit, September 2002, para 15

2 Of which 165,131 are ‘main’ charities; the remainder are subsidiaries or branches of other charities. As at 31 March 2004, Charity Commission Annual Report, 2003/4, p1

3 As at 31 March 2004, Charity Commission Annual Report, 2003/4, p1

Income of the top 500 fund-raising charities, by sector, 2001



4. The Committee recognises the huge diversity of the sector and has been particularly concerned to hear from the many smaller voluntary-run local charities during the course of our inquiry. Our desire here has been to protect charities – and in particular smaller charities – from unnecessary or ill-judged interference or bureaucracy while giving them the prospect of growing if that is in keeping with their wishes.

5. The Committee pays tribute to the vital work that charities perform. We strongly believe that charitable endeavour continues to be the cornerstone of a caring society comprised of active citizens. Charities are valued as organisations independent of Government. We would like to see charities playing an even bigger role and believe that many have the potential to contribute to the modernisation of public services and the enhancement of civic responsibility. Our assessment of the Bill and the recommendations we make are based on a desire to see charities – and charitable endeavour and income – grow, not diminish, in our country.

6. We welcome the importance the Government attaches to the role of the charitable and wider voluntary sector. The draft Bill has been widely welcomed in the sector. The Committee believes that reform and modernisation of charity law is long overdue.

7. Current charity law dates back centuries. It is based on a body of case law and operates within the regulatory framework of the *Charities Acts of 1992 and 1993*. To be charitable, an organisation must have purposes that are exclusively charitable and it must be established for public benefit. The legal concept of a charitable purpose has been developed by the courts over several centuries and is based on the preamble to the *Charitable Uses Act 1601*. This Act does not contain a definition of charity but a list of the purposes that were then considered charitable. New purposes are considered charitable if they are analogous to one of the purposes listed in the preamble. In 1891, Lord McNaghten grouped charitable purposes into four divisions: the relief of poverty; the advancement of religion; the advancement of education; and other purposes beneficial to the community.⁴ The first

three heads of charitable purpose are currently presumed to be for the benefit of the public, but for the other purposes within the fourth head public benefit must be proved.

8. Some sporting organisations and organisations promoting recreation are recognised as charitable under the *Recreational Charities Act 1958*. The *Charities Act 1992* gave greater powers to the Charity Commission, the charity regulator, and set out powers to control fund-raising. The *Charities Act 1992*, except the fund-raising provisions, was consolidated with the *Charities Act 1960* in the *Charities Act 1993*.

9. Those organisations recognised as charities are able to take advantage of valuable tax concessions, as are donors to charities. Charities are normally subject to the regulatory jurisdiction of the Charity Commission. There is presently no structure or legal form which is reserved solely for charities; and in practice charities are usually trusts or unincorporated associations, companies limited by guarantee, industrial or provident societies.

10. Our Committee's proceedings are the latest phase in a process of consultation on charity law that formally began in 2001. In July 2001, the Prime Minister commissioned his Strategy Unit to carry out a review of the law and regulation of charities and not-for-profit organisations. Their review, *Private Action, Public Benefit*, was published in September 2002.⁵ It made 61 recommendations, including proposals to modernise charity law, improve the range of legal forms available, develop greater accountability and ensure effective regulations. Not all of these proposals required legislative change.

11. The Charity Commission response, published in November 2002, welcomed the Strategy Unit's report and confirmed their support for the majority of its proposals, including the proposal to trade directly. The Government published its response in July 2003, following consultation.⁶ It accepted all but one of the main recommendations, rejecting the proposal that charities should be allowed to trade directly. The draft Charities Bill was published by the Home Office on 27 May 2004.⁷

12. The draft Bill seeks to legislate on a range of issues, the majority of which were first proposed in the Strategy Unit report. These include expanding the list of charitable purposes, removing the presumption of public benefit, defining the role of the Charity Commission, establishing a new Charities Appeal Tribunal to hear appeals against Charity Commission decisions, introducing a new legal form for charities and regulating public charitable collections. The detailed proposals within the draft Bill will be explored in more depth in chapters 4 to 10.

13. There are also a number of general issues that we consider should be investigated in further detail. We examine these issues in the remainder of this chapter. These include the draft Bill's purpose, how its success will be measured and whether it will aid charitable giving. We consider the legislation's costs and benefits and its impact on small charities in particular. Finally, given the recent publication of a draft Bill on charities in Scotland, we look at how effectively legislation on charities will work across the UK.

5 Private Action, Public Benefit, Strategy Unit, September 2002

6 Charities and Not-for-Profits: A Modern Legal Framework, July 2003

7 Cm. 6199

Clarity of purpose

14. Our primary concern is to ensure the draft Bill will deliver workable legislation that will enhance the role charities play in society. The majority of evidence we have received welcomes the draft Bill, despite significant criticism of some of its provisions. However, we remain concerned that the Government's case for the draft Bill will be compromised unless there is greater clarity about the objectives against which its success can be gauged. In order to be meaningful the effect of legislation must – insofar as is practicable – be measurable; in order to be measurable it must have clear objectives.

15. The Government has put forward a range of reasons for the draft Bill. In the press release to accompany its publication, they stated that the draft Bill contained proposals to “boost public confidence in charities, help new and existing charities to work effectively, ensure that donations are used properly and abuses are dealt with quickly and firmly”. It contended that the UK's charity law is “in need of urgent modernisation” and that the legislation forms part of the “Government's drive to help local people shape their communities and take the initiative in solving problems and driving forward civil renewal”.⁸ In separate written evidence to the Committee, we were told that the “main purpose of the legislation is to create a modern legal and regulatory environment that encourages a vibrant and diverse charitable sector” and that its success could be measured against the aims of the Strategy Unit's report.⁹

16. In oral evidence, Fiona Mactaggart MP, the Minister responsible for the draft Bill, told the Committee that:

“there will be a substantial benefit to all the charities about achieving a more robust protection of the concept of charity, the ‘charity brand’”.¹⁰

“I think the purpose of the Bill, the fundamental purpose of the Bill, is to protect from the risk of decline”

“the best time to protect a brand is when it is still all right, not when it is seriously at risk”.¹¹

17. At the same time, the Minister suggested that the draft Bill might not just protect against decline, but actually increase public confidence. She proposed that the Government would use research to assess whether “the public perception of charity is stronger and more confident”.¹² A further objective was to “get rid of the bits of regulation which have proved a barrier to the little charities in particular”.¹³

18. We have taken into account a paper from Professor Nicholas Deakin drawing attention to experience in the United States where some scandals have damaged the public image of charities. He cites research by the Brookings Institute:

8 Home Office press release, 27 May 2004, http://www.homeoffice.gov.uk/docs3/charitiesbill_pressnote040527.pdf

9 Ev 296, para 4

10 Q967 (Ms Mactaggart MP)

11 Q976 and Q967 (Ms Mactaggart MP)

12 Q972 (Ms Mactaggart MP)

13 Q967 (Ms Mactaggart MP)

“Confidence slipped when charities were slow to respond after 9/11 and it has been battered in past years by scandals. The news media have delved into lavish spending at some of the nation's leading philanthropies, improper payments at the United Way of the National Capitol Area, conflicts of interest at the Nature Conservancy and the firing of new YWCVA president after just six months in the job. In turn the stories have sparked legislative investigations and calls for tighter regulation.....

“public confidence [in the US] is declining ‘during a period in which confidence in virtually every other civic institution went up’. Brookings’ October 2003 survey ... shows significant public doubts about ‘how charitable organisations deliver services, help people, work and spend money’. It concludes: ‘the public has come to believe that substantial numbers of charitable organisations are either not doing well enough or not doing enough good’.”¹⁴

19. We recognise the Minister’s point that promoting trust is not something that should be done only when it has already been lost. However, the Government’s stated aim to boost public confidence in charities comes at a time when opinion polls show that public trust is already very high. Research undertaken by the consultants nfpSynergy in 2003 found that public confidence in charities has actually risen by a substantial 25% since the 1990s. Charities are considered the third most trustworthy institution (out of 16), beaten only by the Armed Forces and schools. At present, they are significantly more trusted than the church, royal family, civil service or Government.¹⁵ In a research poll undertaken by nfpSynergy in 2002, over 70% of respondents said there were no other kinds of organisations that they would trust above charities, with only 5% of respondents suggesting that they would *not* trust UK charities to spend donations wisely.¹⁶ Other research by the NCVO has shown 91% of respondents expressing respect for what charities do.¹⁷ The Charity Law Association told us:

“What evidence is there that there has been a decrease [in public trust and confidence]?... Organisations that are trusted deeply in this country include charities, so the notion that more regulation will increase public confidence and trust in charities is, I think, erroneous”.¹⁸

“what the Bill is seeking to do is to give statutory force to the practice the Charity Commission has adopted in an enlightened way over the last ten years”.¹⁹

20. At a practical level, a number of witnesses suggested that the draft Bill, far from clarifying the law, actually makes it more complicated. Scotland is also currently planning an overhaul of its charity law and intends to repeal all its existing provisions and bring

14 Ev 659

15 58% of the public expressed a ‘great deal’ or ‘quite a lot’ of confidence in charities. Research by nfpSynergy carried out with a representative sample of about 1,000 adults in July and November 2003.

16 Trusted but misunderstood; public and political attitudes to charities, fund-raising and regulation, nfpSynergy (November 2002)

17 Blurred Vision: Public trust in charities, National Council for Voluntary Organisations Research Quarterly Issue 1, (January 1998). This included a quantitative survey of 1,045 adults.

18 Q276 (Mr Lloyd)

19 Q229 (Ms Hill)

forward a new consolidated Act. By contrast, 35 of the 48 clauses in the draft Bill amend or add to the existing Charities Act of 1992 and 1993. This makes it difficult to understand the draft Bill on its own, as charity law would be contained in a number of different statutes, rather than one consolidated version. As a result, the way the current Bill is drafted has been described as “highly inaccessible, in particular for smaller charities with little experience”.²⁰ We explore this issue further in paragraphs 381-6.

21. The imprecise rationale behind the draft Bill is again evident in the vague means by which the Government intends to assess its impact. In written evidence, the Government told us:

“whilst there are a number of provisions within the draft Bill that would have quantifiable indicators against which the success of the legislation can be judged, many of the provision would not have an immediately measurable effect... for many of the provisions it would be difficult to claim that the Bill’s specific contribution to the growth and development of the sector, or the public’s confidence in it, could be measured in isolation from other influencing factors”.²¹

22. We do not consider this approach to be satisfactory. In oral evidence, the Minister expanded upon the approach to monitoring the effects of the legislation by proposing that a range of different measurements would be taken. These would include monitoring the take-up of the new Charitable Incorporated Organisation (CIO), the number of mergers, growth in the charity sector, the effectiveness of the regulation of charitable collections and data from the new Charity Appeals Tribunal.²² We look for greater clarity about the practical means by which the Government will measure the impact of the Bill. We would have welcomed greater consistency about its key aims.

Effect on charitable giving

23. In its press release to accompany the publication of the draft Bill, the Government proposed that one of its intentions is to increase charitable giving: “By building confidence we can motivate people to connect with charities and give their time, talents and money in ways that will benefit the whole community”.²³ Some measures within the draft Bill have been praised for helping to maintain, if not necessarily increase, charitable giving. The RNID suggested that “proposals for self-regulation of the sector, especially face-to-face fund-raising, will further serve to maintain public support for charitable giving”.²⁴ As the chart on the next shows, more than a third of charitable income comes from individuals.

20 EV 94, para 2

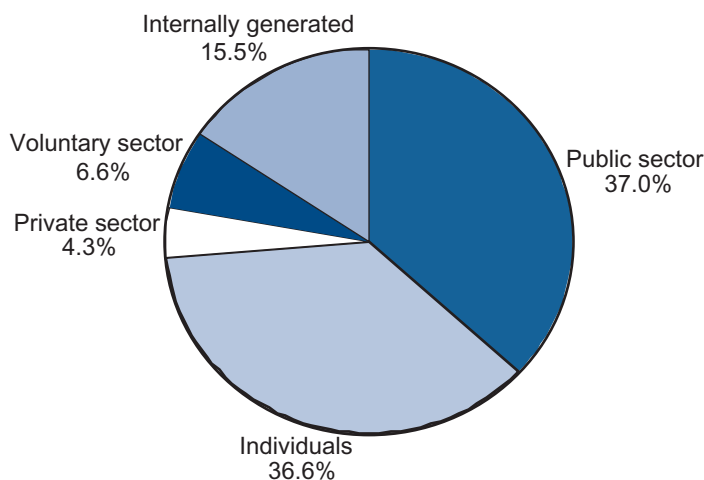
21 EV 296, para 3

22 Qq977 - 979

23 Home Office press release, 27 May 2004, http://www.homeoffice.gov.uk/docs3/charitiesbill_pressnote040527.pdf

24 Ev 9, para 4

Income of general charities, by source, 2001/02



Note: Grants from charitable trusts are defined as coming from the voluntary sector. Income from individuals includes earned income (sales, membership subscriptions with benefits, and fees for services provided) and voluntary income (individual donations, covenants, legacies and membership subscriptions without benefits).

24. Concerns have been raised, however, that the draft Bill does not make a sufficient distinction between the levels of regulation required for grant-receiving charities and that required for grant-making charities. This, it is suggested, may deter philanthropic activities. We have heard from The Rayne Foundation that, “the Bill in its present form will add to the disincentives for wealthy individuals to add funds to existing trusts and foundations or to set up new ones”.²⁵ The Charity Law Association told us that private charitable foundations currently face difficulties by being “sometimes subject to inappropriate regulatory approaches” by the Commission, in relation, for example, to the choice of their trustees. They note that the Charity Commission “has not been given an objective of encouraging charitable giving, with the concomitant objective of not discouraging such giving by disproportionate regulation. Such an objective may, we suggest, be useful”.²⁶

25. We have taken into account the recent report *Why Rich People Give* by Philanthropy UK, which refers to a widespread feeling of unhappiness about the status and respect given to philanthropy in the UK.²⁷ It urges the Home Office to use the opportunity of the Bill to show those with substantial means that they are needed and will be welcome as partners in strengthening civil society. It calls for the Charity Commission to continue its programme of simplification of guidelines and procedure, promote a simplified form of charitable trust and encourage the use of foundations.

26. Support for the inclusion of a ‘philanthropy objective’ for the Charity Commission is echoed by the Nuffield Foundation, who also raise concerns that the burden of regulation and bureaucracy may discourage wealthy donors from establishing charitable foundations.

25 EV 546, para 9

26 Ev 72, para 15.5; also see Ev 86, para 133

27 *Why Rich People Give*, Theresa Lloyd, Philanthropy UK, June 2004

They propose that this problem could be tackled by giving the Commission a duty to ensure that its regulation is “reasonable, proportionate and fair”.²⁸ Similar views have been put forward by the Association of Charitable Foundations²⁹ and Bates, Wells and Braithwaite.³⁰ In response to these concerns the Minister herself proposed that the Charity Commission be given an additional objective under clause 5 to “to increase the willingness to give”, adding that “I think that would be actually a good objective to give to the Charity Commission and I think doing that might meet your concern”.³¹ This issue is further explored in paragraph 139.

Costs and benefits

27. The Government has set out their schedule of the estimated costs and benefits of their proposals in their draft Regulatory Impact Assessment (RIA). In August 1998 the Prime Minister announced that no policy proposal, which has an impact on business, charities or voluntary bodies, should be considered by Ministers without an RIA being carried out. An effective RIA should provide a comprehensive cost-benefit analysis of a policy proposal in order to facilitate assessment of the overall merits of the proposal. The Cabinet Office has drafted detailed guidance as to how it should be undertaken in *Better Policy Making: A Guide to Regulatory Impact Assessment*.

28. Contrary to this Cabinet Office guidance, many of the benefits listed in the RIA are vague and are not quantified. The benefit of provisions on public collections, for instance, is described as “to [increase] public confidence in charitable collections and, therefore, ... charity income”. The benefit described for changes to the Charity Commission is “to enhance confidence in the effectiveness and accountability of the regulator”.³² These loosely worded ‘benefits’ confirm our concern that the draft Bill’s effectiveness is undermined by unconvincing rationale. Cabinet Office guidance states that “The benefits should be quantified as far as possible”.³³ We are disappointed that this guidance was not complied with.

29. Local authorities have been given a duty under the draft Bill to issue and enforce permits for charitable collections. The Local Government Association (LGA) and Bates, Wells and Braithwaite told us that they believed the Home Office’s estimate of how much this would cost local authorities was incorrect.³⁴ The RIA itself states that “We have limited information on the costs to the local authorities of administering the current system of licensing” and later told us “no comprehensive data is available in this area”.³⁵ We were told by the LGA that the Home Office had agreed to undertake work with them to identify the real costs of the legislation.³⁶ We are disappointed that this was not undertaken prior to

28 Ev 528, para 7

29 Ev 53, para 5

30 Ev 529, clause 5

31 Q1000 (Ms Mactaggart MP)

32 RIA, pp136-137

33 <http://www.cabinet-office.gov.uk/regulation/ria-guidance/content/ukchecklist/index.asp>

34 Q308 (Councillor Green); Ev 538, clause 41

35 RIA, para 9.1.1; and p158 of schedule (points made about the draft Bill)

36 Q308 (Councillor Green)

publication of the RIA, but look forward to seeing a more accurate assessment of the financial implications for local authorities in the RIA to accompany the real Bill.

30. A number of witnesses also questioned whether the full range of the Charity Commission's new duties had been taken into account in the RIA. Harbottle and Lewis LLP did not think the RIA had noted the costs to the Commission of its increased workload in assessing public benefit, conducting a review of the charity register or regulating CIOs.³⁷ The Charity Law Association estimated that an additional £250,000 per annum would be needed for the Commission to carry out its rolling public character review.³⁸

31. The Charity Commission have not told us that additional funds are required. Their Spending Review 2004 settlement provides an additional £2m for 2004-05 over the previous year but no further increase in the subsequent two years. The Home Office notes that the Bill will involve one-off costs for the Commission of £1.7 million and annual recurring costs of £1.02 million, but assumes that the Commission will absorb the effects of the implementation of the Bill by reallocating resources internally.³⁹ In oral evidence, the Commission witnesses admitted that if they worked in the way they currently do there would probably not be the capacity to register an estimated 13,000 additional excepted and exempt charities, as required by the draft Bill. However, they added: “[we] have begun to modernise ourselves within the Commission... I think we can learn not just from the charitable sector but also from all sorts of private and public regulation on all the practices which would involve the deployment of our resources more effectively to encompass that”.⁴⁰ We make a recommendation about this issue in paragraph 215. In spite of these assurances we believe that the RIA, published with the real Bill, should provide a comprehensive analysis of the costs and benefits of all provisions.

Impact on small charities

32. Well over half of the charitable sector (by income) is composed of small charities, run on budgets of less than £10,000 a year and often staffed by unpaid volunteers. We were particularly concerned that the legislation should encourage, rather than discourage, the establishment and success of these charities. The chart below shows these smaller charities form the larger share of the charitable sector. Small charities are affected by the majority of the provisions in the Bill. Many provisions which enable trustees, for example, the power to allow payment to trustees (discussed in chapter 7) will be beneficial. The Charitable Incorporated Organisation (considered in chapter 6) will provide small charities with a simple form for limited liability.

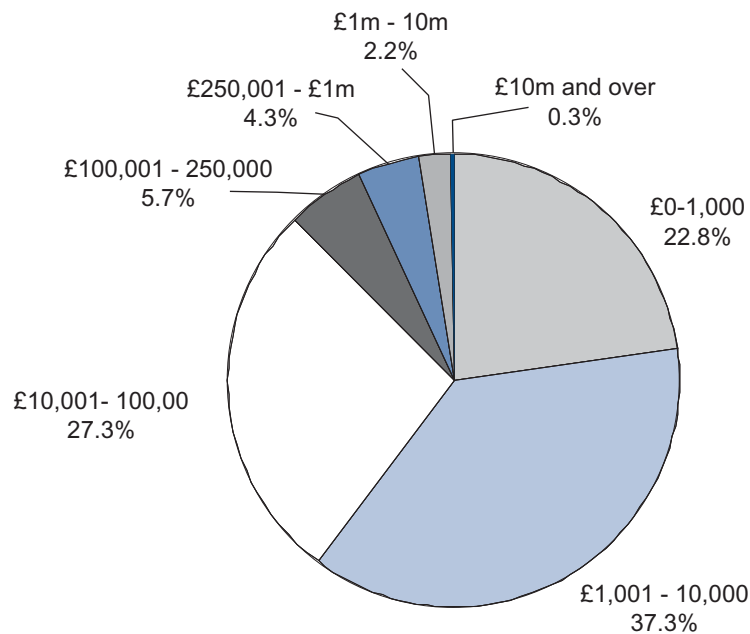
37 Ev 500, section 5

38 Ev 71, para 3

39 Ev 224-5, para 2

40 Q778 (Ms Peacock)

Proportion of registered main charities in England and Wales by income, 2003



33. On the whole, the evidence we have received suggests that many small charities welcome provisions in the draft Bill, although there are differences of opinion about whether the measures go far enough. Most organisations have supported the proposed raising of the threshold above which charities must register with the Charity Commission, from £1,000 to £5,000.⁴¹ Some others have proposed that this should be increased still further to £10,000, as recommended in the Strategy Unit report.⁴² The existing provision that there is no need for independent examination of accounts if gross income is below £10,000 has met with approval.⁴³ Others suggest this threshold should be increased because it imposes costs on those charities whose income is just above £10,000, “which are proportionately greater than larger charities”.⁴⁴ The new legal form of the Charitable Incorporated Organisation (CIO) has been welcomed as helping “small charities which are growing and wanting to incorporate”,⁴⁵ although others have suggested that they would be cautious about seeing how it operates before considering adopting it.⁴⁶

34. Similarly, we have heard different views about the level of regulation small charities are currently subject to, and the impact that the draft Bill might have on this. We have heard regulation by the Charity Commission described as “light touch”.⁴⁷ Others believe that it has been over-burdensome, describing a local group review by the Charity Commission as being “totally over the top for the kind of work which happens on a very local, village basis”.⁴⁸ The British Trust for Conservation Volunteers (BTCV) raised the concern that

41 Ev 361, para 6; Ev 371, para 3; Ev 414, para 6

42 Ev 430, para 1.4

43 Q809 (Mr Curley)

44 Ev 388, para 15

45 Q808 (Mr Curley)

46 Q811 (Mr Finney)

47 Q814 (Mr Curley)

48 Q828 (Mr Moore)

“heavy handed regulation will cause many more [trustees] to refuse to serve than already do so”, but “broadly” thought that “the draft Bill gets the balance about right for small charities”.⁴⁹ It is notable that the Chief Executive of the National Association of Councils for Voluntary Service (NACVS) felt that the barriers to small charities working effectively with minimum labour “are not to do with charity regulation, but to do with health and safety, food hygiene, the Criminal Records Bureau, the demands of local authorities”.⁵⁰ We deal with the case for different regulatory treatment for small organisations from paragraph 119 onwards.

35. We heard from the Churches Main Committee that “a certain amount of publicity will need to accompany any change so that people actually operating small charities know what they are, and what they are not, expected to do”.⁵¹ Similarly, Religions Working Together highlighted their desire for clarity and certainty: “I think people certainly in the religious communities will probably be able to accommodate whatever is proposed as long as we understand what they are”.⁵² It is vital that smaller charities in particular, who may not easily have access to legal advice, are able to clearly understand what the legislation intends to do and how they can comply with the requirements it would place upon them.

Compatibility of UK charity legislation

Scotland

36. The draft Charities Bill covers only England and Wales, as the regulation of charities is a devolved issue for both Scotland and Northern Ireland. The draft Charities and Trustee Investment (Scotland) Bill was published by the Scottish Executive on 2 June 2004 and seeks to “update and strengthen charity law”.⁵³ The deadline for consultation with the public was 21 August 2004, after which the draft Bill will go to the Scottish Parliament’s Communities Committee for scrutiny. We note that key elements of the proposed Scottish legislation may undergo change in light of this scrutiny and therefore new issues may well arise after we have published our report.

37. Scotland already possesses a different system of regulation for charities than in England and Wales. We do not question the appropriateness of the UK and Scottish Parliaments making their own decisions regarding charity regulation. Our main concern is to ensure that the many charities operating across Britain do not face an onerous regulatory burden under two very different systems, and that the two Bills do not contradict each other by creating different definitions of a charity. We held a video conference with the members of the Scottish Parliament’s Communities Committee on this issue during the course of our enquiry.

38. The draft Charities and Trustee Investment (Scotland) Bill shares many of the key principles of the draft Charities Bill and its consultation document states that “where it makes good sense for our measures to fit with the approach being taken in England and

49 Ev 430, para 1.4

50 Q815 (Mr Curley)

51 Q947 (Mr Britton)

52 Q947 (Mr Rosser-Owen)

53 Scottish Executive News Release, 2 June 2004, <http://www.scotland.gov.uk/pages/news/2004/06/SECHRty.aspx>

Wales, we have sought to ensure our proposals complement theirs”.⁵⁴ We have been encouraged to hear that the Home Office and Scottish Executive have liaised to try to minimise potential problems. There are, however, a number of differences between the two draft Bills. The key areas include: variations in the list of charitable purposes; Scotland having no minimum registration threshold compared with England and Wales; all charities in Scotland being required to register with the Office of the Scottish Charity Regulator (OSCR); the removal of excepted and exempt status from charities in Scotland; variations in accounting and fund-raising registration requirements; and no proposals for trustee remuneration in Scotland.

39. Some of these differences will not cause insurmountable problems. We do consider, however, that the definition of a charity is one area where inconsistency could prove particularly problematic. At present, the Scottish draft Bill’s definition of a charity is broadly similar to that in the draft Charities Bill for England and Wales, relying on a list of charitable purposes and the concept of public benefit. However, the draft Charities Bill contains a list of 12 charitable purposes compared with the Scottish draft Bill’s list of 13 and some purposes are phrased differently or contain a slightly different emphasis. Clause 2(2)(j) of the draft Charities Bill, for instance, talks about “the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage”. In the Scottish draft Bill the comparable sub-section is divided into two different purposes, detailing the “provision of accommodation” and the “provision of care”; the categories of those in need are also different. Clause 2(2)(f) cites that a charitable purpose is the “advancement of the arts, heritage or science”. The corresponding provision in the Scottish draft Bill is the “the advancement of arts, heritage, culture or science”.⁵⁵

40. The Charity Law Association has expressed concern about the “minor discrepancies between the wording of purposes listed in the Bill and those listed in the Scottish Bill”, suggesting that “it would be counterproductive for there to be potential for charitable purposes in Scotland and England/Wales to be different”.⁵⁶ Equally, at present neither draft Bill contains a statutory definition of the public benefit test, but this is one of the key matters open for consultation in Scotland. It is not inconceivable that one Bill could ultimately contain a more restrictive definition of public benefit than the other. It would be an issue of some consternation if UK based charities were required to meet different criteria for achieving charitable status in different parts of the UK, or if some organisations were considered charities in one part of the UK but denied charitable status in another.

41. We recommend that the Government consult the Scottish Executive on the implications for national charities of any differences between the two draft Bills, with the aim of avoiding anomalies and confusion.

Wales

42. Concerns have been raised that assumptions made by the Government about the powers to award financial assistance to charities in Wales may not be accurate. Clause 44 of

⁵⁴ Draft Charities and Trustee Investments (Scotland) Bill Consultation, p6

⁵⁵ Clause 7(2)(f)

⁵⁶ Ev 74, para 5

the draft Bill allows the Secretary of State to “give financial assistance by way of grants or loans to any charitable, benevolent or philanthropic institute whose operations are carried [out] wholly or mainly in England”. The explanatory notes to this clause states: “This power extends only to such organisations which operate wholly or mainly in England. Government funding of similar organisations operating in Wales is devolved to the National Assembly for Wales”.⁵⁷ In written evidence, the Government told us that Wales has been omitted from this provision because the National Assembly for Wales already has a duty under s.114 of the *Government of Wales Act 1998* to make a scheme specifying how it will provide assistance to voluntary organisations in Wales. Under s.85, the Assembly has its own power to give assistance of that sort.⁵⁸

43. We have heard, however, from the Wales Council for Voluntary Action that s.85 is not in fact used for this purpose, as “internal Assembly legal advice has precluded the use of this section [s.85] in a manner similar to that now intended by cl.44 [of the draft Bill]”.⁵⁹ They suggest that while “it is not unreasonable for the Home Office to have made the objective assumption that s.85 afforded a similar funding power to that created by cl.44 in practice, this is not the case”.⁶⁰ It does not seem to be the intention of the Government to create anything other than parity between the financial assistance available to charities in England and Wales.

44. In light of evidence we have received, we recommend that the Government re-examine the provisions of the *Government of Wales Act 1998* to ensure that charities in Wales will receive comparable financial assistance to charities in England.

45. We now move on to a detailed assessment in the chapters that follow of the key issues that have come to our attention during the course of our inquiry.

2 Charitable Purposes

Current position

46. For a body to be a charity in law, it must meet two conditions:

- a) it must have exclusively charitable purposes and
- b) it must be for the public benefit.

For a purpose to be charitable under current law, it must fall under one of four “heads” – the relief of poverty, the advancement of education, the advancement of religion, or a general catch-all category “other purposes beneficial to the community”. New purposes under the fourth category are developed by the courts in the common law by analogy to the first three purposes.

57 Explanatory notes, p128

58 See p152 of Schedule (points made about the draft Bill) clause 44

59 Q245, para 4

60 Q245, para 4

Draft Bill changes

47. Clause 2(2) of the draft Bill defines twelve charitable purposes:

- a) the first three existing purposes:
 - i. the prevention or relief of poverty;
 - ii. the advancement of education;
 - iii. the advancement of religion;
- b) eight new purposes to be set out in statute but already recognised in case law:
 - i. the advancement of health;
 - ii. the advancement of citizenship or community development;
 - iii. the advancement of the arts, heritage or science;
 - iv. the advancement of amateur sport;
 - v. the advancement of human rights, conflict resolution or reconciliation;
 - vi. the advancement of environmental protection or improvement;
 - vii. the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
 - viii. the advancement of animal welfare;
- c) any other purposes recognised as charitable purposes under existing charity law or any purposes analogous to the defined purposes.

Evidence

48. The bulk of the evidence received supported the proposals for increasing the number of charitable purposes and the basic structure set out in the draft Bill. In addition, the Committee received suggestions that:

- a) Further charitable purposes should be added to the face of the Bill – requests were made to add the promotion of the efficiency of the Armed Forces,⁶¹ the prevention of violence and crime and the advancement of personal safety,⁶² and the promotion of good race relations.⁶³
- b) Items should be added to some of the descriptions of charitable purposes – requests were made to add the advancement of good community relations⁶⁴ and the promotion

61 Q898 (Major Adler). See also Ev 260

62 Ev 587

63 Ev 586, para 42

64 Ev 586, para 4.5

of racial harmony and equality of opportunity⁶⁵ to the proposed head of ‘citizenship and community development’ and to add culture to the proposed head of ‘arts, heritage or science’.⁶⁶

- c) One description of charitable purposes should be amended – it was suggested that “the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage” should be amended to read ‘social and economic advancement’.⁶⁷
- d) The descriptions of some charitable purposes should be clarified – a number of requests were made to clarify the meaning of religion and the meaning of human rights.⁶⁸

49. The NCVO told us:

“The [existing] list [of purposes] ... was never intended to be comprehensive; rather it was developed as a guide. In cases where an organisation appears to provide public benefit but cannot easily draw an analogy with existing purposes, the courts have had the power to decide whether the organisation’s objects fall ‘within the letter, the spirit or intendment of the preamble and subsequent case law’. NCVO recommends that a version of this statement, amended to replace ‘the preamble’ with ‘the Charities Act 2005’, should be included in subsection (4). This would allow for the possibility of charitable status to be granted by the court to organisations whose purposes are not analogous but who nevertheless provide a clear public benefit.”⁶⁹

50. A number of organisations regretted the failure to include a definition of religion in the draft Bill.⁷⁰ Others pointed out difficulties with the present definition and its requirement of worship of a deity,⁷¹ leading to the anomaly that some organisations already registered under the head of the advancement of religion, for example Buddhism, do not meet the current legal definition.⁷² Concerns were also raised that the present definition is not compliant with human rights obligations.⁷³ Religions Working Together pointed to a lack of clarity in Charity Commission guidance on the charitable status of religious organisations.⁷⁴ Evidence from the Rev and Mrs M Braybrooke said that this “may be prejudicial to newer religious groups or to Jainism which do not speak of a Supernatural Being”.⁷⁵ A possible form of words was suggested by the Charity Law Association: “belief in

65 Ev 608, Ev 354

66 Ev 452, para 2

67 Ev 458, para 3.0

68 Q886 (Mr Lattimer)

69 Ev 2, para 2.3

70 Ev 440, para 3, Ev 406, para 1.4

71 Ev 75, para 9

72 Ev 345, para 17

73 Ev 93 para 26

74 Q920 (Mr Owen)

75 Evidence not printed.

a supernatural being, thing or principle and acceptance and observance of certain canons of conduct giving effect to those beliefs”.⁷⁶

51. Oxfam pointed to revised guidelines on the promotion of human rights which in their view confirmed “that a charity for the promotion of human rights can engage in campaigning activity to encourage states to sign and ratify international instruments as an ancillary activity to an exclusively charitable purpose”.⁷⁷ They said, however, that there has been some confusion about the content of these guidelines.

52. The Committee notes that the Charity Commission currently has a consultation paper out on the Promotion of Human Rights and intends to produce revised Guidance once the consultation process is complete.

Conclusion

53. The Committee agrees that public understanding of charities would be improved if the currently accepted charitable purposes were spelt out more clearly in statute. The list of charitable purposes is not intended to be fully comprehensive and, as before, there will be a residual purpose which leaves scope for future developments.

54. We recommend that the draft Bill includes a definition of religion in clause 2 making it clear that non-deity and multi-deity groups can satisfy the definition of ‘religion’ for charitable purposes. Any organisation would still be subject to the requirement of showing public benefit before it could attain charitable status.

55. The Committee recognises the concerns arising from the failure to spell out the established charitable purposes of the promotion of religious harmony, the promotion of racial harmony and the promotion of equality and diversity.

56. We recommend that an additional charitable purpose be added to 2(2) for “the provision of religious harmony, racial, harmony, and equality and diversity”.

57. We recommend that the new charitable purpose on “the advancement of arts, heritage and science”, should include the word “culture” to bring it in line with the wording of the draft Charities Bill and Trustee Investment (Scotland) Bill.

58. We recommend that “the saving of lives” be added to the new charitable purpose of the advancement of health.

59. We have sympathy with some of the other points made about changing the proposed wording for charitable purposes but are not convinced that the draft Bill needs to be further amended. None of the other changes suggested would either change or clarify the current law on charitable purposes. The flexibility inherent in the way charitable purposes are defined leaves scope for all these points to be dealt with by the Charity Commission and ultimately the new Charity Appeal Tribunal.

76 See Ev 75, para 9

77 Ev 568, para 9

60. We recommend that the draft Bill be amended by adding to the general ‘any other purposes’ category, the words ‘or within the spirit or intent of the [11 specific purposes] listed in clause 2 (2) above.

3 Public benefit

Current position

61. Currently, in order for a body to be a charity in law, it must meet two criteria: (i) it must have exclusively charitable purposes; (ii) it must be for the ‘public benefit’. We have dealt in chapter 2 above with the changes to charitable purposes. We now turn to the Bill’s effect on public benefit.

62. ‘Public benefit’ is not defined in statute law and its legal meaning is derived from a series of court cases over many years. There is no straightforward definition in case law. According to the Government’s Strategy Unit, public benefit means that a charity’s purposes must: confer benefit, as opposed to harm; benefit either the whole community or a ‘significant’ section of it; and confer only incidental private benefit.⁷⁸

63. At present, a charity whose purpose falls under the first three heads – the relief of poverty, the advancement of education and the advancement of religion – is *presumed* to be of public benefit and does not have to demonstrate this unless some positive reason for doubt is presented.⁷⁹ The only change made by the draft Bill in this context is to remove that presumption. Much of our inquiry has been taken up in trying to establish what the consequences of that change will be. The draft Bill does not contain any new statutory definition of public benefit; it provides that judgments about public benefit will continue to be based on principles determined by the courts; and it assumes that the Charity Commission will continue to decide how to apply the public benefit test.

64. On the basis of the evidence we have received, the main difficulty which arises in this area is how schools and hospitals which charge high fees demonstrate adequate public benefit when access to the services they provide is limited in this way. The draft Bill does not explicitly purport to change the charitable status of such organisations. This is not necessarily the most important issue facing the charity sector but it does appear to be an area of great uncertainty about how the draft legislation will work in practice. It has also been the subject of much controversy over many years with some arguing strongly that the fact that wealthy independent schools enjoy charitable status – and the tax advantages it confers – is incompatible with any common sense view of what it means to be a charity. Since the purpose of the Bill, according to the Minister, is to protect the charity brand, it is important that any new law on charity must properly deal with the issue of public benefit.

78 Private Action, Public Benefit; September 2002, para 4

79 Private Action, Public Benefit, September 2002, paras 4.5-4.7

65. In tackling the issue of public benefit we have asked these questions:

- a) What difference will be made by the removal of the presumption of public benefit?
- b) How will the Charity Commission operate the public benefit test in future?
- c) Does public benefit need to be more clearly defined?

66. In assessing the evidence we have received on these points, we have assumed that this issue will not arise the day after the Act comes into effect but when the Charity Commission first has to consider a specific case. This could happen when a body applies for charitable status and there is some doubt about whether it meets the public benefit test. Perhaps more likely, it could occur when the Charity Commission reviews the charitable status of an existing charity. Although the final decision in such cases could be made by the new Charity Appeal Tribunal (subject to appeal to the courts), the initial approach of the Charity Commission in either situation will be critical. The Commission has set out how it plans to conduct this exercise.⁸⁰

The Government's proposals for reform

67. The Strategy Unit review found that there were a number of weaknesses in the way that charitable status is determined.⁸¹ It considered that *all* charities ought to provide public benefit, so the presumption of benefit for the first three heads should be ended.⁸² In addition, it considered that a new definition of charitable status needed to be developed which, *inter alia*, would clarify what constituted a charity and would emphasise the “public character” of charities.⁸³ By public character, the review seems to have meant “public benefit” in the sense, roughly, of not excluding people from benefits for reasons unconnected with the purpose of the particular charity.⁸⁴ In particular, the review said that to demonstrate public character, charities which charged high fees (such as some independent schools) would need “to make significant provision for those who cannot pay full fees”.⁸⁵

68. The Strategy Unit recommended that “charity be redefined in law, based on the principle of public benefit”, although it rejected the idea of achieving this through a statutory redefinition of public benefit. It considered that there would be advantages in continuing to rely on case law and that a statutory definition would introduce uncertainty.⁸⁶

69. The Government in its response to consultation on the review also rejected the idea of a statutory definition of public benefit but said it accepted the “recommendation for a new

80 See p198

81 Private Action, Public Benefit, September 2002, paras 4.8 and 4.9

82 Private Action, Public Benefit, September 2002, para 4.18

83 Private Action, Public Benefit, September 2002, para 4.10

84 The Review was not perfectly clear on what it meant by public character but the key characteristics and the identification with public benefit are discussed at Private Action, Public Benefit, September 2002, para 4.18

85 Private Action, Public Benefit, September 2002, para 4.26

86 Private Action, Public Benefit, September 2002, para 4.18

definition of charity based on the principle of public benefit, and intends to provide for it in the proposed Charities Bill”.⁸⁷ The new definition, the Government said:

“... would rule out organisations which ... were not demonstrably for the public benefit (eg because the services or benefits they provided were not open to a wide enough section of the population, or because they were run for private benefit)”.⁸⁸

Draft Bill changes

70. The draft Bill says that for a body to be a charity, it must:

- a) fall within the 12 (rather than current four) charitable purposes listed in the Bill at clause 2(2);
- b) be for the public benefit “as that term is understood for the purposes of the law relating to charities in England and Wales” (clauses 3(1) and 3(3)).

71. Clause 3(2) says that “it is not to be presumed that a purpose of a particular description is for the public benefit”. This abolishes the presumption of public benefit under the existing law for the relief of poverty, or advancement of education or religion.⁸⁹

72. Thus, on the face of the draft Bill, the only clear change is the removal of the presumption of public benefit. The definition of public benefit does not appear. It will continue to be determined by case law.

Difference made by the removal of the presumption

Evidence

73. The NCVO told us that “all organisations with charitable status should be required to demonstrate that they provide public benefit on an on-going basis, not just at registration”.⁹⁰ They told us further:

“It is crucially important that the Charity Commission make it clear that they will use the public character checks to apply the common law definition of public benefit as established under the fourth head to all existing charitable activities. We should not assume that those organisations which are currently charitable should retain charitable status... otherwise we face the real danger that there will be two classes of charity in England and Wales, that is those charities which did not have to demonstrate public benefit because it was assumed under the old Act and would not now have to apply it and those charities which had to demonstrate public benefit under the new Act. So my view is strongly that we should be reassured by the Commission that they will apply such checks to existing charitable activity for which

87 Charities and Not-for-Profits: A Modern Legal Framework, para 3.12

88 Charities and Not-for-Profits: A Modern Legal Framework, para 3.16

89 Explanatory Notes, p105

90 Ev 2, para 2.4

the public benefit test was not applied because it was assumed. That is a critical point in this Bill”.⁹¹

74. The Minister confirmed this, when she told us:

“If the Government did not intend the removal of the presumption of public benefit to particular classes of charities to have no impact at all, if that had been the intention of the Government, we would not have bothered to do it. We believe that it is necessary for it to have an impact”.⁹²

75. Throughout our public evidence sessions we received conflicting advice on how much difference the draft Bill would make in practice. The Charity Commission, dealing with the issue of independent schools, told us:

“The existing case law would need to be applied to the modern context in which charities now operate and in light of the new legislation. The exceptions to general public benefit principles are part of current case law and organisations have been recognised as charities on that basis over significant periods of time. **The removal of the presumption of public benefit as proposed by the legislation would probably not change this.** The Commission would not be able simply to over-ride these exceptions given that they have been specifically addressed by the court and allowed to stand”.⁹³ (emphasis added).

76. This interpretation left the draft Bill in the ludicrous position of promising to bite on the public benefit bullet without having any teeth to do so. For witnesses such as NCVO and ACEVO this view taken by the Charity Commission, as the body charged with interpreting and implementing any new law, caused some consternation. The NCVO said that this was “a critical issue that the Committee need to clarify”.⁹⁴ This position was based on an interpretation of the law which was supported by some of our witnesses and disputed by others. Most significantly and perplexingly it became clear that the Home Office and the Charity Commission saw things differently.⁹⁵ This is deeply unsatisfactory. For a matter of such public importance and interest to produce such total confusion at the heart of the draft Bill is nothing short of farcical.

77. The Charity Commission’s interpretation of the law was supported by Professor Peter Luxton, Professor of Property Law at Sheffield University and author of *The Law of Charities* (OUP, 2001)⁹⁶ and the charity law barrister, Hubert Picarda QC, who told us: “Mere reversal of the ‘presumption’ of public benefit cannot change the declared law on this point”.⁹⁷ On the other hand, the Charity Law Association (CLA) believed “that the necessary public benefit tests are present within the existing case law ... does not prevent the tests being applied to independent schools in the same way as they will be applied to all

91 Q59 (Mr Etherington)

92 Q1071 (Ms Mactaggart MP)

93 Ev 192, para 19

94 Q64 (Mr Etherington)

95 Qq1063-4

96 Ev 591

97 Ev 625, para 9

other charities. There is therefore no need for any further provisions on this matter to be included in the Bill”.⁹⁸ The Minister told us that the Home Office also disagreed with the Charity Commission’s interpretation of the Bill in this regard.⁹⁹ She said further:

“Our view, in common with the large majority of practitioners in the field, is that – I have had legal advice on this – the Commission has ... full scope to apply the same public benefit criteria to all charities which charge fees...”¹⁰⁰

78. We have not rehearsed the full legal arguments again here because, as we finished taking evidence, a joint position was agreed between the Home Office and the Charity Commission. That statement is set out in the box on the next page.

98 Ev 60, para 16

99 Q1064 (Ms Mactaggart MP); and see Q1059 (Mr Corden)

100 Q1063 (Ms Mactaggart MP)

Extract from a letter to the Committee from the Home Office and the Charity Commission

The current law on public benefit would be preserved by the draft Charities Bill, except that the presumption of public benefit for charities for the relief of poverty, the advancement of religion and the advancement of education would be removed.

The law provides that public benefit is determined on a case-by-case basis. Although in every category of charity public benefit must be present, the courts have not adopted the same practical measures of public benefit for different categories of charity. Different standards are required for different charitable purposes.

The Charity Commission will continue to follow that approach of the court when determining public benefit in any particular case. The Commission will have regard to the social and economic context within which an organisation operates, as well as to the relevant charitable purposes and activities of the organisation.

As with the law on charitable purposes, the law on public benefit will evolve and develop over time. The removal of the presumption of public benefit will provide a basis for further development of the law.

In considering specifically the impact of fee charging on public benefit, we further agree that:

The Commission will apply the broad principles indicated by the court in the case of *Re Resch*. These principles are that:

- a) both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an organisation does, or can, operate for the public benefit;
- b) the fact that charitable facilities or services will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean that the organisation does not operate for the public benefit; and
- c) an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.

The Commission will apply these principles in judging whether or not a charity is meeting the public benefit requirement. It will apply the general principles in cases of all fee-charging charities, whatever their particular charitable purposes and however long they have been established.

The “schools cases” referred to in the Commission’s earlier evidence to the Joint Committee will not prevent the Commission from carrying out public benefit checks on schools and will not prevent the overarching principles above from being applied to schools. As with any other legal case which impacts on public benefit, the schools cases are to be considered as part of the overall framework which also includes: -

- i. the principles referred to above;
- ii. the nature of the particular charitable purpose;
- iii. the particular circumstances of the organisation; and
- iv. the current social and economic conditions under which the organisation operates.

Finally, we agree that fundamental to all this is the fact that the law on public benefit will evolve and develop over time. This evolution will have regard to both the particular charitable purposes and the social and economic changes in society. It is in this context that the Commission will, in considering the application of the principles which apply to fee-charging charities, including independent schools, be mirroring the court's approach and encouraging the law to develop as appropriate in pace with modern society.

Interim conclusion

79. The work of the Committee was compromised by the failure on the part of the Home Office and the Charity Commission to sort out their differences on this key point during the course of our evidence sessions. The process of pre-legislative scrutiny of this draft Bill has revealed a schism between the two bodies most closely involved which goes to the heart of the purpose of the Bill. In the course of our inquiry the Home Office and the Charity Commission have come to an agreement to resolve their differences on this point. That agreement will doubtless be tested in debate when the real Bill appears. Whether this matter should be left to a concordat between the Home Office and the Charity Commission or whether the draft Bill should provide for some more formal expression of how public benefit should be defined and how the test should be applied is an issue we turn to in paragraph 94 below. First, we set out some of the evidence we have heard on how the Charity Commission would operate checks and then on the issue of independent schools and hospitals.

How the Charity Commission would operate public benefit checks on existing charities

80. We received evidence from a number of bodies expressing concern about how the Charity Commission would actually go about applying the checks and what criteria they would use in deciding whether charities had met the public benefit test. Volunteering England and the Association of Charitable Foundations both stressed that there would need to be transparency about how the Commission arrived at its judgements in testing public benefit.¹⁰¹ Governance Works told us that they would welcome criteria on the face of the Bill which would give guidance to the Commission in policing public benefit if the Bill should become law. They told us:

“As it stands, it feels as if there could be some confusion out there in practice. We are talking about quite a wide sector, particularly those organisations that are newly

101 Q145 (Mr Spence, Mr Emerson)

established charities might feel that they are unclear about how they are going to be measured up against this test”.¹⁰²

81. The Charity Commission told us:

“Once the proposed legislation has been enacted the Commission would look at the position of existing charities, including those registered under a presumption of public benefit where concerns have been raised, or where there is the potential for concerns to be raised, about whether they meet public benefit requirements. The Commission would look initially at the fee charging sectors. The Commission would undertake this exercise to assure itself that these organisations have a public character or, in other words, provide a benefit to the public”.¹⁰³

82. When asked about fee-charging schools, the Charity Commission said:

“We will outline, in consultation with the relevant sub-sector, ways in which charities might demonstrate public benefit in the way of putting flesh on the bones of what we set out in paragraph three of the consolidated paper we submitted to you. Being realistic we are likely to start with fee-charging charities and in all probability schools, but I think as it is something that is for the Commissioners as a Board to decide, that ultimately they would make that decision. We would then fully consult on ways of meeting public benefit within of course the legal framework we have outlined. We would actually take a statistically valid sample charity from that sub-sector and we would assess the extent to which they are meeting public benefits against the criteria we have outlined and consulted on. We will then publish that in the form of a report. We already do regulatory reports of this nature and we would use those results, which of course would have best practice as well as failures to meet standards, as a basis for making the individual assessments, the individual checks, as it were.”¹⁰⁴

83. The criteria which would be applied by the Charity Commission were set out in their evidence:

- a) “whether any individuals or other organisations (other than those who should properly benefit from the charitable services) are significantly benefiting or profiting from the charity;
- b) where the charitable services are available only to a charity’s members, any restrictions on who can be a member which are inconsistent with the charitable purposes;
- c) physical access to buildings and land, where that is relevant to delivery of the charitable purpose;

102 Q145 (Ms Howarth)

103 Ev 192, para 27

104 Q761

- d) where the level of fees charged for services may have the effect of excluding the less well off, whether there is alternative provision for access to services for those unable to pay; and
- e) whether the charity confers any indirect public benefit (e.g. relief of the public sector)¹⁰⁵.

Fee-charging schools and hospitals

84. The importance of the requirement of public benefit, and the difficulty of applying any test of public benefit, became very apparent from the evidence we received in relation to independent schools and hospitals. The draft Bill makes no explicit provision for any change in the charitable status of schools and hospitals which charge fees and therefore limit public access to a certain extent. Although we have taken evidence about schools and hospitals at the same time, their situations are different. Some medical charities are funded in part by government contracts while most of the funding for independent schools comes in fees from individuals.

85. Thirty years ago the Education, Arts and Home Office Sub-Committee of the Expenditure Committee said:

“We believe that our recommendation to make a test of public benefit the overriding consideration with that of education accords, both with the spirit in which many of our sixteenth century public schools were founded and with a widespread public feeling today that charitable activities should not be manifestly devoted to privilege or exclusiveness. We would therefore expect that our new test of “purposes beneficial to the community” would only admit to charitable status those institutions which manifestly devote the education they provide towards meeting a range of clear educational needs throughout the whole community.”¹⁰⁶

86. The main points which have been made to us are set out below. The Socialist Education Association told us:

“ ‘public benefit’ can only be justified if it can be applied unequivocally to the central purposes of a charity, which each applicant must be obliged to demonstrate and maintain. There can be no blanket awards based on a few inessential additions to their main activities. If private schools are not prepared to open the opportunity to attend them to all children equally, irrespective of parental income or deemed ability (which would be a true public benefit) they should not be regarded as a charity. The private sector’s role in the provision of education in this country is significant for many reasons. Few of them currently have much to do with charity. Until all of them face up to the true nature of the role they have chosen to play, and stop trying to safeguard privilege for the already privileged as well as £100+ million per annum in

105 Ev 190

106 Tenth Report from the Expenditure Committee, HC 495-1, 1974-75, para 50

public subsidy, those that do not provide genuine ‘public benefit’ should be denied charitable status.”¹⁰⁷

87. We took oral evidence from the independent schools sector and a private hospital on 30 June and that evidence, together with much written evidence, is published with this report. Among the points made to us on behalf of educational and health charities were:

“Education is a charitable purpose. It has been a charitable activity for more than 400 years and it remains so in this draft Bill. I think that most people, the general public, would actually prefer schools to be in the hands of charitable institutions rather than to be run for profit. In terms of what we do, we educate nearly half a million children and that is in itself a public good because education is a public good. We use endowments, fees and other sources of revenue to widen access, and really the important point ... is the extent to which schools, independent schools, extend the access to their benefits beyond the class of people who can afford to pay full fees. We are doing that more and more and I personally see this Bill as entirely beneficial to the extent that, if there is any need for a wake-up call, it will provide a mechanism to ensure that schools actually do provide public benefit, it will be audited, and to the extent that they need to provide more, then the Charity Commissioner, as regulator, will be able to ensure that.”¹⁰⁸

“I have become a headmaster of a new school in September. The loss of charitable status would increase the costs of that school by £335,000 a year. That is unequivocally £335,000 which that school would not be able to spend on the community, on bursary places, on widening access and on giving places on purely merit grounds.”¹⁰⁹

“There is a financial benefit from charitable status. As a fundraiser, there is a tremendous benefit to the charity which I run in enabling it to raise money to fulfil its charitable purposes. It is a huge asset”.¹¹⁰

“My plea almost to you is that in looking at charity status, you will not cut across the fundamental ethos of what is beginning to happen. There is a dialogue beginning to occur between this Government and the independent sector we have a more stable platform in which to see how these innovations can spread across the sectors..... suddenly the academy movement became available and it was utterly different from anything else which had been available to us, but, and it is a very important “but”, we do not have a foundation and, therefore, for every academy we have to raise £2 million. We did not know whether we had the story to raise it and we went to two or three charities to see whether they were prepared to support us and, they did. Therefore, many people are supporting us in what we are doing, but out of charitable foundations, so they are dealing charity to charity, and they are paying

107 Ev 333, para 10

108 Q444 (Mr Shephard)

109 Q478 (Dr Stephen)

110 Q457 (Dr Stephen)

their money to the Church Schools Company, not directly to the city academy. Our charitable status is, therefore, absolutely crucial for our standing in what it is we are trying to do.... there is an enormous possibility here. It will grow, but it needs nurturing and it needs help”.¹¹¹

“We [Nuffield Hospitals] have been a charity for approaching 50 years. It is not a current loophole that we used to become a charity. As a provident association they do enjoy certain tax benefits. We believe that the public feels more comfortable in purchasing health care services from a not-for-profit company.....: I cannot deny that we do enjoy the benefits of charitable status. We believe that we have used those benefits wisely over the last 50 years. We have made investments into communities that a pure for profit provider of health care services might not have made”.¹¹²

88. On the other hand we heard from Dr Anthony Seldon that:

“There are two very different kinds of independent school. There are the small minority which are very wealthy which are doing extremely nicely and which ... I do not think are very innovative. They look after themselves and they pay lip service to odd charitable things, but they are a self-perpetuating oligarchy and they have great wealth, and I think they should be doing much more, not the least charitable and not the least creative and innovative, to play a responsible part in our one nation, and there are the rest. I would say that the rest are about 97 per cent, like Brighton College, and we are passionate about being involved in the local community and our parents are drawn from a very broad cross-section and they make huge sacrifices. They remortgage their homes and grandparents pay, both parents go out to work and I just want to break down this notion of a monolithic independent sector”.¹¹³

89. He went on to argue that:

“I think that we are one country. I think that the perpetuation of a socially divisive education system is not conducive to social integration, but I would also say that our grammar schools and our socially elitist comprehensives often have parents who are far more affluent than in many single sex day schools for girls, e.g. the girls’ day school trusts and other schools with low fees, low margins, a very broad intake of parents. We have to distinguish. My general point is that to those schools to whom much is given much should be expected and we should break up this monolithic vision. Yes, I would be prepared to say that certain schools which are very richly endowed, who have very affluent parents who can pay the full fees, should be doing the most because they are the kinds of people whose children go on to elitist universities, go on to elitist jobs and I think that in 2004 that is wholly inappropriate”.¹¹⁴

111 Q486 (Sir Ewan Harper)

112 Q531 and Q538 (Mr Jones)

113 Q487 (Dr Seldon)

114 Q529 (Dr Seldon)

90. Under questioning it became clear that there was mixed evidence about whether the independent sector as a whole was demonstrating consistent public benefit. Whilst many independent schools were performing a variety of public benefits some were not. Nuffield Hospitals struggled to make any convincing case for being a charity or receiving the tax advantages that go with it.

91. When these points were put to the Minister, she said:

“The charity communitybelieve, as I do, that the removal of the presumption of public benefit from particular classes of charity, including education, promotion of religion and so on... will mean that every charity needs to show that it benefits the public, that it meets the kind of criteria where guidance about public benefit and fee charging charities, for example, is met and they are enthusiastic about that being the case which is a change from the present situation. I think that will encourage a tradition which has started [of] fee-paying schools putting more emphasis on their contribution to wider society rather than traditionally they have done and this will accelerate that process. If it does that it is a good thing.”¹¹⁵

92. We welcome the steps being taken in parts of the independent school sector to demonstrate a higher degree of public benefit in return for the tax advantages of charitable status. It will be for individual fee-charging institutions to demonstrate adequate public benefit if that status is to be retained. In this context there are perhaps 1,000 independent schools and a smaller number of private hospitals out of a charitable sector of about 150,000 charities in all.¹¹⁶

93. It must be expected that some fee-paying institutions which apply in future for charitable status may fail to satisfy the public benefit test at the point of registration. When the Charity Commission starts to conduct its rolling programme of public character checks, it is likely that some schools and hospitals which are currently charities will be unable to demonstrate adequate public benefit and could lose that status. In practice, loss of charitable status would only occur if, after negotiations with the Charity Commission, the institution concerned refused or otherwise failed to demonstrate adequate public benefit. If it was a case of refusal, the Commission would have the right to replace trustees.

A clearer public benefit test?

94. The debate about the charitable status of fee-charging schools and hospitals has focused attention on whether the draft Bill should contain or provide for a more explicit test of public benefit. If those institutions were removed from the charitable sector, this would be less prominent an issue. Some people believe it is difficult to equate charitable status with fee-paying schools and hospitals and feel such institutions should no longer have charitable status. Others disagree.

115 Q1092

116 As at 31 March 2004, Charity Commission Annual Report, 2003/4, p1. The RIA, however, estimates that there are about 153,000 charities, p133, para 1.5.

95. We have considered some alternative arrangement under which the tax exemptions of fee-charging schools would be retained, but they would no longer be considered charities. This has its attractions, not least in removing the confusion and controversy surrounding the charitable status of private schools but is radical and we have not been able to take evidence on the full implications. There are also considerable definitional problems in determining which schools and hospitals should be removed: for example, how should a fee-paying school for children with special educational needs be dealt with? Furthermore, a solution which leaves independent schools in the charity sector and encourages them to make charitable contributions to the community may have something to recommend it. Nonetheless we believe that the Government should consider reviewing the charitable status of independent schools and hospitals with a view to considering whether the best long term solution might lie in those organisations ceasing to be charities but receiving favourable tax treatment in exchange for clear demonstration of quantified public benefits.

96. Short of this radical proposal we have considered a number of possible alternative solutions for resolving the uncertainty about how the public benefit test will work for all charities:

- a) to include a definition of public benefit in the Bill
- b) to include non-exclusive criteria for assessing public benefit in the Bill
- c) to include a provision for the Home Secretary to issue non-binding statutory guidance
- d) for the explanatory notes with the Bill (which may be cited in court when interpreting the legislation) to set out the Government's intention in removing the presumption of public benefit.

97. We have commissioned from one of our specialist advisers, Professor Jean Warburton, an illustrative definition of public benefit which could be set out on the face of the Bill. This appears in the box below. But the majority view of those who gave evidence to us was that to have a definition of public benefit entrenched in statute would create inflexibility in an area where charity law needs to move with the times.¹¹⁷ It would also, as the Charity Law Association pointed out, introduce uncertainty as to how that definition would be interpreted in practice.¹¹⁸ The NCVO, for example, were strongly in favour of leaving the detailed definition of public benefit to the courts:

“We are pleased that clause 3(3) of the draft Bill states that public benefit will continue to be determined by reference to common law; this will ensure that the law has the flexibility both to accommodate the diversity of the sector and to evolve over time. It also ensures that the definition of public benefit remains free from political interference”.¹¹⁹

117 For example, from Volunteering England and the Association of Charitable Foundations (Q144 (Mr Spence, Mr Emerson). Also, the Charity Commission, Qq763-765 (Ms Chapman, Mr Dibble)

118 Ev 75, para 12

119 Ev 2, para 2.6

A possible statutory definition of the 'public benefit' test

(1) The section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.

(2) The requirement is satisfied if, and only if, the following three conditions are complied with:

- a) the purpose is intended to provide benefit [in the sense of common good or social value]: and
- b) the purpose is directed to the public or a sufficient section of it; and
- c) any private benefit is incidental to the purpose and reasonable.

(3) In determining whether the requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.

(4) Subject to subsection (3), the three separate conditions in subsection (2) are to be interpreted in the context of the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

98. As for the inclusion of non-exclusive criteria in the Bill, the Charity Commission told us they thought this would be an acceptable solution.¹²⁰ However, the Minister told us:

“...we should not put the criteria on the face of the Bill. I think even having non exclusive criteria on the Bill has some substantial risks in it. I think the idea of non-statutory guidance agreed between the Home Office and the Charity Commission might be one of the kinds of ways forward to get beyond the points that people have raised here because we are not trying to increase confusion... If a mechanism which provides more clear understanding of how that can work through the form of something like non-statutory guidance might be a sensible way forward I think that would be helpful”.¹²¹

99. We have not received evidence specifically on the merits of having statutory guidance from the Home Office on the definition of public benefit. We understand that this would mean guidance issued by ministers which would be binding on the Charity Commission.¹²² It could be subject to parliamentary approval. Of the options we are considering for a more explicit definition of public benefit under statute law, this is the one which gives most flexibility. But it carries the risk of leaving the way open to periodic interference by the government in the definition of what is charitable.

¹²⁰ Q770 (Ms Peacock), Qq771 and 772 (Mr Dibble)

¹²¹ Q1085 (Ms Mactaggart MP)

¹²² e.g. Licensing Act 2003, s182

100. We have also considered whether the explanatory notes with the Bill should be clearer about the consequences of removing the presumption of public benefit. The relevant section of the current explanatory notes gives no clue about the intended consequences. As we have already noted, the Minister has told us that the removal of the presumption is intended to have an impact.¹²³

101. We conclude that while a detailed statutory definition of public benefit would be too inflexible, nonetheless that there is a need for a more explicit definition of public benefit in connection with the Bill.

102. We therefore recommend that the basic principles for a definition of public benefit should be those set out in the recent concordant between the Home Office and the Charity Commission (as in the box after paragraph 78) and that those principles should be replicated either in non-exclusive criteria included in the Bill or in non-binding statutory guidance issued by the Secretary of State.

Loss of charitable status

103. It is a possible consequence of the Charity Commission carrying out checks on the public benefit requirement that a small number of institutions will lose charitable status. Wilsons noted that the draft Bill did not deal with the question of what happens to the assets of charities which lose their charitable status and that this was a matter of concern to those charities potentially subject to public benefit checks.¹²⁴ Bates, Wells & Braithwaite similarly sought clarity in the draft Bill as to what would happen to the assets of institutions which are no longer charities.¹²⁵

104. It is established law that property held by unincorporated charities or on trust when charitable status is lost is applied cy-pres, i.e. directed to be used for the next nearest charitable purpose. The law in relation to the corporate property of charitable companies that lose charitable status is not settled. It is arguable that such property can continue to be held by the company after it ceases to be a charity and not used for other charitable purposes.¹²⁶

105. We recommend that the real Bill include provisions to clarify the effect of the loss of charitable status on the assets of a charity. The Government should consider whether the Bill should contain provisions enabling the Charity Commission to agree that trustees in such circumstances can elect to retain their assets and continue to run the organisation, as a not-for-profit organisation without charitable status, for the original purposes.

123 Q1071

124 Ev 440

125 Ev 531, clause 7

126 The Maintenance of an Accurate Register, Charity Commission, RR6, <http://www.charity-commission.gov.uk/publications/pdfs/rr6.pdf>

4 Regulation by the Charity Commission

106. The draft Bill, building on previous legislation, sets out regulatory objectives, general functions, general duties and incidental powers for the Charity Commission. Much of the evidence we have received about how the Bill will work in practice is based on our witnesses' experience of how the Charity Commission has operated in the past. One concern which has emerged in particular is how the Commission functions as a regulator. In this section we deal first with the different thresholds at which charities are subject to regulation by the Commission and then move on to the issue of whether different types or sizes of charity should be subject to different levels of regulation. The Commission's general functions, under the draft Bill, are set out in the box below.

General functions of the Charity Commission

- a) Determining whether institutions are, or are not, charities;
- b) Encouraging and facilitating the better administration of charities;
- c) Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein;
- d) Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its regulatory objectives; and
- e) Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its regulatory objectives.

Source: Draft Bill Clause 4 (1c)

Thresholds

107. The first determinant of what charities have to do to comply with the law is the level of income they receive each year. There are thresholds above which they have to register and higher ones above which they have to satisfy various accounting requirements.

Current position

108. Currently, charities with an annual income of more than £1,000 or permanent endowment or occupation of land are required to register with the Charity Commission. They are subject to regulation by the Commission in accordance with the Charities Acts 1992 and 1993.

109. The extent to which the accounts of a charity are subject to external scrutiny depends both on income levels and legal structure. The accounts of unincorporated charities have to be audited if the gross income or total expenditure exceeds £250,000 in the present or the

two preceding financial years.¹²⁷ If gross income exceeds £10,000 but does not exceed £250,000 a charity can elect to have its accounts examined by an independent examiner.¹²⁸ Charitable companies have to have their accounts audited if their gross income exceeds £250,000 or assets are above £1.4m. A charitable company with gross income exceeding £90,000 but not £250,000 can opt for an audit exemption report from a reporting accountant.¹²⁹

Draft Bill changes

110. Clause 7 of the draft Bill (amending section 3 of the 1993 Act) raises the threshold for compulsory registration to annual income of £5,000, with no reference to permanent endowment or occupation of land. Charities with incomes below the new threshold may still choose to register.

111. Clause 22 of the Bill will increase the audit threshold for unincorporated charities to a gross income of £500,000. There will be an additional trigger for audit of the holding of assets in excess of £2.8m if a charity's income exceeds £100,000. The changes will come about by relevant amendments to section 43 of the *Charities Act 1993*. Where a charity's income falls between £250,000 and £500,000 the accounts will be subject to independent examination, but the examiner will have to be a member of one of the specified bodies.

112. Clause 25 of the Bill amends section 249A of the Companies Act 1985 to raise the audit threshold for charitable companies to income of £500,000 or assets of £2.8m. The lower limit for an accountant's report remains at £90,000. Commensurate changes are made in the audit thresholds for charitable companies which are parent companies or subsidiary undertakings.

Evidence

113. The majority of evidence supported the proposal to raise the threshold for registration to £5,000 annual income. The British Trust for Conservation Volunteers (BTCV), however, did propose that the threshold be raised further to £10,000, as recommended in the Strategy Unit's Report.¹³⁰

114. There was general welcome for the raising of the audit threshold to £500,000.¹³¹ The comment of the Charity Law Association that £500,000 appears to be an appropriate level at present is representative.¹³² Some concern at the raising of the audit limit was expressed on behalf of grant-making trusts that rely on audited accounts.

115. A number of organisations voiced concerns about the introduction of an asset trigger for the imposition of an audit. Cardiff Further Education Trust, for example, pointed out that presently they have their accounts independently examined, but as they hold assets of

127 Charities Act 1993, s. 43(1)

128 *Ibid*, s.43(3)

129 Companies Act 1985, ss. 249A-249E

130 Ev 430, para 1.4

131 Ev 352, para 3, Ev 126, section 2.4; Ev 594, para 3(vi)

132 Ev 78, para 42

£20.4 million they would in future be required to have their accounts audited, with a resultant increase in costs.¹³³ The Committee note, however, the Home Office’s response to these concerns was that the proposed asset threshold is in reaction to feedback to the Strategy Unit report and that it is consistent with the asset threshold for charitable companies under the Companies Act.¹³⁴

116. Michael Gwinnell, a trustee of four charities, was one of a number of witnesses who pointed out the different audit requirements applying to unincorporated charities and charitable companies.¹³⁵ In particular, charitable companies with income below £90,000 are not required to have an audit exemption report, whereas other charities with income over £10,000 are required to have their accounts independently examined.

117. The Committee recognises the dangers to public confidence in raising the income limit for the independent examination of accounts for the majority of charities. The alternative route to removing the anomaly, by lowering the £90,000 limit for charitable companies, would impose additional regulatory burdens on those charities. We also note that CIOs will be subject to the accounting regime under section 43 of the *Charities Act 1993* and not the regime for companies.

118. Several organisations pointed out that the Association of Charity Independent Examiners would not be a recognised body for the purposes of examining accounts where the gross income was above £250,000. The Committee is pleased to note that the Home Office are considering the possibility of specifying further bodies in section 43(3A) of the 1993 Act.¹³⁶

Regulation of smaller charities: could it be lighter?

Evidence

119. We received much evidence telling us that charities – particularly small charities – are over-regulated under the current law and working practices of the Charity Commission. The Royal National Institute for Deaf People (RNID) told us:

“You asked about the small charities and I think at the moment they are over-regulated. They have this sense that the Charity Commission is looking at them very closely and they say to each other, ‘Are we permitted to do that? Will the Charity Commission allow us?’ They kind of have this restriction in their outlook which is

133 Ev 358, para 3

134 See p132 of Schedule (points made about the draft Bill) clause 22(2)(1)

135 Ev 514, para 5

136 See p133 of Schedule (points made about the draft Bill) clause 22(5)(3A)

out of all proportion to an organisation like mine where frankly the regulation is very, very light indeed and I would advocate more regulation...¹³⁷

120. BTCV (the British Trust for Conservation Volunteers) told us:

“Over-regulation of the sector comes primarily from the Charity Commission rather than from Parliament and providing effective statutory redress against occasional over-zealous, bullying and unforgiving behaviour by the Regulator will be the most effective way Parliament can avoid over-regulation... In the Charity Commission series of advisory publications the Commission uses the word ‘must’ with precision to indicate what they require of charity trustees if they are to avoid the wrath of the Regulator. They use this word six hundred times in that series of publications alone... We do not believe that there is a small or large charity in the land which is always in compliance with all these requirements or a single trustee who knows them all”.¹³⁸

121. The Charity Commission themselves told us they thought the last sentence was probably true and that the sector was over-regulated.¹³⁹ The Minister, when we asked her whether smaller charities were over-regulated, replied: “I think at present they theoretically are,” although she said in practice this was slightly less so because the Commission was trying to apply a more proportionate approach.¹⁴⁰

122. We asked witnesses whether the draft Bill should require the Charity Commission to regulate small charities with a lighter touch. NCVO told us that the way to deal with this problem, in the Bill, was to include a requirement that the Commission exercise its powers “proportionately”, a question we discuss more fully in (paragraphs 161 to 169).

123. We have, however, also received evidence pointing in a very different direction. The representative of the National Association of Councils for Voluntary Service (NACVS), which supports local Councils of Voluntary Service (the key umbrella organisation for small charities) told us:

“...wearing a different hat, I chair a family charity which provides free holidays for disadvantaged families mostly in Yorkshire in close association with Headway, and I have to say that I am surprised by the kind of debate which has gone on around this because we think that the Charity Commission’s regulatory impact on what we do is very, very light touch at the moment... Our sole dealing with the Commission is one exchange of correspondence once a year when we make a return and a return these days is largely printed for us when it arrives and all we have to do is delete if a trustee has changed, which is very rare, and we are not obliged...to get the accounts audited, so we see it as very light touch at the moment...”

137 Q10 (Dr Low)

138 Ev 430, para 1.3

139 Qq667, 674 and 675 (Ms Peacock)

140 Q983 (Ms Mactaggart MP)

“... the problems that tax us, the barriers that get in the way of us doing a simple task effectively with minimum input of labour are not to do with charity regulation, but to do with health and safety, food hygiene, the Criminal Records Bureau, the demands of local authorities who give you £2,000 a year and want £2,000 of reporting on it and so on, so it is that kind of problem, not to do with the Charity Commission”.¹⁴¹

“most registered charities in this country, will receive three pieces of written correspondence each year from the Charity Commission. Two of those are newsletters and one is a short return, most of which is pre-printed for you and I just do not see what the concern is about the level of regulation for most small charities”.¹⁴²

124. The Charity Commission told us that they did not think that the draft Bill should contain restrictions on their role in relation to smaller charities; how regulation operated in practice “should be done in consultation with the public and with charities themselves rather than prescribed on the face of the legislation”.¹⁴³ They pointed out that the draft Bill “set out a raft of measures which will obviate the need for smaller charities to come to the Commission with various consents, regulation, changes to objects, powers and things of that nature. It already moves in that direction”.¹⁴⁴ They said:

“Our approach to regulation is to follow the better regulation principles by focusing our priorities and resources where we believe that we can make most difference to charities and their beneficiaries and where there is greatest risk”.¹⁴⁵

Conclusion

125. The Committee believes that the actual impact of the draft Bill on small charities will be marginal. We received evidence, however, of concern about the performance of the Charity Commission and the impact that has on smaller charities. Poor performance by the Commission has a disproportionate effect on such charities. We accept that some of the evidence we have received may be based on experience of the Charity Commission going back over many years to a time when its performance was far from satisfactory - as reported on by the Public Accounts Committee (see paragraphs 182-3).¹⁴⁶ Equally, we accept in good faith the commitment of the new chairman of the Charity Commission to improve performance in future. With the exception of grant-making charities (see paragraphs 128-139) we do not see a practical way of setting out in the legislation different levels of regulation based on the size or nature of the charities concerned. But we do think the Bill needs to contain some safeguard against over-regulation. We think this will be provided by the recommendation we make later in this Report to adopt the idea of

141 Qq814 and 815 (Mr Curley)

142 Q830 (Mr Curley)

143 Q643 (Ms Peacock)

144 Q643 (Ms Peacock, Mr Dibble)

145 Ev 199, Annex 1, para 2

146 Q1043 (Mr Corden)

NCVO's and others (paragraphs 61-9) of a duty on the Commission to act proportionately. We were reassured by NCVO's evidence that this would satisfactorily address the problem.

126. The Committee was struck by the evidence that small charities consider the major barrier to their effective working as not relating to charity regulation but to the combined effect of a raft of regulations.

127. We recommend that the Government commissions an independent review of the burden of regulation that charities face more generally, to ensure that regulation is fair and proportionate, especially to smaller charities.

Grant-making charities

Current Position

128. There can be said to be a distinction between grant-making charities (or foundations) and other charities such as those that provide services. Grant-making foundations generally have secure funding, provided through an endowment or otherwise and do not actively engage in public fund-raising. Their activity consists of funding other charities or causes. Most do not raise money from the public or provide services directly. They are supported through private funds – generally the income from an endowment created by a rich individual or family and/or company profits. Other charities will, in many cases, have to raise funds and will provide direct services to carry out their purposes. No distinction is made in the treatment of grant-making foundations either in the law or in regulation.

Draft Bill Changes

129. The draft Bill, like previous legislation, contains no provisions distinguishing between grant-making and other charities.

In favour of the Bill providing for lighter regulation of grant-making charities

130. The Association of Charitable Foundations (ACF) and a number of other bodies argued that the draft Bill should include provisions making a distinction between grant-making and other charities and reducing the regulation of the former. Their grounds were, essentially, that there is a risk that increased regulation will deter wealthy donors from setting up or contributing further to grant-making charities. This would be a serious blow to the charity sector because the top 500 grant-making charities made grants of £2.2 billion in 2003 and because the flexibility of grant-making charities meant they addressed issues and situations that are untouched by other funders.¹⁴⁷

131. ACF told us they had conducted a three year project looking at the reasons for philanthropy, as part of which they had conducted a large number of interviews with

¹⁴⁷ Ev 36, paras 3 and 6

people of substantial means. The interviews revealed that “a fifth of those who had set up grant-making charities had serious reservations about one or more aspect of doing so, the majority of which were related to the burden of bureaucratic regulation”.¹⁴⁸

132. The Sainsbury Family Trust gave us, as an example of the increasing burden of regulation, the requirements imposed by the Statement of Recommended Practice (SORP) on accounting practice, which, they said, had increased from 240 paragraphs in 1995 to 439 paragraphs in 2004. This was a “largely unnecessary overhead and diversion for sizeable grant making charities which often have relatively few transactions to report in any given year”.¹⁴⁹

133. ACF told us:

“We support a regulatory and advisory regime that goes no further than ensuring that grant-making charities make grants within the scope of their objects, that they don’t persistently fund poor quality projects, and that their objects reflect the public good”.¹⁵⁰

134. The Rayne Foundation gave evidence in very similar terms. They said the problem was that Charity Commission guidance was developed from the perspective of service-providing charities and was not always appropriate to grant givers.¹⁵¹

Against the Bill providing for lighter regulation of grant-making charities

135. The Charity Commission told us that they had given thought to the question of whether the Bill should recognise the distinction between grant-making charities and others. However, they said, the sector divided in a much more diverse and sophisticated way than this dichotomy. They told us that they would adopt a more sophisticated approach to regulation than “one size fits all” and that they had agreed a model form of governing document for cases where rich people might be deterred from making grants and setting up foundations by the nature of the regulatory regime.¹⁵²

136. We asked the Minister whether grant-making charities should be subject to lighter regulation. The response was:

“No, I do not think I think they should. I think it is true that grant-making charities are different in character from many other charities. Often they are quite substantially resourced. They benefit substantially from the public purse because they benefit from the tax breaks which we, as the citizen, put into the charitable sector. It seems to me that the need for regulation actually comes fundamentally from the fact that the sector is invested in by the people of Britain through the contributions which it makes through forgoing taxation, so I do think that all

148 Ev 54, para 9

149 Ev 648

150 Ev 36, para 4

151 Ev 546, para 8

152 Qq689-691 (Mr Dibble)

charities, particularly those which have most benefited, should properly be regulated.”¹⁵³

“There are already significant differences in the regulatory regimes....grant-making charities have no donors, so there is no requirement to subject them to measures designed to give accountability to the donors ... Therefore, if you are a charity which does not do any public fund-raising of any sort, then none of that [regulation] applies to you Another point was the distinction between grant-receivers and grant-makers. If you are a grant-receiver and you receive funds either from the Government or from other charities, if you are a service-providing charity, which very many grant-receivers are, then you are very likely to be subject to regulation in respect of your service-providing activities none of that applies either to grant-receiving charities, so there are already, I think, significant differences in the nature and level of regulation.”¹⁵⁴

137. We put it to the Minister that there was evidence that 20% of potential starters of foundations had been put off by the regulatory regime; the Minister said that, if this was so, she would be in favour of changing the regime. She said further:

“I think the point you are making is important, but I am trying to make the argument that the best way to achieve that is not to say, ‘We’re going to have this kind of way of dealing with a village hall, this kind of way of dealing with foundations’, but it is actually creating a clarity about what are the objectives of regulation...

“Can I suggest a way that you could recommend that... if you look at clause 5, subsection (2) gives the objectives which are for the regulatory objective and the public confidence objective is to increase public confidence and trust in charities, and one could actually perhaps put in that objective quite properly ‘to increase the willingness to give’, and I think that would be actually a good objective to give to the Charity Commission and I think doing that might meet your concern”.¹⁵⁵

Conclusion

138. From the evidence we have received, we conclude that the draft Bill should include provision to ensure that the regulatory burden on grant-making charities does not discourage philanthropy. There are two ways in which this can be tackled. A number of submissions to us suggested, like the Minister, that the Charity Commission should be given a general duty to encourage philanthropy.¹⁵⁶ Secondly, as we mention in paragraphs 161-9 below, the exercise of the regulatory role should be proportionate.

139. We recommend that the Government amend the public confidence objective in the proposed section 1B(3) 1 of the *Charities Act 1993* to be inserted by clause 5 of the draft

153 Qq998 and 1000 (Ms Mactaggart MP)

154 Q986 (Mr Corden)

155 Qq984 and 986 (Ms Mactaggart MP)

156 For example, Ev 71, para 15.5

Bill to read: “The public confidence objective is to increase public trust and confidence in charities and to stimulate philanthropy”.

140. We also recommend that the Government commissions an independent review of the burden of regulation that grant-making charities face more generally, to ensure that regulation is fair and proportionate.

The Charity Commission’s objectives

Current position

141. Clause 1(3) and (4) of the *Charities Act 1993* set out the general objects and functions of the Charity Commission as follows:

“The Commissioners shall (without prejudice to their specific powers and duties under other enactments) have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses.

“It shall be the general object of the Commissioners so to act in the case of any charity (unless it is a matter of altering its purposes) as best to promote and make effective the work of the charity in meeting the needs designated by its trusts; but the Commissioners shall not themselves have power to act in the administration of a charity”.

Draft Bill changes

142. Clause 5 of the draft Bill sets the Charity Commission a number of regulatory objectives:

- a) the public confidence objective is to increase public trust and confidence in charities;
- b) the compliance objective is to increase compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;
- c) the social and economic impact objective is to enable and encourage charities to maximise their social and economic impact; and
- d) the accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

The social and economic impact objective

Evidence

143. The proposed social and economic impact objective was criticised by some of our witnesses and not supported by any witnesses from the charity and voluntary sector. The RNID told us:

“We are appalled at its inclusion. Do we really expect a charity to prove that it is going to have an economic impact? It is not in the objectives of my charity or any that I know of and it does not even say in the Bill that it has to be a positive economic impact. We could go to some of our environmental friends who might feel that a negative economic impact is appropriate. There are other, so-called charities which might wish to seek registration which would desire a negative social impact as well and they would see that as their objective, so this is clearly inappropriate, in our view”.¹⁵⁷

144. Mr Lloyd of the Charity Law Association told us:

“The social and economic impact objective I am deeply worried about. That seems to be implying some form of social utility test. It reminds me of Oscar Wilde’s line about knowing the price of everything and the value of nothing. The whole notion of charities is that many of them start off, for example, by taking up deeply unpopular causes, many of which seem to have an adverse social and economic impact. To take one good example, abolishing slavery in the 19th century had a very adverse social and economic impact on a lot of people but was a profound charitable purpose. Retaining bits of virgin rainforest – does that have any social and economic benefit? I doubt it, although you can see that it has huge ecological benefit, let alone if you then try and apply these things to religions which remain as charities. I would want the social and economic impact objective excised from this Bill. I want the Charity Commission instead to be under an obligation to advance public benefit... That should be one of their objectives...”¹⁵⁸

145. NCVO pointed out that the objective constituted a back-door redefinition of public benefit, in conflict with the current understanding of the term and going beyond the current legal requirement placed on charities.¹⁵⁹ In addition, they were concerned at the reference to social and economic impact at clause 15 of the draft Bill in regard to cy-pr s.

146. Other bodies which expressed opposition to the objective, or were uneasy about it, included the Association of Charitable Foundations, Hubert Picarda QC, Stone King (solicitors), Kingston Smith (chartered accountants) and the Wellcome Trust.¹⁶⁰ The one body which gave evidence on the question in terms which were not negative was the Chartered Institute of Public Finance and Accountancy (CIPFA):

¹⁵⁷ Q41 (Dr Low)

¹⁵⁸ Q276 (Mr Lloyd)

¹⁵⁹ Ev 1 paras 2.7 and 2.8

¹⁶⁰ Respectively, Q186 (Mr Emerson); Ev 626, paras 12-13; Ev 370, para C2; Ev 425; Ev 519, para 4.10

“We note that a new objective of the Commission will be to ‘encourage charities to maximise their social and economic impact’. CIPFA recognises the challenge of measuring such an impact elsewhere in the public sector and believes that the Charity Commission will need to carefully consider this experience if this objective is to be meaningfully addressed. CIPFA would be interested to assist in this area”.¹⁶¹

147. The Charity Commission told us that they “were a bit surprised at some of the fuss about this because we saw it simply as a modern reworking of the existing legislation which talks about promoting the effective use of charitable resources... we also thought it would pave the way towards a more facilitating approach to regulation”.¹⁶² They thought that it was important to have the objective in the Bill:

“We do need something in place which turns on prompting the effective use of charitable resources, which is the Commission’s remit. We see social and economic impact as a modern interpretation of promoting the effective use of charitable resource. That is how it has been seen”.¹⁶³

148. Ms Geraldine Peacock, the new Chief Commissioner, told us that she did not think it was vital to keep the objective in the Bill: “I would not die a death over it but I think there is a use in it being there because it helps people see there are different measures of efficacy and impact that are important in society”.¹⁶⁴ The Minister told us:

“I think that it is effective and efficient in achieving its public benefit and charitable purposes. Therefore, I think this wording ...is very clearly a way of trying to express that it is not just how you manage yourself internally..... It is the aim of...trying to make sure that those goals of charity which has a social and economic impact actually changes the world, because that is what charities do, they build a better world, they have a benefit for the public, it is to do with their purpose as well as the way in which they operate, and they have an impact which is social and economic. It is trying to get at that. The difficulty of saying “effectiveness and efficiency” is that it could be interpreted ...as the way [the Charity Commission] manage themselves rather than the way they achieve their ends.”¹⁶⁵

Conclusion

149. The weight of evidence received by the Committee is clearly against including the social and economic impact objective in the draft Bill.

150. We recommend that in clause 5 the words “social and economic impact” be left out and the wording of the 1993 Act be retained, namely “promoting the effective use of charitable resources”.

161 Ev 594, para 2(ii)

162 Q715 (Ms Chapman)

163 Q719 (Mr Dibble)

164 Q719 (Ms Peacock)

165 Q1020 (Ms Mactaggart MP)

New powers given to the Charity Commission

Current position

151. The Commission already have wide powers to conduct inquiries under the *Charities Act 1993* and other legislation to regulate the sector through, *inter alia*, registering and de-registering charities, conducting inquiries and giving advice.

Draft Bill changes

152. The draft Bill extends the Charity Commission's powers in a number of respects. The main new powers in the Bill are:

- a) Existing Commission powers are extended to cover exempt charities, which they did not before.¹⁶⁶
- b) The Commission are given wider powers to give advice and guidance (see paragraph 193 below).¹⁶⁷
- c) The Commission are given new powers to enter premises. They must obtain a warrant before doing so; they can only do so as part of an inquiry under Section 8 of the *Charities Act 1993*; and they must be able to show that there is a document or information on the premises which is relevant to the inquiry (this is a higher requirement than applies to the Financial Services Agency or the Office of Fair Trading, which only have to show reasonable grounds for suspecting information is on the premises).¹⁶⁸
- d) The Commission can give directions to trustees and employees (if an inquiry into the charity is in train) to take specific action.¹⁶⁹ They can also direct the application of charitable property where they are satisfied that this is required in the interests of the charity concerned.¹⁷⁰
- e) The Commission are given powers to approve the formation or amalgamation of Charitable Incorporated Organisations (CIOs).¹⁷¹

153. The Bill also gives the Commission greater powers in relation to cy-pres.¹⁷² The removal of the presumption of public benefit and plans for the Commission to carry out public character tests also place more emphasis on the Commission's powers of registering charities and removing them from the register.

¹⁶⁶ Draft Charities Bill, schedule 5

¹⁶⁷ Draft Charities Bill, clause 20

¹⁶⁸ Draft Charities Bill, clause 21

¹⁶⁹ Draft Charities Bill, clause 16

¹⁷⁰ Draft Charities Bill, clause 17

¹⁷¹ Draft Charities Bill, schedule 6

¹⁷² Draft Charities Bill, clauses 14, 15 and 27

Evidence

154. Many respondents considered that the Commission's new powers should be accompanied by greater accountability to the sector. A range of mechanisms were proposed, including:

- a) a provision in the Bill requiring the Commission to act proportionately and fairly;
- b) an improved appeal mechanism;
- c) better distinction between advice and regulation; and
- d) improved consultation and representation.

155. Respondents who took this view included the NCVO and we discuss their ideas later on (paragraphs 161-9). A second group of respondents welcomed the increase in the Commission's powers and, in some cases, thought the Commission should have greater powers still. Cancer Research UK, for example, told us:

“We do not consider that the ‘Public Confidence’ objective has been adequately met by the powers which have been bestowed upon the Charity Commission”.¹⁷³

156. They thought that the Commission should be given further powers to deal with fraudulent fund-raising and to stop people using the term “charity” for non-charitable purposes.¹⁷⁴ The Myasthenia Gravis Association told us:

“... we welcome the strengthening of the regulatory function as it affects the issue of public confidence in charities which is very important to us as a fund-raising charity... the powers which are given to the Commission in the Bill are reasonable... and... there seems to be in the Bill... sufficient protection”.¹⁷⁵

157. A third group opposed some of the Commission's new powers. The Thalidomide Trust expressed concern about the Bill's proposals to allow the Commission to give directions to trustees and to direct the appropriation of property:

“It is unclear what situations are envisaged that would justify giving such draconian powers to the Commission and especially what their effects may be when taken in conjunction with the Commission objectives ...these provisions could result in the award of unconfined, undefined and apparently arbitrary power to the Commission and we consider they should be reviewed”.¹⁷⁶

158. BTCV also opposed these powers and complained that they had been introduced to the Bill without any previous consultation.¹⁷⁷ In addition, BTCV opposed the proposed power to enter premises:

¹⁷³ Ev 437, para 3.2

¹⁷⁴ Ev 437, para 3.2

¹⁷⁵ Q850 (Mr Finney)

¹⁷⁶ Ev 352

¹⁷⁷ Ev 433-4, paras 16 and 17

“This proposed section is premature. It is not many years since the Charity Commission investigated Iran Aid, a case in which we believe that had the Commission been successful in their attempt to seize the records then sixteen thousand beneficiaries of that charity would have been arrested and suffered the most inhumane punishments. We do not yet have sufficient confidence in the Charity Commission, the Commissioners or their investigations staff to wish to see them trusted with this important power, and we recommend that this section be omitted”.¹⁷⁸

159. The Charity Law Association told us that the Bill presents an opportunity to amend Section 8 of the 1993 Act to stipulate that the Charity Commission can only open enquiries where it has reasonable grounds to do so and is obliged to give the charity a statement of those reasonable grounds.¹⁷⁹

160. We recommend that, when exercising its powers to conduct inquiries under section 8 of the *Charities Act 1993*, the Commission should be required to tell the charity concerned why it is doing so, subject to any safeguards necessary to protect sources of information or to prevent delay in the inquiry.

Objective for the Charity Commission to act proportionately

Current position

161. Under current charities legislation, there is no specific objective set out for the Charity Commission to act proportionately and reasonably, but such a requirement is placed on all public bodies by common law.

Draft Bill changes

162. The draft Bill lays down a number of regulatory objectives for the Charity Commission at clause 5, but these do not include such an objective.

Evidence

163. NCVO, in oral evidence to us, expressed concern that the powers of the Commission were being extended in the Bill and yet there was no constraint on the exercise of those powers:

“Our concern is that there is no way in which a charity has redress against a decision by the Commission which is stifling citizen engagement by advice being interpreted as regulation. There is nothing in the Bill which gives a charity the right, if you like, to appeal against the behaviour of the regulator”.¹⁸⁰

178 Ev 535, para 18.1

179 Ev 73, para 19

180 Q28 (Mr Etherington)

164. To address this problem, NCVO advocated that the Bill should include a clause saying that the Charity Commission should exercise its powers “in a reasonable, proportionate and judicious manner”,¹⁸¹ although they made it clear that it was important that such a clause should be backed up by an appeals tribunal which could enforce it.¹⁸² If such a clause were included in the Bill, with an appropriate appeals mechanism, then, said NCVO, “that would satisfy us”,¹⁸³ meaning, we took it, that it would satisfy their concerns for proper redress by charities against the Commission. ACEVO supported this proposal, although they emphasised that they saw the Commission as being a powerful tool to aid the sector and thought that it was probably not helpful to be very prescriptive about the exercise of the Commission’s powers.¹⁸⁴

165. We also received written evidence from the Charity Law Association making a similar proposal. “In our view,” they told us, “the Bill must contain a provision obliging the Charity Commission to use its powers proportionately, fairly and in accordance with the principles of natural justice (particularly in view of its new powers in part 2 Chapter 5 of the Bill)”.¹⁸⁵

166. The Association for Charities and BTCV also favoured a provision to this effect in the Bill.¹⁸⁶ The Institute of Chartered Secretaries & Administrators said that they would expect the Commission to “be encouraged to act proportionately and fairly” in the regulation of charities.¹⁸⁷

167. We questioned the Minister about this proposal. She did not accept it, on the grounds that “[it] is a duty of all public bodies at all times, to act proportionately and fairly, and if you put that in one kind of legislation, it would imply that in other bits of legislation you were expecting people to be disproportionate and unfair”.¹⁸⁸ It would in fact “imply that public bodies could do things which were unreasonable in other circumstances, which is not true”.¹⁸⁹ She told us that she had “been extensively advised about this on many occasions, not merely in relation to this Bill”.¹⁹⁰

Conclusion

168. We are not persuaded by the Minister’s advice that if such a provision were included in the Bill it would cast doubts about whether other public bodies were still under an obligation to act proportionately. As for the argument that the provision would not change the existing position in law, we conclude that the provision would at least provide clarification and reassurance to charities. We believe it essential for the health and vitality

181 Qq16, 18 and 19 (Mr Etherington)

182 Qq18 and 28 (Mr Etherington)

183 Q28 (Mr Etherington)

184 Q27 (Mr Bubb)

185 Ev 56, para 3.1, repeated at Ev 73, para 18

186 Ev 395, para 2.15; Ev 434, para 20

187 Ev 61, part 2

188 Q1002 (Ms Mactaggart MP)

189 Q1011 (Ms Mactaggart MP)

190 Q1008 (Ms Mactaggart MP)

of the charitable sector as a cornerstone of a modern civil society to be free from unnecessary and potentially harmful regulation.

169. We therefore recommend that the Bill should include a provision obliging the Charity Commission to use its powers proportionately, fairly and reasonably.

Membership Charities

170. The Charity Commission has no specific powers in relation to the members of charities; their powers are restricted to the trustees. The Charity Law Association told us that their members often found themselves in the position of advising charities that need to make changes requiring resolutions of the membership but which have no up to date list of members. The situation would be eased if the Charity Commission had power to determine, on the application of a charity, who are the members of the charity.¹⁹¹ It is the experience of the Charity Commission that many charity disputes have their origins in conflicts about membership.¹⁹²

171. We recommend that the Charity Commission be given the power to determine, either on the application of the charity or after the opening of a section 8 inquiry into the running of a charity, who the members of a charity are.

Accountability of the Charity Commission

Current position

172. The Charity Commission is a Non-Ministerial Government Department. This means that Ministers have no legal power to give directions to the Commission. Only the courts can overturn decisions taken by the Commission.¹⁹³ The Commission is accountable to Parliament in the following ways:

- a) under the *Charities Act 1993*, it must report annually to the Secretary of State and lay a copy of the report before Parliament;¹⁹⁴
- b) its accounts are annually audited by the National Audit Office (NAO);
- c) it is subject to periodic Value for Money examinations by the NAO and Public Accounts Committee, which lead to published reports;¹⁹⁵ and
- d) it can be called to give oral or written evidence to the departmental select committee responsible for monitoring the expenditure, policy and administration of the parent department, the Home Office.

¹⁹¹ Ev 74, para 26

¹⁹² Membership Charities, RS7, Charity Commission

¹⁹³ Private Action, Public Benefit, September 2002, para 7.14

¹⁹⁴ Charities Act 1993, section 1 (5)

¹⁹⁵ 'Private Action, Public Benefit, Strategy Unit Report, September 2002, para 7.9

Draft Bill changes

173. Clause 5 of the draft Bill sets the Commission a number of regulatory objectives, general functions and duties. These are more detailed than the Commission's general function and general objects under the current position, but are still broadly drawn. The Commission will remain a Non-Ministerial Government Department, but clause 4(1) of the draft Bill says that its functions are to be performed "on behalf of the Crown". Under clause 5, the Commission must comply, so far as is reasonably practicable, with any request made by a Minister for information or advice on any matter relating to any of its functions.

Evidence

174. We have considered whether the Charity Commission should communicate more effectively with the public and be more accountable. The evidence we received raised three key questions on accountability:

- a) Is the Charity Commission sufficiently independent of the Government?
- b) Is the Commission adequately accountable to Parliament?
- c) Is it adequately accountable to the sector?

Independence from Government

175. The Strategy Unit review, speaking of the Commission's present status as a Non-Ministerial Government Department, said:

"... only the court can overturn the Commission's decisions in exercise of its statutory powers. Ministers have no capacity to direct or reverse any of the Commission's decisions. This insulation from political interests is a strength of the current system and is greatly valued by charities. They see it as a safeguard against charity and the advantages attached to it, becoming a political football".¹⁹⁶

176. A number of respondents, however, were concerned that the Commission's independence would be seriously compromised by the clause in the Bill saying that the Commission would perform its functions "on behalf of the Crown". The Charity Law Association saw this as giving the appearance, at least, of turning the Commission into a Government Department and they objected to the clause on the following grounds:

"If the Charity Commission is a Government Department, then it is likely to lessen, rather than increase, public confidence in charities. It will be seen as susceptible to being used by the Government to further its own policies. Indeed, it is conceivable that this is in fact what the relationship between the Commission and the Government would develop into; it may not only be a matter of perception. To avoid this, the Commission needs to be – and to be seen as – an entity established to serve the public benefit and uphold the law, not beholden to the Government and outside the sphere of governmental policy considerations.

¹⁹⁶ Private Action, Public Benefit, September 2002, para 7.14

“In some aspects of its work (such as making schemes and orders for charities and, under the Bill, relieving trustees of personal liability), the Commission has judicial functions. If the Commission is a Government Department, then the Commission’s role will include both executive and judicial functions, contrary to the principle of the separation of powers”.¹⁹⁷

177. The Charities Finance Directors Group (CFDG) wanted reassurance that the clause did not “represent a risk of greater political interference”.¹⁹⁸ The solicitors, Bircham Dyson Bell, said “there is a risk that making the Commission an incorporated Crown body will prejudice its quasi-judicial functions, a potentially dangerous position”.¹⁹⁹ NCVO asked what the implications of the clause would be for judicial acts (such as scheme-making) undertaken by the Commission on behalf of the High Court, since the Crown has no functions in these areas.²⁰⁰

178. We put these concerns to the Minister and suggested that a statement be made on the face of the Bill saying that the Charity Commission is an independent regulator and making clear what the relationship between the Commission and Ministers would be. The Minister told us that she was open-minded about this suggestion and that if the matter was not already sufficiently clear – although she believed it was – then “we will take the view of the Committee”.²⁰¹

179. We share the unease of the respondents who expressed concern about this question. We are unclear about what the expression “on behalf of the Crown” means in this context and are concerned that it might be used to infringe on the Commission’s (and charities’) independence.

180. We recommend that clause 4(1) (insertion 1A(3)), containing the phrase “on behalf of the Crown”, should be removed and replaced by a clear statement that the Commission shall be a body independent of Government.

Accountability to Parliament

181. The other side of independence from Government is that the Commission should be accountable to Parliament. We were concerned that more needs to be done in this regard. There seems to us to be an ‘accountability gap’.

182. The Commission submits its annual report to Parliament through the Secretary of State and its accounts are audited annually by the NAO, but the annual report is not systematically examined, and the audit of the accounts only scrutinises financial propriety and regularity. The main form of scrutiny of the Commission’s overall performance – its efficiency and effectiveness – is through periodic value for money examinations of the Commission by the NAO and the Public Accounts Committee (PAC), but these are

¹⁹⁷ Ev 71, para 2.2

¹⁹⁸ Ev 387, para 6

¹⁹⁹ Ev 387, para 6

²⁰⁰ Ev 2, para 2.10

²⁰¹ Qq1023 and 1024 (Ms Mactaggart MP). This was echoed in questioning by the Minister’s Home Office official who said the Home Office believed the Bill already clarified the relationship between the Commission and Government but they would be prepared to listen to suggestion if the Committee did not agree (Qq1026 and 1027 (Mr Corden)).

relatively infrequent: the PAC has examined the Commission on four occasions over the past 17 years, in 1988, 1991, 1998 and 2002.²⁰²

183. On the first three occasions the Committee found severe short-comings.²⁰³ On the last occasion, the PAC found that there had been significant improvement but that much remained to be done. For example, the Commission had previously met only 10 out of 26 targets covering their core activities; in 2000-01, they met 23 out of 32 targets.²⁰⁴ Since that date improvement had continued with 9 out of 11 targets met in 2001-2002²⁰⁵, 15 out of 17 met in 2002-2003²⁰⁶ and 16 out of 19 met in 2003-2004.²⁰⁷

184. We are concerned that, since the Commission have sometimes struggled to meet their current responsibilities, they might not be equal to the new ones the draft Bill would give them, particularly the public character checks. When taking evidence from the Home Office, we asked whether the Commission were equal to their new responsibilities. The Minister told us, “I do not think we are there yet but with the changes the Bill sets out... we will be there”.²⁰⁸

185. In taking oral evidence from the Charity Commission, we gained the impression that this was a body – unlike many others in receipt of public funds – which was unaccustomed to explaining its workings in public. We have come to the view that more regular appearances before parliamentary committees might be mutually beneficial. This could take a variety of forms – the Public Accounts Committee, the Home Affairs Committee or a temporary Committee in the Lords – but the important factor would be a regular evidence session on the Commission’s annual report.

186. We therefore recommend that the Home Affairs Select Committee have an annual evidence session with the Charity Commission. We recommend that the annual report of the Charity Commission be debated in each House every year.

187. Accountability to Parliament is a means of securing accountability to the public. The Committee noted recommendations in the Strategy Unit report that the Charity Commission should open its Board meetings to the general public and, in order to demonstrate responsiveness to public views, should signpost on its website other appropriate bodies that members of the public should contact if they wish to complain about a particular aspect of a charity’s work or mode of conduct.²⁰⁹ It understands that the Charity Commission has already implemented the first of these recommendations and that they are working on the second. This is very welcome.

202 Committee of Public Accounts, Giving Confidently, The Role of the Charity Commission in Regulating Charities, 39th Report, 2001-02, HC 412, para 3

203 Committee of Public Accounts, Giving Confidently, The Role of the Charity Commission in Regulating Charities, 39th Report, 2001-02, HC 412, para 3

204 Committee of Public Accounts, Giving Confidently, The Role of the Charity Commission in Regulating Charities, 39th Report, 2001-02, HC 412, para 17

205 Charity Commission Annual Report 2001-2002, p42

206 Charity Commission Annual Report 2002-2003, p31

207 Charity Commission Annual Report 2003-2004, p35

208 Q103 (Ms Mactaggart MP)

209 pp76-77

Accountability to the sector

188. Several respondents told us that, since the Commission was acquiring new regulatory powers, it was important that the charity sector should be more listened to about the exercise of those powers: “No more regulation without representation” might have been their motto. Governance Works told us:

“Because the Bill does give the Charity Commission very wide-ranging powers – and I do not have a problem with that, but it does have wide-ranging powers – it does feel as if the sector should have an opportunity at some point to comment on the extent to which the Commission has met its obligations as a regulatory body and has fulfilled its function as a regulatory body”.²¹⁰

189. In response to a question on whether this could be achieved through representation on the Commission’s Board, Governance Works replied:

“That would be one route for it, but it may be that it did not necessarily go that far. I had assumed that people who were appointed to that board would have some charitable background and, in that sense, would be representing the sector or would have some contacts with the sector. It may be more to do with the Charity Commission being obliged to consult on some sort of regulatory basis with the sector on their own performance and effectiveness”.²¹¹

190. Volunteering England told us they agreed with this: “I am not sure exactly of the mechanisms, but I think to try to build in the notion of both consultation with the sector and accountability to the sector would be a very good move”.²¹²

191. We had sympathy with these ideas, although the Committee were aware they could be taken too far. There is a risk of “agency capture”; in the words of the Strategy Unit review, “The regulator should be independent both of day-to-day interference and of the charitable sector itself”.²¹³ A reasonable compromise, we believe, would be limited sector representation on the Commission’s Board.

192. We recommend that there should be a greater number of people on the Charity Commission board with experience and knowledge of the charitable sector, in order to reflect its great diversity, particularly at grass roots level. This should be accompanied by adequate safeguards against conflicts of interest.

210 Q161 (Ms Howarth)

211 Q162 (Ms Howarth)

212 Q163 (Mr Spence)

213 Private Action, Public Benefit, September 2002, para 7.13

Advice and regulation

Current position

193. Section 29(1) of the *Charities Act 1993* says the Charity Commission “may on the written application of any charity trustee give him their opinion or advice on any matter affecting the performance of his duties as such”. With some special exceptions, a trustee who follows such advice is deemed to be acting in accordance with his trust,²¹⁴ but the advice is quite distinct from the exercise of the Commission’s regulatory powers and trustees are at liberty not to follow it.

194. The Strategy Unit review in 2002 found that:

“... the blurring of boundaries between the Commission’s advisory and regulatory roles continues to cause confusion among charities and other key stakeholders.

“The Commission’s primary function is, and should be, a regulatory one... Nor does the Commission have the resources to sustain an advisory capacity as extensive as the statutory phrasing... suggests. It should retain an advisory role but this should be more precisely defined and focused on the issues over which it has regulatory responsibility”.²¹⁵

195. The review’s recommendation, which was accepted by the Government,²¹⁶ stated that

“The Charity Commission’s advisory role should be defined in statute to give a clearer focus on regulatory issues”.²¹⁷

Draft Bill changes

196. Clause 20 of the draft Bill, contrary to the Strategy Unit’s recommendation, clarifies and legitimises the wide power of the Commission to give advice as follows:

- a) They are allowed to give advice not just to trustees, but to any employee of a charity.
- b) They are also allowed to give whatever advice or guidance they think appropriate on the administration of charities (that is, they do not need to be asked) to a particular charity or a group of charities or charities generally. And they can give this advice in whatever way they think is appropriate.

Evidence

197. A large number of witnesses told us that they were concerned that there was an inadequate distinction between advice and regulation issued by the Charity Commission. Charities – particularly small charities – were unclear whether they were being advised to

214 *Charities Act 1993*, clause 29(2)

215 *Private Action, Public Benefit*, September 2002, paras 7.48 and 7.49

216 *Charities and Not-for-Profits: A Modern Legal Framework*, Strategy Unit, para 6.7

217 *Ibid*, para 7.49

do something by the Commission or directed. The result was that, to be on the safe side, they treated advice as if it was direction. This was significantly eroding the autonomy of the sector and increasing the degree of regulation. NCVO told us:

“[The Charity Commission] need to make it clear to charities, particularly the smaller charities, when they are giving advice and when it is a must-do because if you are not clear about that, the smaller charities will interpret advice by the Commission as a must-do and the potential creep if that is not always clear is enormous... the Commission need to be absolutely crystal clear when they are advising trustees of when it is a must-do and when it is a good practice should-do... we would not want to see spontaneous, citizen-led activity stifled by a regulatory regime which actually, when it gave advice, implied that you could or could not do certain things which had the force of statute when it did not...”²¹⁸

198. There was also concern about the way that the draft Bill proposed to define the Commission’s advisory powers. The Association of Charitable Foundations told us that they feared these very wide powers might “end up blurring the boundaries between the Charity Commission’s advisory and regulatory roles even more than to date”.²¹⁹

199. NCVO said that, while the Commission’s role of giving advice on regulation should be retained and even strengthened, wider advice to charities should be independent of the Commission and would more appropriately be carried out by umbrella and resource bodies owned by the sector,²²⁰ a view supported by Volunteering England.²²¹ Six of the eight witnesses whom we heard from the small charity sector also thought that the functions of advice and regulation should be separated, either by having two different organisations delivering advice and regulation, or two very clearly segregated arms of the Commission separately responsible for each function.²²²

200. However, NACVS, which supports local Councils for Voluntary Service, (a key small charities umbrella) and Minority Rights Group International thought the solution to the blurred line between advice and regulation lay in the Commission’s making a clearer differentiation between the two categories – through the use of different letterheads, for example – and that separation of the Commission’s advice function was not necessary.

201. The Charity Commission itself acknowledged that its power to give advice and guidance was a concern in the sector and that the power was too widely drawn. It said it had worked with the Home Office to devise a formula to confine the power within acceptable limits but this had proved difficult.²²³ They told us:

“In the past the Commission has been rather indiscriminate in terms of its publications between specific legal requirements and matters which go towards

218 Qq23 and 27 (Mr Etherington)

219 Ev 37, para 9

220 Ev 3, paras 2.13-2.16

221 Q169 (Mr Spence)

222 Q834 (Mr Finney); Q838 (Mr Moore); Q841 (Ms Chandavarkar); Q948 (Mr Rosser-Owen); Q950 (Major Adler); Q950 (Mr Britton)

223 Q655 (Mr Dibble)

carrying out those requirements which might be called at one end best practice. It is something which we will attend to in the future. It is not only the publications of course, it is the way our Commission staff [m]ay approach their work. Clearly, for the Commission to distinguish between those two areas is very important for a Regulator and it is something which we can do better...²²⁴

202. The Commission, however, thought that it was best to retain the two functions within the same organisation because they complemented each other and provided the best framework for assisting trustees.²²⁵ They said they had no objection to the Bill being strengthened to clarify the relationship between the regulatory and advisory roles.²²⁶

203. The Charity Commission and other witnesses proposed colour coding as a simple but effective method of ensuring that charities can distinguish between advice and instruction. In oral evidence the Charity Commission highlighted this as one way of helping to alleviate confusion:

“I think there are practical things we could do in terms of the way we present our advice indeed on our website and in our direct dealings with charities, even things that sound perhaps a little frilly but would be useful, for instance colour coding what is advice and what is mandatory”.²²⁷

204. The idea was also put forward by the National Association of Councils for Voluntary Service (NACVS):

“I almost feel that if the Charity Commission are writing to you, they should have two different colours of letterhead, one being advice and the other being, ‘You must do this’. In other situations you get told, ‘These are instructions which you must comply with and this is guidance on what you might choose to do’, and I am thinking of Ofsted inspections and the reports to school governors, where they say, ‘You must do these things’, or, ‘We would suggest that you look at these areas in order to improve your practice’.”²²⁸

205. NACVS said that 87% of its members valued the Commission’s advisory role,²²⁹ a view echoed by ACEVO, who told us that the Commission’s role in giving advice and guidance was a part of the Commission’s important strategic and enabling function in the sector.²³⁰ The usefulness of the Commission’s advice was conceded even by critics such as NCVO and the Association of Charitable Foundations.²³¹ The Public Accounts Committee, when

224 Q670 (Mr Dibble)

225 Q670 (Mr Dibble)

226 Qq654 and 655 (Ms Peacock)

227 Q673 (Ms Peacock)

228 Q833 (Mr Curley)

229 Ev 233, para 2.3

230 Q10 (Mr Bubb)

231 Q27 (Mr Etherington); Q169 (Mr Emerson)

it examined the Commission's performance in 2002, found "the Commission's advice and support activities are well regarded by charities overall".²³²

Conclusion

206. The Committee is concerned that the draft Bill proposes to give clear statutory recognition to the Charity Commission's wide advisory role, contrary to the Strategy Unit review's recommendation, which the Government had accepted. However, the evidence, though conflicting, does lend support to the claim that the Commission's advice function is widely regarded as useful and important. The principal problem seems to be that advice is not clearly differentiated from regulatory directives, a problem which can be addressed through less drastic and disruptive means than the suggestion of moving the advice function out of house: for example, all communications can be clearly headed to show whether they give advice or directives, advisory documents could carry clear notifications that trustees were free not to comply with the advice shown, and so on. Colour coding will not be the only means by which the Charity Commission should seek to ensure that the distinction between advice and regulation is clear. However, we consider that it is an easily implemented, cost-efficient and effective tool in helping to do so. If this problem can be solved, then the risk attendant on the Commission's wide power to give advice would be acceptable.

207. We recommend that the Charity Commission should take steps to differentiate between its advisory and regulatory functions and make clear in all its communications the distinction between advice and instructions.

Adequacy of Commission's resources

208. The draft Bill, if enacted, would impose heavy additional responsibilities on the Charity Commission. These would include:

- a) registering excepted charities with incomes above £100,000;
- b) registering exempt charities;
- c) carrying out the programme of public character checks; and
- d) defending appeals to the independent Tribunal.

209. The draft Bill contains a Regulatory Impact Assessment (RIA) which estimates the costs it would give rise to. This is deficient in certain respects: it contains no estimate for the cost of the public character checks the Commission will be carrying out or for the cost of the Commission's enhanced advice function under the Bill. The Commission updated these estimates in evidence to the Committee. The updated estimates are shown in the table on the next page.²³³

²³² Committee of Public Accounts, Giving Confidently, The Role of the Charity Commission in Regulating Charities, 39th Report, 2001-02, HC 412, para 4, last bullet

²³³ Ev 224-5, paras 2-4

	One-off costs	Continuing costs (cost per year)
Independent tribunal	£0.200m	£0.200m
Excepted charities: registration	£0.500m	
Excepted charities: regulation and monitoring		£0.225m
Exempt charities: registration	£0.750m	
Exempt charities: regulation and monitoring		£0.345m
Public character checks	£0.250m	£0.250m
TOTAL	£1.700m	£1.020m

Data Source: Supplementary Memorandum from the Charity Commission, Ev 224, paras 2-4

210. The Commission also told us that £0.3m is already being applied to meeting the costs of the Bill – this has been met from efficiency savings or previously identified Spending Review 2002 funding. Further funding from the Spending Review 2002 has been allocated for pre-legislative changes (such as new governance arrangements for the Commission): £0.61m already implemented and £0.95m to be implemented.

211. These estimates would be vulnerable to changes in certain assumptions:

- a) The Commission has estimated the costs of the Tribunal on the basis of 50 cases a year being brought to the Tribunal. However, the RIA notes that estimates of the number of cases vary between 35 and 2,500. While a caseload in the thousands would be improbable, if 100 or 150 cases went to the Tribunal a year, the cost estimates above would be disturbed. Additionally, the estimates assume cases before the Tribunal will last on average seven days at most. But the RIA concedes: “In terms of the length of each case, there is little evidence to work upon... there is no established time-scale for cases”.²³⁴
- b) The number of exempt and excepted charities the Commission would have to register and monitor under the draft Bill.

212. The Home Office told us that the Charity Commission’s budget for the current year and the Commission’s 2004 Spending Review settlement were as shown in the following table.²³⁵

Year	Cash budget (£m)	Annual Increase
2004-05	29	0%
2005-06	31	6%
2006-07	31	0%
2007-08	31	0%

²³⁴ p151, para 1.64

²³⁵ See p185

213. The Home Office added that they were “confident that the Commission has sufficient resources to implement the Bill effectively”.²³⁶ They also told us that:

“The Charity Commission will absorb the costs of implementing the Charities Bill within its resource allocation, prioritising its use of resources as necessary to ensure effective implementation...

“The recently appointed Chair and Chief Executive will shortly conduct a strategic review of the organisation, to determine its strategic direction and equip it effectively to implement the measures of the Charities Bill and to discharge its future responsibilities. This will be a challenging period for the Commission, but it does provide opportunities for it to develop innovative solutions and improve its focus on frontline delivery”.²³⁷

214. We have seen a paper, prepared for the Charity Law Association by Dr Julia Black of the London School of Economics, comparing the legal structures, powers and accountability of the Charity Commission with three other regulatory bodies: the Office of the Scottish Charities Regulator (OSCR), the Financial Services Authority (FSA) and the Office of Fair Trading (OFT). In general, this comparison did not show the Charity Commission to a disadvantage, but there were some key differences. The Charity Commission has less flexibility in the appointment of staff (Ministers approve numbers and terms of staff) than the FSA; unlike the OFT, the Commission is not statutorily required to have a management statement or to have regard to guidance for public bodies or to follow the principles of good regulation; unlike the FSA, the Commission is not required to conduct cost benefit analyses for all rules and guidance.

215. The evidence we have heard has given us reason to question whether the Charity Commission is properly organised and properly resourced to make it effective in its new tasks. We recommend that professional advice be sought to review the ability of the Charity Commission to meet its new responsibilities under the draft Bill and in particular the quality of the processes, methods and organisation; the calibre of its staff; its resources; and whether the Commission should, like other regulators, be able to determine the number and conditions of its own staff.

²³⁶ See p185, para 1

²³⁷ See p185, para 1

5 The Charity Appeal Tribunal

Current position

216. At present the only route for appeal against a *decision* of the Charity Commission is to the High Court. The Charity Commission does operate a complaint and review system. The system has two parts:

- a) people who are dissatisfied with the Commission's *conduct or service* can lodge a formal complaint. The complaint is handled internally by the Commission to begin with, but, if it is not resolved, it passes to the Independent Complaints Reviewer, whose role is similar to that of an external ombudsman. If people are not satisfied by the ICR decision they can ask their MP to take the issue to the Parliamentary Ombudsman.
- b) people who are dissatisfied with a *decision* the Commission has made in exercising its statutory powers (for example, deciding not to register a body as a charity or to de-register a body as a charity or to remove a person from the trusteeship of a charity) can ask the Commission to review the decision. The Commission will then conduct a process with several possible stages which can go up to Board level. However, the procedure ends there – the Independent Complaints Review does not review *decisions*. If the complainant is still dissatisfied, their only recourse is to appeal to the High Court. In practice, they would do this very rarely, given the likely expense involved.

217. The Strategy Unit review, noting this situation, said it was “important that the Charity Commission’s decisions should be, in both fact and appearance, open to challenge”.²³⁸ It said that this would be even more important if the Charity Commission were to embark on the programme of public character checks the review envisaged and which are now being planned.²³⁹

Draft Bill changes

218. Clause 6 of the draft Bill proposes to set up a Charity Appeals Tribunal. The Tribunal would be able to hear appeals from Charity Commission decisions or other matters set out in the box on the next page.

²³⁸ Private Action, Public Benefit, September 2002, paras 7.73

²³⁹ Ibid

Remit of Charity Appeal Tribunal

- To enter or not to enter an institution in the register of charities;
- to remove or not remove an institution from the register;
- to require change of charity's name;
- to institute inquiries;
- to establish a scheme for the administration of a charity;
- to appoint, discharge or remove a charity trustee or trustee for a charity, or remove an officer or employee;
- to vest or transfer property, or require or entitle any person to call for or make any transfer of property or any payment.
- to make schemes or alter application of charitable property;
- to act for protection of charities;
- the investigation of accounts;
- the disqualification for being trustee of charity; and
- acting as charity trustee while disqualified.

219. The main matters it would *not* hear appeals about are:

- a) The Commission's conduct or service, including questions about whether the Commission was giving advice which might be mistaken for regulatory directives. Complaints about these matters would be handled, as at present, through the Commission's normal complaint and review system, which, as we have seen, provides for external review.
- b) Decisions by the Commission to open an inquiry into an institution – except for appeals on the grounds that the institution was not a charity – or to investigate the accounts of a charity.²⁴⁰
- c) *Ex gratia* payments.
- d) Decisions to authorise dealings with charity property or to authorise charity proceedings.

²⁴⁰ Ev 127, para 3.6

- e) Decisions to authorise the sale, disposal or mortgage of land by a charity.
- f) Decisions to give advice or guidance (when requested to do so).

220. There was a wide welcome for the Tribunal from witnesses and respondents. No witness argued against the creation of the Tribunal. Some argued for extending the remit of the Tribunal. Others asked for the Tribunal to be given powers to award compensation. We have also asked whether the costs of going to the Tribunal would make it more accessible than the High Court.

Widening the Remit of the Tribunal

221. We heard three groups of suggestions for widening the remit of the proposed Charity Appeal Tribunal. The first group of suggestions was from respondents who wanted the Tribunal's remit to cover *all* decisions of the Charity Commission. Help the Aged told us:

“We welcome the creation of a Tribunal to whom interested parties can go to challenge decisions of the Commission. However, we note that not all legally binding decisions of the Commission are subject to the ability to be appealed by means of the Tribunal; we see that the approach has been taken to define specific decisions against which appeals can be made. This would mean that some decisions would be capable of appeal and others not. This does not make sense and breeds uncertainty. Furthermore the Commission's powers are being hugely strengthened in this Bill and so there needs to be an effective mechanism to challenge the exercise of all its powers”.²⁴¹

222. The Charity Law Association (CLA) also told us:

“We recommend that the Tribunal be able to hear appeals against **any** decision of the Charity Commission (including ‘non-decisions’, such as a decision not to make a scheme or order), on any point of law, on any basis.

“There seems to be no provision for the Charity Commission to refer matters to the Tribunal for interpretation, which could be useful. Equally, there seems to be no general right of reference to the Tribunal (for example, by representative bodies) which could also be useful”.²⁴²

223. The second group of suggestions was from respondents who favoured extending the remit of the Tribunal to cover, not all Commission decisions, but some additional areas of decision-making. Nuffield Hospitals wanted to include decisions about inquiries: “we feel the scope for appealing against a decision by the Charity Commission to institute an inquiry should be extended to include the ground that there was no reasonable basis for

²⁴¹ Ev 413-4, para 3

²⁴² Ev 57, paras 8-9

instituting the inquiry”.²⁴³ The Charity Finance Directors’ Group wanted to include decisions by the Commission to investigate the accounts of a charity.²⁴⁴

224. The third group of suggestions was from respondents in favour of allowing the Tribunal to hear appeals against any action of the Commission, not just decisions. For example, the Association of Charitable Foundations told us that it would be helpful if an appeal was allowed on any action of the Commission,²⁴⁵ a view shared by the Myasthenia Gravis Association.²⁴⁶

225. The Charity Commission were opposed to any widening of the remit of the Tribunal. They told us that the Commission’s conduct and service were adequately covered by their existing complaints procedure, which allowed for appeal to an external reviewer and reparations. As for allowing further areas of decision-making to come within the Tribunal’s remit, they suggested this would harm the operational efficiency of the Commission.²⁴⁷ For example, the Commission’s power to institute an inquiry into a charity “simply could not be reviewable in the context of the Commission operating efficiently with investigative powers. There has to be a limit on the number of occasions that decisions of the Commission can be reviewed in such a context”.²⁴⁸

226. The Minister also told us she was opposed to widening the remit of the Tribunal:

“One of the concerns that I have about widening the remit is that the point of the Tribunal ... is to try and make things easier, more flexible, and less expensive than the present court arrangements are. I think it is quite important that we make sure that we do not take some things which can currently be dealt with by the independent complaints reviewer, a process which works reasonably well, elevated up. Constantly what we want to do is to bring things down from the expensive to the simple, to the more straightforward as far as is possible, and that is what we have sought to do. In effect, I think that the kind of concerns which people might have expressed to you about the maladministration and so on actually risk elevating things up from the things which can currently be dealt with by the independent complaints reviewer. I think that it is more cheap, more simple, more effective, to deal with things at that level. In addition, there is the Parliamentary Ombudsman which can also deal with complaints against the Charity Commission.”²⁴⁹

Compensation

227. The Association for Charities called for the Tribunal to be given “the power to award compensation to charities, trustees and other parties harmed by Charity Commission misbehaviour”.²⁵⁰ The Charity Commission told us that they do make compensation

243 Ev 151, para 8

244 Ev 127, para 3.6

245 Q165 (Mr Emerson)

246 Q873 (Mr Finney)

247 Q698 (Mr Dibble)

248 Q699 (Mr Dibble)

249 Q1033 (Ms Mactaggart MP)

250 Ev 404, para 19

payments on the recommendation of the Independent Complaints Reviewer and there might be some logic in applying the same principle to the Tribunal.²⁵¹

Conclusion

228. We are persuaded that the Tribunal's remit should not be extended to cover the Commission's conduct and services. The Commission's existing complaints procedure is adequate to deal with these areas. However, the Committee is in favour of widening the Tribunal's remit to hear appeals concerning decisions by the Commission. This is an appropriate measure of improved accountability at a time when the powers of the Commission are being significantly increased. The Committee saw two options for doing this:

- a) To add to the specific decisions which are subject to appeal to the Tribunal;
- b) To give the Tribunal supervisory jurisdiction over all of the Commission's decisions – that is, essentially, to give the Tribunal power of judicial review, i.e. to review whether the Commission had taken its decisions reasonably.

229. Tribunals are creatures of statute and have to act within their specific statutory jurisdiction. The jurisdiction is usually set out by giving a tribunal power to hear appeals from specific decisions of the relevant administrative or regulatory body. Tribunals are not given overall supervisory jurisdiction. The High Court, by comparison, has an inherent supervisory jurisdiction which it exercises in its judicial review function. The two are linked in that the High Court has power to judicially review tribunals as well as administrative and regulatory bodies.

230. We recommend that the Home Office should review other areas of excluded decision-making with the aim of adding them to the Tribunal's remit wherever a strong objection is not found.

231. We recommend that the Tribunal be able to hear appeals against any decision of the Charity Commission (including 'non-decisions', such as a decision not to make a scheme or order), on any point of law, on any basis.

232. We also recommend that the Tribunal should have the power to award compensation and/or costs against the Charity Commission.

Cost of appeals to the tribunal

233. One of the key aims of introducing the Tribunal was that taking appeals before it should be inexpensive enough to allow decisions by the Charity Commission to be challenged. A contrast was drawn with appeals to the High Court, which are generally accepted to be so expensive that charities are almost invariably precluded from making them.²⁵² The Charities Law Association (CLA) told us:

251 Qq709-714 (Ms Peacock & Mr Dibble)

252 Private Action, Public Benefit, September 2002, paras 7.71-7.75

“In general, charities cannot afford (or are understandably unwilling) to take expensive legal action, as testified by the tiny number of charity cases taken in recent years. Moreover, charities are run by volunteers. Accordingly, a complex system is likely to deter many charities from bringing claims to the Tribunal. We therefore consider it vital that the Tribunal is inexpensive and simple for charities to use”.²⁵³

“[The cost] depends on the degree to which the rules laid down by the Lord Chancellor are based on the complexities of the rules of evidence and so forth that you get in the industrial tribunal or whether the pole is set lower and it is deliberately designed to have a chairman who is more willing to be more like a continental chairman, i.e. to help the applicants come to a decision rather than sitting there in judgment. So I think there is a real argument for the way the rules of that tribunal should be framed”.²⁵⁴

234. Witnesses from smaller charities, however, were unconvinced or doubtful that appeals to the Tribunal would actually be inexpensive. The Minority Rights Group International told us that “the essential problem would be that charities would still be dissuaded from taking appeals because of the perceived costs involved”.²⁵⁵ The Myasthenia Gravis Association said:

“... we support very strongly the Appeals Tribunal provision. We also are very concerned about costs and the procedures and we are a bit concerned that the whole issue of procedure is currently being left to rules which will be determined later by the Lord Chancellor and I believe that the Bill should say more on its face about these issues about access and cost”.²⁵⁶

235. Larger charities were also concerned about this issue: Oxfam said it would welcome clarification about how cases brought to the Tribunal would be funded.²⁵⁷ In response to the Committee’s concerns about the possible costs to charities of appeals to the Tribunal, the Charity Commission told us:

“...the Tribunal will form the forum of factual adjudication in those cases in which legitimate reviews of the Commission’s decisions are requested. It will be a low-cost and more informal forum for determination of those issues. We expect to see an increase in the number of challenges to the Commission’s exercise of their powers as a result. We expect the adjudication to be quicker and more final and those using the service to be more satisfied by its outcome than, as you have pointed out, the rather cumbersome and expensive legalistic process of going to the High Court for redress”.²⁵⁸

253 Ev 76, para 19

254 Q246 (Mr Lloyd)

255 Q857 (Mr Lattimer)

256 Q856 (Mr Finney)

257 Ev 569, para 20

258 Q692 (Mr Dibble)

236. We asked why cases brought before the Tribunal should be cheaper than those brought before the High Court, given that in most cases there would probably be the same number of lawyers doing the same job. The Charity Commission told us “the parties appearing before the Tribunal do not have to be legally represented and the Commission itself would not necessarily call on external legal support to put its own case”.²⁵⁹ We do not find this a convincing answer, given the inadvisability of charities’ eschewing legal support in these circumstances and the fact that the Commission is well provided with in-house lawyers. In fact, we noted that the Commission estimates in the costings accompanying the draft Bill that each case before the Tribunal will on average cost them between £3,000 and £5,000 to process, so it sounds as if they intend to devote quite considerable resource to fighting cases.²⁶⁰ Even if charities represented themselves, they might still incur heavy cost if the Tribunal awarded costs against them.

237. The Home Office replied in similar terms to the same question. The Minister said that in many cases it would be possible for people to appear before the Tribunal without qualified legal representation.²⁶¹ We suggested that the draft Bill should provide for a suitors’ fund or legal aid as a means of ensuring access to the Tribunal. She replied that she did not think such devices were required and that, in any case, it would not be necessary to refer to them on the face of the Bill for them to be used.²⁶² However, she did say that:

“Were it to appear that in practice the existence of the Tribunal did not make it more accessible to people to take cases and so on... as a matter of policy Government might then consider making more resources available to complainants”.²⁶³

Conclusion

238. We were not convinced by arguments from the Minister and the Charity Commission that charities could or would successfully use the Tribunal without expensive legal representation. We agree with the Charity Law Association that much will depend on what rules the Lord Chancellor lays down for the Tribunal’s procedure²⁶⁴ and, as the Myasthenia Gravis Association pointed out to us, these are still to be determined.

239. We recommend that the Commission formally state that they will not seek to recover costs from an unsuccessful appellant (except where the Tribunal decides that the appeal amounted to an abuse of process).

240. We recommend that consideration be given to including in the Bill a residuary power for Ministers to make regulations enabling financial assistance to be given to parties to the Tribunal if it becomes apparent in the light of experience that access to the Tribunal is being limited by cost.

259 Q707 (Mr Dibble)

260 Draft Charities Bill, p151, para 1.64. (An estimate of £150,000-£250,000 per annum is given for the cost to the Commission of processing 50 appeals – that is, a cost of between £3000-£5000 per appeal.)

261 Qq1039 and 1040 (Ms Mactaggart MP)

262 Qq1041 and 1044 (Ms Mactaggart MP)

263 Q1044 (Ms Mactaggart)

264 Q246 (Mr Lloyd)

241. We recommend that the rules to be made by the Lord Chancellor on appeal to the Tribunal should include provision for either the Charity Commission or the Attorney General to refer matters to the Tribunal for interpretation without individual charities having to incur the costs of pursuing a specific case. We note the position of the Attorney General on this point.²⁶⁵

6 Charitable Incorporated Organisations

Current Position

242. There is no legal structure specifically for charities. Charities use a variety of legal structures (which is beneficial to them) but they have to be adapted and this can present problems for charities. Charitable trusts and unincorporated associations place personal liability on trustees in respect of any dealings with third parties. This is a particular problem for charities involved with service delivery. Many charities are companies limited by guarantee to limit liability but they face the disadvantage of dual registration, regulation and reporting between the Charity Commission and Companies House. In addition, company law is designed for profit-making enterprises and subject to European Union law, which does not fit easily with charities and charity law.

Draft Bill Changes

243. Clause 26 and Schedule 6 of the Bill provide a completely new legal structure for charities; the Charitable Incorporated Organisation (CIO). The CIO will be a corporate body with limited liability with one or more members and registered with the Charity Commission. Provision is also made for the conversion of a charitable company or registered friendly society to a CIO by application to the Charity Commission.

244. Any two or more CIOs will be able to apply to the Charity Commission to be amalgamated but the Commission will have power to refuse amalgamation if it considers that there is a serious risk that the new CIO will be unable properly to pursue its purposes – section 69J(9). The Secretary of State will be also be given wide power to make regulations about the administration of CIOs generally by section 69P.

Evidence

245. There was general welcome for the CIO as a useful means of incorporation²⁶⁶ and of easing the burden of dual registration.²⁶⁷ The Local Government Association considered that the CIO would make it easier for charities to develop partnership approaches with local authorities and other voluntary and community organisations.²⁶⁸ However, many

²⁶⁵ Letter to Lord Phillips of Sudbury, 15 September 2004, see p200

²⁶⁶ Ev 3, para 2.20

²⁶⁷ Ev 35, para 3.5

²⁶⁸ Ev 103, para 3

organisations noted that the lack of detail about the CIO made it difficult to judge its ultimate benefit.²⁶⁹

246. A number of charities and their professional advisers did comment on specific clauses in the Bill. There was particular objection to the power to be given to the Charity Commission to control mergers in section 69J(9).²⁷⁰ The Joseph Rowntree Charitable Trust was disappointed that the recommendation from *Private Action, Public Benefit* that this should be available in a foundation form (without members) as well as a membership form, is not included in the bill: “The likely outcome of this omission is that a number of CIOs will go through the motions of maintaining a nominal membership structure, simply to secure limited liability, which is precisely the sort of inappropriate and wasteful governance arrangement that the CIO was designed to remove”.²⁷¹ The Charity Finance Directors Group said there was a marked lack of detail about the rules relating to insolvency, winding up and dissolution and charges for converting to a CIO.²⁷²

247. Perhaps a typical response from existing charities to the new legal form was given by Mr Finney of the Myasthenia Gravis Association:

“The CIO, in principle, we are interested in, but we are unlikely to rush into that because we are incorporated already as a company limited by guarantee and I think we would be very cautious about seeing how the new CIO operates before we leap into that one.”²⁷³

248. One question that we had in considering the proposals for the CIO was that of its distinctiveness from the Community Interest Company (CIC). The Companies (Audit, Investigations and Community Enterprise) Bill contains proposals to establish a CIC. Mr Lloyd of the Charity Law Association made clear that a CIC was a very different structure from a CIO and was designed to serve a different purpose.²⁷⁴ His evidence also brought out the advantages to charities of the CIO. We found the following summary very helpful:

“The CIO, the Charitable Incorporated Organisation, is designed as a one-stop shop exclusively for charities to be able to get the benefits of limited liability by registering with the Charity Commission and obviating the need to undergo dual registration in order to obtain limited liability by registering as a company with the Registrar of Companies and as a charity with the Charity Commission. It is a method of giving a simple form of limited liability status exclusively to charities. That is that packet. The Community Interest Company has been designed in order to allow limited liability for companies, whether limited by shares or by guarantee, to be established as generally not-for-profit companies under English law with a not-for-profit status that means they cannot be privatised once they have been set up; like a charity, they

269 Ev 127, para 3.7

270 Ev 9, para 2

271 Ev 460, para 12

272 Ev 127, para 3.7

273 Q811

274 Q270 (Mr Lloyd)

are there for the long term. It is to stop demutualisation and that sort of privatisation. They are aimed at organisations principally that are not charities”.

249. The evidence showed that the CIO is a very welcome development for charities, that it will be deregulatory and that it will go a long way to alleviate the problem of personal liability for trustees. The evidence also showed that the precise form of the CIO and the detailed provisions in the Bill are not well understood. The concern over the effect of the provisions is understandable when the explanatory note to the Bill for the proposed sixteen new sections and a new Schedule to the 1993 Act dealing with the CIO consists of five lines of text with no explanation of individual sections.

250. We conclude that the new legal form of a Charitable Incorporated Organisation is welcome but that the real Bill will need to be accompanied by more detail in the explanatory notes on how it will operate in practice.

251. We recommend that clause 26 and Schedule 6 are redrafted to reflect the intended elements of the Charitable Incorporated Organisation and in a far more understandable form.

7 Trustees

Current position

252. The role of charity trustee is a voluntary one. The general, or default, rule is that a trustee should not receive any financial benefit from acting as a trustee. A trustee is not only barred from being remunerated for acting as a trustee; but the default rule is that he or she cannot be paid for goods or services rendered to a charity. There must be specific authority in a charity’s governing instrument or permission from the Charity Commission before a trustee can be paid. The Commission will only authorise payment where there is a clear benefit to the charity and the amount paid is reasonable.²⁷⁵ A trustee is, however, entitled to be reimbursed from charity funds for expenses properly incurred in carrying out his or her duties.

253. Individuals can become personally liable when acting as a charity trustee in two ways. First, they can become liable for breach of trust, i.e. for acting in contravention of the duties imposed on them as trustees. Secondly, they can become subject to third party liabilities such as breach of contract.

254. The duty of care imposed on trustees is generally to act with such skill and care as is reasonable in the circumstances. Trustees who act reasonably and prudently and have primary regard to the interests of the charity are highly unlikely to incur personal liability for breach of trust. As a long stop, the court has power under section 61 of the *Trustee Act 1925* to relieve a trustee from liability who is technically in breach of trust but who has

²⁷⁵ Payment of Charity Trustees, CC 11, Charity Commission, <http://www.charity-commission.gov.uk/publications/cc11.asp>

acted honestly and reasonably. Trustee indemnity insurance against liability for breach of trust can only be purchased by a charity if there is explicit power in the charity's governing instrument or the Charity Commission gives permission as it amounts to a personal benefit for a trustee. Whilst the Charity Commission has recently made obtaining permission easier, it is still a process which has to be gone through.²⁷⁶

255. Charity trustees can purchase insurance in the usual way to protect themselves from liability to third parties. Charities which have more than occasional dealings with third parties often adopt the structure of a company to limit liability.

Draft Bill changes

256. Clause 27 of the Bill will allow trustees to be remunerated for providing goods and services to a charity if four conditions are satisfied:

- a) First, the amount of the remuneration must be reasonable and be set out in a written agreement.
- b) Secondly, the trustees must be satisfied that it is in the best interests of the charity for that trustee to provide the relevant services and at that cost.
- c) Thirdly, if more than one trustee is being remunerated, such trustees must be in a minority.
- d) Fourthly, the governing instrument must not contain an express prohibition against the relevant trustee being paid.

In addition, by new section 73B, before entering into any remuneration agreement the trustees must have had regard to any guidance issued by the Charity Commission and exercise the statutory duty of care in section 1(1) of the *Trustee Act 2000*.

257. Clause 28 provides that a trustee who would be entitled to remuneration under an agreement is disqualified from taking part in any decision made by the trustees in relation to that agreement. If a trustee does take part in a decision about his own remuneration he is made liable to a criminal penalty and can also be directed by the Charity Commission to repay any such remuneration.

258. The Charity Commission will have power to relieve trustees from personal liability for breach of trust by clause 29. The power applies to a trustee who has acted honestly and reasonably and ought fairly to be excused. The Charity Commission is, in effect, given the power of the court under section 61 of the 1925 Act.

²⁷⁶ Charities and Insurance, OG 100, Charity Commission, <http://charity-commission.gov.uk/publications/cc49.asp>; Trustee Indemnity Insurance, OG 100, Charity Commission, <http://www.charity-commission.gov.uk/supportingcharities/ogs/index100.asp>

Remuneration of trustees

Evidence

259. A number of organisations that submitted written evidence, including the NCVO,²⁷⁷ were concerned to stress the importance of the voluntary nature of trusteeship and some considered honorary appointment to be essential for the maintenance of confidence in a charity.²⁷⁸ Other charities reported increasing difficulty in getting people to act in a voluntary capacity²⁷⁹ and suggested that a charity should be able to pay a trustee for acting as such.²⁸⁰ There was almost unanimous welcome however, for the power to permit charities to pay trustees for providing goods and services, even from those organisations which supported the voluntary principle.²⁸¹ The Society of London Theatre considered that it would enable charitable theatres to attract eminent individuals with a high level of knowledge and experience to their boards.²⁸² The possibility of abuse was recognised and the need for the conditions set out in clause 27 to be complied with before payment could be made were considered appropriate.²⁸³

260. The solicitors Bates, Wells and Braithwaite, told us:

“We think it would be useful to state that any provision in the trusts of a charity permitting remuneration for professional services rendered to the charity is to be taken as including remuneration for services provided by any person within the proposed new Section 73 A. Otherwise, we think that constitutions will need to be amended unnecessarily where they contain a general provision prohibiting remuneration and then permission for professional charging. There has of course been great confusion as to what ‘professional’ means in this context and it has been narrowly interpreted by the Courts”.²⁸⁴

“In Section 73B (3) it should be made clear that the Trustee Act in this context applies to all charities, however established (the Trustee Act does not normally apply to companies, for example, unless they are themselves trustees)”.²⁸⁵

261. The Committee commissioned research from one of our specialist advisers, Margaret Bolton, into payment of trustees in the United States.²⁸⁶ In the US, there are no general restrictions on the payment of trustees for their duties as trustees, for other services provided to the charity or to meet their expenses. Payments can be made provided they are reasonable. However, there are complex legal rules designed to prevent trustees benefiting from their trusteeship to the detriment of the charity. Different rules apply to ‘public

277 Ev 4, para 2.21

278 Ev 259

279 Q53 (Ms Marsh)

280 Ev 361, para 8

281 Ev 238, para 7

282 Ev 584, para 2

283 Ev 80, para 73; Ev 607, para 9

284 Ev 535, clause 27

285 Ev 535, clause 27

286 Ev 660-664

charities²⁸⁷ and private foundations.²⁸⁸ But media attention in the US has recently focused on excessive trustee payment by private foundations and other issues including conflicts of interest, fund-raising practices, charities being set up as tax shelters and charities serving as a conduit to finance terrorist activities.

262. The US experience carries warnings about the risk of loss of public confidence in charities generally through excessive payments to trustees. We are not satisfied that recruitment problems have reached such a level in this country that a power wider than that proposed in the draft Bill is necessary.²⁸⁹

263. Considerable concern was expressed about the possible imposition by clause 28 of a criminal penalty on a trustee who takes part in a decision about their own remuneration. Comments varied from “unacceptable”²⁹⁰ at one end of the scale to “draconian”²⁹¹ at the other. We note that the Home Office has proposed to add the offence to the list in section 94(2) of the 1993 Act so that no prosecution could take place without the consent of the Director of Public Prosecutions (DPP). Bircham Dyson Bell considered that criminal sanctions would introduce a further deterrent to volunteering and make it more difficult to recruit trustees.²⁹²

264. The draft Bill already contains a number of protective provisions to guard against abuse for example, a new section 73B says that before entering into a remuneration agreement the trustees must have regard to any guidance issued by the Charity Commission. The Committee recommends that this guidance reflects best practice in procurement making it clear for example, that charities should test the market (for example, by undertaking research on prices or through competitive bidding for larger contracts) to ensure that contracting with a trustee is in the charity’s best financial interest.

265. The Committee are concerned about a blanket imposition of a criminal penalty for breach of trust, particularly as the power is likely to be used by many small charities to enable basic work such as building maintenance to be done by trustees at cost. **We conclude that cases should only be pursued where a trustee acts dishonestly or recklessly and recommend that a requirement of dishonesty or recklessness is added to the definition of the offence in 73 (c) 4.**

266. **We consider that the imposition of a criminal penalty would be counterproductive and recommend that the Bill should impose a civil penalty without leaving someone with the stigma of a criminal conviction.**

287 A public charity must meet certain operational conditions (for example, that it is operating or will operate as a school, hospital or religious institution) and normally derive at least one third of their annual funding from the public, or they ‘support’ such organisations.

288 A private foundation generally derives its financial support from the contributions of a single individual, family, corporation or other entity. They receive less favourable tax treatment.

289 Q833(Mr Curley); Q834 (Mr Lattimer)

290 Ev 536, clause 28

291 Ev 366, para 2.13

292 Ev 389, para 18

Personal liability

267. Differing views were taken as to the effect of potential personal liability on discouraging people from becoming trustees. Ms Rhona Howarth of Governance Works stated that trustees either did not understand the risk, or, if they did, they found ways to manage the risk.²⁹³ On the other hand, Simon Cramp, a trustee of two large charities, considered that lack of indemnity insurance for personal liability deterred people from being a trustee.²⁹⁴ Bates Wells & Braithwaite regarded the present position, in relation to the ability of trustees to take out indemnity insurance, as unsatisfactory and suggested that the Bill should include a power for trustees to take out such insurance subject to safeguards similar to those in clause 27.²⁹⁵ We note that the Charity Commission has recently simplified the procedure for charities to obtain their agreement to purchase trustee indemnity insurance.²⁹⁶ The proposed power in clause 29 for the Charity Commission to be able to relieve a trustee from liability has been welcomed as a “laudable proposal”²⁹⁷ and “long awaited”.²⁹⁸

Other points on trustees

268. The following additional points were made by the Charity Law Association and Bates, Wells and Braithwaite, in relation to trustees:

“We would also like to see an obligation placed on the Charity Commission to permit the Trustees of the Charity concerned to add their comments to the face of any published report of an enquiry [under section 8 of the Charity Act 1993].”²⁹⁹

“There is an anomaly in the 1993 Act which allows the Charity Commission to remove by order charity trustees, officers or staff, but not members where the charity is incorporated. This can lead to the ludicrous situation, where the members are the same individuals as the removed trustees, that they can simply exercise their powers in general meeting to reinstate themselves.”³⁰⁰

293 Q217 (Ms Howarth)

294 Ev 419, para 2

295 Ev 540, para 2.1

296 Charities and Insurance, CC 49, Charity Commission, <http://charity-commission.gov.uk/publications/cc49.asp>; Trustee Indemnity Insurance, Charity Commission, OG 100, <http://www.charity-commission.gov.uk/supportingcharities/ogs/index100.asp>

297 Ev 9, para 5

298 Ev 81, para 77

299 Ev 73, para 19

300 Ev 73, para 21

“We believe that anyone who is barred from being a trustee under section 72 *Charities Act 1993* should be disqualified for a maximum period of 5 years unless he or she has been convicted of an offence involving dishonesty. In the latter case it should be in the Charity Commission’s discretion to allow someone back to serve as a trustee on application after 5 years. A lifetime disqualification is entirely disproportionate bearing in mind the Rehabilitation of Offenders Act.”³⁰¹

269. We recommend that the Home Office review the proposed legislation to ensure these additional points on trustees are covered in the real Bill.

8 Fund-raising and public collections

270. Maintaining public confidence in charities is a major driver behind the draft Bill. One concern is that the fund-raising methods used by some charities could undermine that confidence. Concern has, for example, recently been expressed in the media about the solicitation of direct debit or standing order commitments (sometimes known as face-to-face fund-raising). The draft Bill provides both for self-regulation of fund-raising generally and new arrangements for one specific aspect of fund-raising, public collections, including provision to bring clearly within the scope of regulation direct debit or standing order solicitation. This combination of statutory and self-regulation should address concerns about this form of fund-raising. Statutory regulation should for example, guard against too many collectors being on the streets at any one time. Self-regulation should ensure that these collections are conducted in an appropriate manner (for example, collectors are not overly aggressive or hectoring). As explained in more detail below, should self-regulation fail, the Secretary of State has reserve powers in the Bill to introduce further statutory regulation. In this chapter we consider first the effect of the draft Bill on the self-regulation of fund-raising generally. Secondly, and in more detail we review the new arrangements for public collections. Thirdly, we refer to the statements to be made by professional fund-raisers and commercial participators.

Self regulation of fund-raising

271. Recently, an independent commission (the Buse Commission) was established on the initiative of the Institute of Fundraising to make proposals for the consolidation and development of fund-raising self-regulation across all fund-raising methods including street collections, direct mail and TV and press advertising. The Commission reported in January this year and consideration is being given by sectoral bodies to how the work might best be taken forward.³⁰² The draft Bill contains (clause 36) a reserve power for the Secretary of State to make further regulations to control fund-raising. The intention is that this power would only be used should the new self-regulatory scheme fail.

301 Ev 80, para 72

302 Further information about the Commission including its January report is available on its website: www.busecommission.org.uk

Evidence

272. We received a significant number of submissions supporting self-regulation by the charitable sector. NSPCC, however, said their support was conditional on the Secretary of State having power to intervene if self-regulation did not work, since they explained “under current arrangements, self-regulation is not co-ordinated and is too informal”.³⁰³

273. The draft Bill does not outline the criteria against which the success of a self-regulatory scheme will be measured, and therefore under what circumstances the reserve power will be used. A number of organisations, including the Institute of Fundraising, Help the Aged and PricewaterhouseCooper, have called for the publication of criteria by which this would be determined. In oral evidence, we heard that charities “need to know where the Home Secretary would determine that self-regulation had not worked” and that the criteria be “proportionate and reasonable”.³⁰⁴

274. Some organisations wanted to see criteria on the face of the Bill.³⁰⁵ The Institute of Fundraising, however, suggested that criteria should not be set out in statutory guidance because further research and consultation were needed in the sector to establish the scope of the self-regulatory scheme and what the criteria for success should be. They considered that a successful regulatory scheme should have targets set by the sector, not the Government and that the criteria should evolve alongside fund-raising techniques.³⁰⁶

275. In its response to the Strategy Unit, published in July 2003, the Government stated its intention to publish the criteria by which the Home Secretary would judge the self-regulatory scheme. In evidence, the Government told us first that they intended to work with the Charity Commission to establish criteria,³⁰⁷ and later that they would work with the sector to do so.³⁰⁸ It would have been useful for the public and the Committee to have been able to scrutinise the criteria alongside the draft Bill.

Conclusion

276. On the basis of the limited evidence we have heard, the Committee supports the approach of encouraging effective self-regulation backed by the prospect of reserve powers if that is unsuccessful.

277. We recommend that the explanatory notes published with the Bill set out more fully the criteria by which the Secretary of State will determine whether self-regulation is working effectively.

303 Q90 (Ms Marsh)

304 Q95 (Mr Etherington and Ms Marsh)

305 Ev 417, para 16

306 Ev 94

307 Ev 297

308 See p140 of Schedule (points made about the draft Bill) clause 36

Public collections

278. One way in which charities raise funds is through *public collections*. There are basically two types of public collection covered by different acts dating respectively from 1916 and 1939.³⁰⁹

- a) Street collections – collections in the street or other public places – the current street collections legislation does not cover semi-public places like public spaces in railway stations or in airports. There is also a lack of clarity about whether it covers solicitation for direct debit commitments or not – some local authorities take the view that such collections need to be licensed, others do not.
- b) House-to-house collections.

The current situation

279. Public collections have often caused concern because of their potential to create a public nuisance and the risk that they may lead to abuse – for example, people fraudulently claiming to be collecting for charity. The present regulatory regime is based on the *Police, Factories etc, (Miscellaneous Provisions) Act 1916* for street collections and the *House-to-house Collections Act 1939*. Essentially, this legislation provides as follows.

- a) Street collections (except for London) are under the control of local authorities, which have powers to license them (but are not obliged to). Most local authorities (but not all) require street collections to have a licence.
- b) House-to-house collections (except for London) are licensable by local authorities. The legislation provides for a national system and every local authority is expected to license house-to-house collections (but they do not necessarily do so). But a charity collecting over a large part of the country can get an Exemption Order from the Home Office – this exempts them from local authority control, so they do not have to obtain a licence from a large number of local authorities but they are still required to notify the local authority of their intention to collect in their area.

280. In London, both street collections and house-to-house collections are controlled by the police instead of local authorities. Local authorities have different views on the licensing of the collection of direct debit commitments. However, generally speaking such public collections are licensed when conducted house-to-house but not in the street. Under the current legislation, local authority decisions not to grant a house-to-house collection licence can be appealed to the Home Office. There is no formal right of appeal against decisions not to grant a street collections licence.

281. There has long been a feeling in the sector and Government that this messy system should be replaced by one which was more integrated and provided better and more comprehensive regulation. Provisions for an integrated system of control were enacted in Part III of the *Charities Act 1992* but never brought into force.

³⁰⁹ For this and following background paragraphs, see draft Charities Bill, pp157-158 and 163-168

The draft Bill

282. The draft Bill and associated measures will set up a new comprehensive scheme of regulation, the key elements of which are:

- a) All local authorities would be required to license all public collections (except very small and local ones – e.g. carol singing), including direct-debit collections and collections in semi-public areas such as supermarket forecourts or railway stations. In London, responsibility for public collections would be transferred from the police to the London boroughs.
- b) Licensing would have two stages:
 - i. The Local Authority would issue a *certificate of fitness*. This would certify that the collection promoter was fit to carry out a collection (e.g. had no relevant criminal convictions). Once issued, the certificate would be valid for up to five years.
 - ii. The Local Authority would issue a *permit* based on whether there was *capacity* in their area (that is, whether or not too many collections were being conducted).
- c) House-to-house collections would be licensed in the same way but (i) only a certificate of fitness would be required and (ii) house-to-house collections of *goods* (as opposed to money) would require no licensing at all but in both cases notification to the local authority would be required.
- d) Instead of National Exemption Orders issued by the Home Office allowing charities to collect house-to-house over large areas of England and Wales, there would be a “lead authority” system. Under this, a charity could get a certificate of fitness from the local authority in whose area its registered office is located. This would then apply throughout England and Wales.
- e) For street collections, the organisation would then only need to get a permit from the local authority in whose area it wished to collect.
- f) For house-to-house collections, the organisation would only need to *notify* the local authority in whose area it was collecting of the dates and locations of collections.

283. Clause 39 of the draft Bill requires promoters to notify door to door collection of goods to the local authority, specifying the purpose for which the proceeds of the appeal are to be applied, the date or dates on which the collection is to be conducted, the location within which the collection is to be conducted (and such other matters as shall be prescribed). Such notifications must be made at least 14 days before the collection date.

284. Clause 41 of the draft Bill provides that applications for permits for street collection of cash and direct debit commitments cannot be made more than six months before the start of the collection and should be made at least 14 days before the collection date.

285. These proposals have implications for charities and local authorities and the Regulatory Impact Assessment attached to the draft Bill provides estimates of their costs and benefits.

Benefits and costs

286. The benefits of the proposed scheme are not quantified but are said by the Home Office to be:

- a) Significantly reducing the confusion which currently exists among charities, local authorities, professional fund-raising organisations and the public;
- b) Promoting greater uniformity in the application of the law;
- c) Increasing public confidence in public collections.³¹⁰

287. The Regulatory Impact Assessment (RIA) identifies three main sources of cost for the proposals:

- a) Costs to local authorities outside London. The RIA says these should be negligible: “The scope of the current licensing regime would be extended under the new scheme but the number of checks undertaken by each individual local authority would be reduced”.³¹¹
- b) Costs to the London local authorities as a result of the transfer of the licensing regime from the police to them. The RIA estimates this as £32,500-£103,584 a year.³¹²
- c) The costs of appeals to the Magistrates’ courts against the refusal or withdrawal of applications for a certificate of fitness or a permit. The RIA estimated these costs as £14,104-£26,404 a year.³¹³

288. The Institute of Fundraising, the Institute of Licensing, and the Local Government Association all told us that the RIA’s assertion that the new scheme would be cost-neutral was untrue.³¹⁴ The PFRA also told us that they believed the estimated costs for London local authorities were far too low. They were based on the Metropolitan Police’s costs of £33,000 for 226 applications. But, the PFRA told us, the police figures were based on the number of cash collections, the only ones the police licensed. Local authorities, under the new scheme, would have to license non-cash collections (e.g. soliciting donations by direct debit). PFRA thought that a conservative estimate of the number of applications to London local authorities would be 14,000 a year. The fact that London local authorities had no previous experience of licensing charitable collections also meant that extra costs would be incurred as they climbed the learning curve.³¹⁵

289. LGA sent us a submission setting out the reasons they thought extra costs would be incurred by local authorities as a result of the new scheme. These included:³¹⁶

310 Draft Charities Bill, p162

311 Draft Charities Bill, p136

312 Draft Charities Bill, p136

313 Draft Charities Bill, p136

314 Q345 (Mr Watt, Ms Coombes and Councillor Green)

315 Ev 102, paras 3.3

316 Ev 121

- a) It is not compulsory to license street collections and some local authorities currently do not do so. The new arrangements will make it compulsory for all local authorities in England and Wales to licence street collections in their area. Authorities which had not operated the old arrangements will not make offsetting savings by moving to the new arrangement therefore, as the RIA assumes.
- b) The new arrangements increase the types of collections to be licensed (e.g. solicitations for direct debits): this will increase the number of applications.
- c) Local authorities will have a duty to provide fair access to applicants – this means they will have to develop a licensing policy. The LGA estimate this will cost about £12 million.
- d) The lead authority system may lead to an increase in the number of organisations conducting collections across several local authorities, leading to further costs.

290. A further – and most important – source of cost, however, would be enforcement of the new arrangements. This has not been taken account of in the RIA. It was emphasised to us that without enforcement the new arrangements simply would not produce the benefits they promised. The Institute of Fundraising told us:

“Enforcement is a very important point... because under the current regulation enforcement is pretty much not carried out at all. It is getting new structures in place and ensuring that they are properly funded. If that does not happen then the benefit of the universal application of the proposals simply will not be felt because it will not be enforceable”.³¹⁷

291. The RIA itself lends support to this point:

“Some local authorities have said that they are unable to undertake or undertake only limited levels of enforcement in connection with the current licensing regime. Of the 33 local authorities spoken to in relation to this matter 10 indicated that they undertook no enforcement action... a further seven said they were able to undertake a limited or small amount of enforcement work”.³¹⁸

292. We recommend that the Home Office revisit its financial estimates in discussion with the charitable sector and Local Government Association with a view to ensuring the real Bill is accompanied by a more through assessment of the costs and benefits of the scheme for public collections.

293. The Committee was also concerned that the measures in the Bill should not place an undue extra burden on charities, and also that the Charity Commission should have the resources to take on any extra duties. **We recommend that the Home Office consider both the regulatory burdens and the resource issues carefully in bringing forward proposals in the new legislation.**

317 Q309 (Mr Watt)

318 RIA, para 2.4.5

Evidence

294. In considering the workability of the fund-raising proposals we have examined three issues raised in the evidence:

- a) Will the new scheme combat abuse?
- b) Are the notification arrangements satisfactory?
- c) Should certificates of fitness to conduct public collections be issued by local authorities?

295. Evidence on the current extent of abuse in public collections pointed in two directions. The Regulatory Impact Assessment says:

“There are no figures currently available on the level of bogus street collections but respondents to [...] consultation, generally did not believe that bogus street collecting activity represented a major problem.”³¹⁹

296. The Institute of Fundraising (IOF) told us:

“Levels of fraud in relation to public activities are very low. Most of the evidence about it is anecdotal anyway but a case of fraud in relation to a charity has a disproportionate impact on the public and it is covered by the media. You very seldom see ‘Charities Performing Well Today’. What you do see is ‘Illegal Rose Selling Scam Nets £30,000 in Bolton Pubs’.”³²⁰

297. On the other hand, we received first-hand testimony from the Institute of Licensing that bogus fund-raising in Leeds was a very serious problem (this evidence is summarised in the box below). The Local Government Association (LGA) supported this evidence. So did the witness from the Home Office, who told us: “I cannot see anything which persuades me that Leeds would be a special case. If the question is might this be going on in other cities of similar size, I think the indication must be yes because I do not think Leeds is special”.³²¹

319 Draft Charities Bill, p160, para 2.4.6

320 Q288 (Mr Watt)

321 Q1107 (Mr Corden)

The experience in Leeds

“There is a large problem with bogus fund-raising.... Forty-eight [prosecutions have been brought from 2002 to date] with regard to predominantly fraud and deception. The police are not interested in taking these cases forward but they should be taken out of the local authority hands. [The problems are related to] clothing collections.....street collections, collections of money from pub to pub. We are also talking about clothing banks which are placed indiscriminately in car parks..... We are talking about mass fraud across the country.....[These collections]..... are purporting to be on behalf of charities. They obtain headed notepaper from charities and use that to legitimise their collections throughout not just Leeds. One collection that I found that we enforced in Leeds we tracked back to Portsmouth and worked with Portsmouth local authority to undertake a joint prosecution on the specific company involved”.³²²

298. Swindon Borough Council told us:

“Our town centre is plagued by highly questionable companies selling prize competition cards....The standard patter used.....[is].... ‘would you like to nominate a organisation to receive a specially converted minibus’. The words (in clause 37 of the draft Bill) ‘in association with a representation that the whole or any part of its proceeds is to be applied for charitable, benevolent or philanthropic purposes’ are not sufficient to defeat these semantic tricks. Some reference to “or implied representation” would solve the problem. Second hand dealers who make reference to the ‘Third World’ and that all garments “are to be worn again” would be similarly thwarted”.³²³

299. Would the draft Bill deal with this problem? Again, the evidence we examined pointed in different directions. The Institute of Licensing told us: “The provisions laid down [in the Bill] for compliance will combat illegal collections and hopefully help eradicate fraud and deception providing a better climate for legitimate charitable collections, thus increasing public awareness and restoring public confidence”.³²⁴ The Institute gave as an example of how the draft Bill would help that it if raised fines from £200 to £5,000.³²⁵

300. There were, however, other measures which the Institute thought would help deal with abuse which the draft Bill does not contain. The Bill does not require unattended receptacles (e.g. collection tins on shop counters) to be licensed, or house-to-house collections for goods; and it does not oblige local authorities to inform lead authorities of offences committed by organisations applying for a certificate of fitness.³²⁶

322 Edited extract from Qq312 – 319 (Ms Coombes)

323 Ev 330, para 3

324 Ev 105, para 3

325 Q340 (Ms Coombes)

326 Ev 105-107, 6-14 and 20

301. The Public Fund-raising Regulatory Association pointed out that since there is a lack of statutory guidance on the details of the new licensing scheme, it was likely to increase rather than reduce inconsistent practice among local authorities.³²⁷ Furthermore, the Institute of Licensing said that the proposal to remove the licensing of public collections in London from the police and give it to the London local authorities, which had no experience of this function, would be unlikely to reduce abuse, at least in the short-term.³²⁸

302. The key problem, we were told by LGA and the IOF, was not so much what provisions the draft Bill contained as whether they would be enforced. That in turn depended on whether there would be funding for enforcement, something both bodies were clearly not convinced would be forthcoming.³²⁹ The Institute of Licensing told us:

“The draft Bill... is such an improvement on the legislation we work under currently. However, if it cannot be enforced by the local authorities it will have no bearing on the bogus fund-raising... I know that within England and Wales there are few local authorities currently that can afford or have the manpower to undertake enforcement and although the provisions have been set out in the draft Bill, whether or not they are used to combat this will be another matter”.³³⁰

303. We recommend that the Home Office urgently review its proposals on the regulation of fund-raising to ensure that the crimes described to us by Leeds City Council and Swindon Borough Council are adequately tackled by the real Bill.

Notification arrangements

304. We received a number of submissions which expressed concern about the notification requirements for the collection of goods house-to-house. Acorn Children’s Hospice said that while the

“removal of collections made house-to-house from the licensing system is to be welcomed...the benefit of this de-regulatory measure is totally negated by the specific notification requirements”.³³¹

305. The Association of Charity Shops told us that:

“specific date notification is currently not required by local authorities granting licenses to collect [goods house-to-house]; instead a generic description of the frequency and the general location of the collections is accepted in granting licenses”.³³²

306. They gave the example of a charity currently making 10 applications for licences and submitting 10 reports on their collecting activity each year who would be required to make

327 Ev 102, paras 2.1-2.3 – a point supported by the Institute of Fundraising and the Local Government Association, see Qq363 and 364 (Mr Watt and Councillor Green)

328 Ev 106-7, paras 15-18

329 Qq306-308 (Councillor Green) and 309 (Mr Watt)

330 Q340 (Ms Coombes)

331 Ev 353, para 2-3

332 Ev 339, para 9(ii)

1,250 notifications a year (“assuming that no one shop collects across more than one area very unlikely in urban settings”). They went on say that “the bureaucratic burden on the charity would significantly raise its operating costs”.³³³

307. The Association of Charity Shops also explained in their written evidence that the requirement to make the notification 14 days in advance “takes no account of how house-to-house collections of goods are made and is unworkable”. They explained that charity shops often have little storage space and organise collections at short notice when stocks are running low and when they have a volunteer driver available.³³⁴

308. The British Red Cross said in their written evidence that the provision in the Bill that applications for permits can not be made more than six months from the date of the first collection will cause them difficulties. They have an annual programme of national collections known as Red Cross Week and start planning for this major event at least one year in advance.³³⁵ The Hospital Broadcasting Association make a similar point in their submission, suggesting that prospective collection promoters should be able to apply for a permit up to 18 months before the intended collection in order to make the planning of annual campaigns easier.³³⁶

309. We recommend that the Home Office should review the notification arrangements before bringing forward the real Bill. We recommend that the Bill should include an order-making power to vary the time limits for notifications contained in clauses 39 and 41 of the draft Bill to enable these to be adjusted in the light of experience.

310. The Home Office should also consider whether, when a charity has notified a local authority of a collection, it should also inform the authority of the amount raised in the collection and the local authority should publish that information as soon as possible on its website.

Lead authority

311. As we have seen, clause 40 of the draft Bill introduces a system of “lead authorities”. Under this system, fund-raising organisations wishing to collect in more than one local authority area have to obtain a certificate of fitness from their “lead authority” (that is, the local authority in which the charity has its registered address). They will then be allowed to collect in any local authority area in England and Wales provided the local authority issues a permit saying its locality had the “capacity” to accommodate the collection (that is, that not too many collections are being conducted in the area). The Institute of Fundraising welcomed this proposal.³³⁷

312. Others were opposed to the ‘lead authority’ model for determining whether charities are fit to carry out public collections. The PFRA told us:

333 Ev 339, para 9(ii)

334 Ev 339, para 9 (i)

335 Ev 590, para 7.3.2

336 Ev 361, para 5

337 Ev 97, para 2.2

“Adopting the Lead Authority model will mean the burden of unified regulation falling disproportionately heavily in certain areas. A limited number of London boroughs will receive a significant volume of applications reflecting the concentration of charities [registered addresses] in certain areas. London Boroughs currently have no responsibility for charitable fund-raising; it is fair to assume that this will present significant management challenges to some of the Boroughs involved”.³³⁸

313. The Institute of Licensing expressed similar concerns.³³⁹ They did not think that local authorities would either have the competence or the resources to act as lead authorities. They suggested that the Charity Commission should be the lead authority, or some other body with experience of charities.³⁴⁰ The Royal Borough of Kensington and Chelsea, which might be expected to bear some of the new responsibilities for issuing certificates of fitness, said it “will be wholly unequal to the task of administering the licensing functions conferred upon it in the absence of very significant additional funding”.³⁴¹ The Local Government Association agreed. They told us:

“The most appropriate body to be the lead authority would be the Charity Commission or another such body. If you think of the burdens that could fall, say, on Islington, Camden and the Corporation of London where a number of national charities are based, to be the lead authority to assess those charities, then a burden could fall upon those central London local authorities disproportionately to other authorities. A national body like the Charity Commission, which has a wealth of experience both in terms of supporting charities and also regulation, would be the most appropriate in my view”.³⁴²

314. In response to the suggestion that the Charity Commission be the lead authority, the Minister said:

“People have talked about the burdens on the Charity Commission in this Bill and I think that will be an additional unnecessary burden and that it is a role which it sounds as though the officer for Leeds [the representative of the Institute of Licensing] has demonstrated that local authorities can properly provide and should”.³⁴³

315. However, the “officer for Leeds” had spoken to us eloquently about enforcement of the licensing scheme and not about the issuing of certificates of fitness. In fact, she had recommended that the Charity Commission should issue certificates of fitness.³⁴⁴ While we agree with the Minister that this would be an additional burden on the Commission, we

338 Ev 102, para 3.1

339 Ev 106, para 15

340 Qq329- 332 (Ms Coombes)

341 Ev 469, para 15

342 Q332 (Councillor Green)

343 Q1108 (Ms Mactaggart MP)

344 Q331-2 (Ms Coombes)

believe it is in a better position to judge fitness to carry out public collections and to do so at lower cost than local authorities.

316. In conclusion, we recommend that, while local authorities should retain powers of enforcement, the Charity Commission, rather than local authorities, should be the lead authority for granting certificates of fitness to carry out public collections.

Other points on fund-raising

317. The following additional points were made by Fund-raising Initiatives, the Institute of Fundraising and the British Red Cross, in relation to fund-raising:

“As the Bill is currently drafted charities headquartered in Scotland and Northern Ireland will not be able to fundraise in England and Wales. We believe this was unintentional and would seek further clarity.”³⁴⁵

“the right of appeal, set out at [clause] 40, 66H, should also apply in respect of decisions taken by local authorities relating to permits to collect and notified collections. The draft Bill is not clear that the right of appeal against local authority decisions extends beyond refusal to issue a certificate of fitness.”³⁴⁶

“when there is unauthorised fund-raising although s62 of the Charities Act exists this is a costly exercise for charities [and] we suggest that consideration is given to referring such matters to the Charity Commission to initiate for the public benefit.”³⁴⁷

318. The Charity Law Association told us:

“We are not sure that the definition of ‘charity fund-raising’, in Clause 36 (new Section 64 A(2) of the 1993 Act) really deals with the bogus fundraiser who is raising funds for unspecified benevolent/philanthropic purposes that are not charitable. We wonder whether there ought to be a Subsection (2) (d): “persons or companies raising funds for general charitable, benevolent or philanthropic purposes (in new Section 65B of the Act)”³⁴⁸

“This is a good opportunity to deal with the anomaly in the *Charities Act 1992* (CA ’92) whereby a Charity Promoter (CP) who raises fund for charitable purposes (as opposed to a particular charity) is subject to less than equivalent penalties. This is dealt with under regulations 7 and 8 of the Charitable Institutions (Fund-raising) Regulations 1994. This anomaly should be addressed.

“In particular s62 CA ’92 gives power to a charity to prevent unauthorised fund-raising, but this can be a costly exercise and it may be beneficial if the charity could

345 Ev 549

346 Ev 117, para 1.1

347 Ev 590

348 Ev 84, page 25, para 110

refer the matter to the Charity Commission to initiate for the public benefit, which would relieve the charity from having to do so.³⁴⁹

319. We recommend that the Home Office review these other points on fund-raising to ensure they are covered in the proposed legislation.

Statements by professional fund-raisers and commercial participators

Current position

320. Section 60 of the *Charities Act 1992* requires a professional fund-raiser (a fund-raising business either run by an individual or an organisation) to state in general terms the method by which their remuneration is determined. The same clause requires a commercial participator (an organisation entering into a joint promotion with a charity or voluntary organisation) to make a general statement outlining the method of determining the benefit to the charity or voluntary organisation of a promotional venture.

Proposals in the draft Bill

321. Clause 35 of the Bill amends section 60 of the 1992 Act so that professional fund-raisers and commercial participators will be required to provide more precise information about their remuneration. Current requirements for professional fund-raisers are described in the explanatory note to the clause as too imprecise “offering little assistance to those they were designed to help”.³⁵⁰

322. Under the draft Bill, professional fund-raisers will be required to state the actual amount of their remuneration or, if the actual amount is not known at the time of the appeal, will be required to give as accurate an estimate of the amount as is reasonably possible in the circumstances. Commercial participators will similarly be required to indicate the actual amount or, if this is not known at the time, an estimate of the amount, calculated as accurately as is possible in all the circumstances, which is to be given or applied for the benefit of the charity or voluntary organisation as a result of the promotional venture. This amount is called in the Bill ‘the notifiable amount’.

Professional fund-raisers

Evidence

323. Evidence received from Action on Disability and Development argues that while it makes sense to require paid fund-raisers to declare that they are paid and not volunteers, there should not be a requirement to provide more comprehensive financial information at the time of the appeal:

“We do not feel it is appropriate to automatically disclose specific amounts of remuneration. It is not relevant to each person, and therefore could serve to make

³⁴⁹ Ev 537-8, clause 35

³⁵⁰ p122, clause 35

people unnecessarily suspicious about why it is being pressed upon them.....We do feel it is important to distinguish between paid fund-raisers and volunteers and support the current position where a declaration to that effect is made either verbally or in writing (or both) before the potential donor signs the gift form. Charities are not required to make such a specific declaration in other areas of their work.³⁵¹

324. The Dialog Group picked up this theme arguing that transparency about costs was not required for all types of fund-raising appeals:

“Why the requirement to declare public collections costs when there is no such burden on press, direct marketing or TV activity? This is disproportionate, inconsistent and prejudicial.....Charities can provide the relevant information to the Charity Commission through SORP/SIR, and then clearly communicate cost to income ratios, in context, via its annual report. This is a consistent and proportionate response to the issue of transparency”.³⁵²

325. The CLA suggest that one problem with the proposal is that it will continue to “apply only to non-employed professional fund-raisers”.³⁵³ The implication is that the main distinction of interest to the public is whether a fundraiser is paid or not. Beyond this it matters little whether the fundraiser is a paid employer of the fund-raising organisation or of another organisation or an individual providing fund-raising services under contract.

326. Bates, Wells and Braithwaite also considered that the nature of the payment should be disclosed. The implication was that this might be more important to members of the public rather than the exact amount of the remuneration:

“In respect of third party fund-raising by a commercial third party.... it should be obliged to make it clear that it is paid and the nature of that payment should be disclosed whether it is a payment by results, fixed fee or otherwise”.³⁵⁴

Commercial participators

327. A number of submissions suggested that the proposed amendment to the 1992 Act concerning statements by commercial participators would not help to achieve greater transparency. It would simply lead to spurious accuracy because of the difficulty of specifying in advance what the exact return is likely to be from promotional ventures. As Oxfam say in their written evidence, “our concern is that many joint ventures are quite complex”.³⁵⁵ They give the example of the difficulty of specifying the return to a charitable institution from a concert or event. This is because: all the tickets may not be sold; tickets may have different face values; concessions may be available and the event organiser generally has to deduct expenses which for some events may be difficult to determine precisely in advance. They also give the example of credit cards: charities receive a

351 Ev 601

352 Ev 473, para 4.3

353 Ev 83, para 99

354 Ev 537, para 35

355 Ev 568, para 11

percentage of the consumers use of the card. Similar relationships exist with internet access providers and mobile phone providers. Oxfam explain that they want “to keep the statement as simple and as accurate as possible at the point of sale” and they “hope there will be some flexibility in how the definition of ‘notifiable amount’ will be interpreted especially to allow percentage figures”, where this is most appropriate.³⁵⁶

328. The Charity Law Association expressed similar reservations about whether the provisions reflected the complexity of many of the relationships that fund-raising organisations have with commercial participators. Their view was that more “general provisions supplemented by guidance agreed with charities [would] be preferable. For example, this guidance might allow CPs to express the amount that will pass to charity as a percentage of profits. This would accord with current practice e.g. in relation to sales of Christmas cards”.³⁵⁷

329. The Charity Law Association also said:

“To our knowledge there have been no criminal prosecutions against Professional Fund-raising Organisations (PFOs) or Charity Promoters (CPs) under the Charities Act 1992. The Crown Prosecution Service appears uninterested. We would recommend that the Charity Commission or possibly Trading Standards be given power to prosecute defaulting commercial organisations”.³⁵⁸

Conclusion

330. We recommend that clause 35 of the draft Bill should be amended to require all those fund-raising on behalf of charities who are paid for their services (whether under a contract of employment or otherwise) to take all reasonable steps to make this status clear when they are making an appeal. The written material, provided at the time to those making donations by direct debit or standing order, should explain the nature of their remuneration (i.e. whether they are paid a salary, a fixed fee or whether they are paid on a commission basis). In addition, fund-raisers should be required to carry with them a collectors identity card from the charity for whom they are acting stating the remuneration fund-raisers are receiving and this should be available on application when a member of the public requests it. The Home Office should issue guidelines on the information required to be available, including information on remuneration and other information taking into account what is practical, workable and not unduly burdensome. This could be supplemented by requiring that the basis of remuneration of fund-raisers and the ratio of costs to funds raised should be reported in the annual report of the charity.

331. We recommend that the Bill should be amended to say that commercial participators will be required to make as accurate a representation of the return from the venture as is possible in the circumstances. It should specify that new Home Office guidance will be produced covering the different forms of statement appropriate to

356 Ev 568, para 14

357 Ev 83, para 106

358 Ev 537, clause 35

different types of joint ventures between charitable institutions and companies and that this guidance should be based on extensive consultation with fund-raising organisations and commercial participators. We note that the Charity Commission had already proposed to develop and consult on guidance on the content of statements.

332. In order for these proposals to have any impact there needs to be enforcement. We therefore recommend that the Home Office takes up the recommendation made by the Charity Law Association and considers giving either the Charity Commission or Trading Standards the power to prosecute when these measures are breached.

9 Trading

Current position

333. There are, currently, three main types of trading by charities:

- a) Primary purpose trading – i.e., trading in the course of actually carrying out the primary purpose of the charity: for example, charging for admission to an exhibition by a charitable art gallery;
- b) Ancillary trading – i.e., trading linked to and carried out at the same time as carrying out the primary purpose of a charity: for example, sales from a bar run by a theatre charity for members of the audience;
- c) Non-primary purpose trading – i.e., trading with the sole or main aim of raising funds: for example, some charity shops or charity mail order catalogues.

334. In regard to (i) primary purpose trading and (ii) ancillary trading, charities both have the power to trade and are exempt from income tax on any profits from trading.

335. In regard to (iii) non-primary purpose trading, the situation is more complex. If the income from this type of trading is small or incidental – i.e., £5,000 or less than 25% of the charity's total income (up to a maximum of £50,000) – then the charity both has the power to trade and is exempt from income tax on trading profits. However, a charity can get around this restriction by setting up a separate trading company to carry on trading; the trading company can then transfer its profits back to the charity under the Gift Aid scheme, so that no tax is paid on them. There are some disadvantages to doing this: mainly that it results in additional paperwork.

Draft Bill changes

336. The draft Bill leaves the current position unchanged. The Strategy Unit, however, recommended that charity law should be changed:

“...to allow charities to undertake all trading within the charity, without the need for a trading company. The power to undertake trade would be subject to a specific statutory duty of care...”³⁵⁹

337. The Government rejected this recommendation. They said:

“Conducting trading activities within the tax exempt structure of charities would offend the principle of a level playing field with private sector businesses”.³⁶⁰

338. We understand the issue to be whether charities can conduct trade in areas beyond their primary purpose without setting up a separate trading company – in addition to the existing specific exemptions allowing a certain amount of non-primary purpose trading.

In favour of allowing charities to trade within the charity

339. Most of the evidence we received on this question supported reinstating the Strategy Unit recommendation to allow charities to trade within the charity, subject to a duty of care.³⁶¹ The major advantage of allowing charities to trade within the charity, we were told, would be to relieve them of the significant bureaucratic burden of having to set up a trading company to trade. ACEVO told us:

“The current necessity to establish trading subsidiaries places a considerable burden on charities... [It] involves considerable costs, including professional advice and fees, additional financial transaction, compliance costs and staff transferrals. These are of particular significance to smaller charities.

“Managing trading subsidiaries demands double accounting procedures with respect to VAT, management accounts, and tax returns. This makes allocating costs and apportioning charity reliefs complex and problematic.

“To avoid tax charges, subsidiaries must donate their entire taxable profit to the parent charity, making it difficult and expensive to build up working capital.”³⁶²

340. We received evidence from the National Coalmining Museum (a charity) illustrating the problem. The Museum runs conferences and a shop with a turnover exceeding £50,000. It therefore has established a separate trading company to run the shop and the conference facilities. The same staff must be apportioned between the charity and the trading company. The Museum buys 20 loaves of bread but has to keep two order books to record them. A record must be kept if a sandwich is exchanged between the trading

359 Private Action, Public Benefit, September 2002, para 4.47

360 Charities and Not-for-Profits: A Modern Legal Framework, para 3.34

361 Bodies giving evidence in these terms included the Charity Finance Directors' Group, the National Council of Voluntary Organisations (NCVO), the Association of Chief Executives of Voluntary Organisations (ACEVO), the National Society for the Prevention of Cruelty to Children (NSPCC), the RNID, Help the Aged, Save the Children, the Association of Chartered Certified Accountants (ACCA) and the Charity Law Association. See (respectively) Ev 126 and 129, para 2.1 & Annex 1; Ev 5, paras 4.4, 4.4.1-4.4.3; Ev 5, para 4; Ev 8, para 17; Ev 9, para 3; Ev 412, p4, para 6; Ev 428, paras 3.4-3.9; Ev 512, paras 7 & 8; Ev 88, paras 157-161

362 Ev 31, para 3.3

company and the charity. Running the trading company costs the charity about £30,000 extra in staff time.³⁶³

341. The Charity Commission, in written evidence, told us they too supported the recommendation to extend the right of charities to trade:

“The proposal is in the same liberalising spirit as other recent better regulation developments, such as the changes to investment rules made by the Trustee Act 2000. The Commission has taken an active part in these developments, for example in our approach to trustee remuneration where we look at what is expedient in the interests of the charity. These changes are all designed to give trustees greater freedom – balanced with a duty of care – in deciding how to deploy resources to best advantage. The present proposal would put trading, as a form of income generation, on the same footing as fund-raising – an area where the great majority of charities have a record of proportionate and successful investment.

“The new freedom would emphasise charities’ ability to identify and control risk. Many charities would need advice and guidance from specialist advisers on how best to structure their trading activities so as both to minimise bureaucracy and mitigate risks to their assets. Measures that charities took to mitigate risk would have their own costs attached. Trustees of unincorporated charities would need to consider the risks of direct trading very carefully indeed, given the personal liabilities involved.

“Should the proposal be implemented the Commission would work with charities to build better understanding of the issues and to increase transparency of such trading activities”.³⁶⁴

342. The Charity Finance Directors Group (CFDG) also raised the question of sponsorships – cases where a charity gives recognition to a corporation (as by displaying the corporation’s logo) in return for a donation. The Inland Revenue in some circumstances classes the donation as “advertising revenue” and taxes it unless the charity has set up a trading company to handle the arrangement. The CFDG told us:

“We do not believe that this area of ‘trading’ impacts on any competition issues nor does it face any of the risk issues discussed above. Therefore, if there is no change on the government’s position regarding the need to use trading companies we request that serious consideration is given to allowing donations which are presently treated as taxable sponsorship to go through the charity without having to set up a trading company to receive what is in substance a donation. The requirement to channel such fund-raising through a trading company to avoid a tax liability from falling on the charity seems unnecessary”.³⁶⁵

363 Ev 201; Ev 550; Ev 33, Annex 1, para 2

364 Ev 201, Annex 1, para 6

365 Ev 129, Annex 1

Against allowing charities to trade within charity

343. We sought evidence from the Federation of Small Businesses about whether the proposals in the draft Bill would lead to unfair competition by charities against small businesses. Mr Alambritis told us of:

“the impact on the smaller businesses next door, especially where there was a common element as to what they sold. [Charities running] coffee bars are the classic example, greetings cards is another one, crockery another.... We have no objection to the charitable status, to the fund raising; the only objection we have is to the business rate tax break. That is the one element that small businesses are concerned about. They would have no objection to the charity shop being next door provided the tax system was relevant to all because they do see them as fairly aggressive commercial institutions.”³⁶⁶

344. We also received a submission from the Charity Advisory Trust, who were opposed to extending the power of charities to trade. They said:

“...The Charities Advisory Trust’s ‘Charity Trading: a *statistical analysis*’ shows that trading income rarely produces significant income for charities. There is evidence that there have been quite substantial losses through trading. Figures for 1995 - 2000 (incl.) show trading income as a proportion of income for the top 200 charities, by income, was on average less than one quarter of a%. 10% of charities made losses...

“The device of the wholly owned trading company has much merit. It isolates the trading activity so it is easier to see if it is profitable or loss-making. Investment (subsidy) in trading is easier to identify...

“It would be regressive to return to this situation. Our experience in analysing charity trading accounts is that when charities trade without using a separate trading company, costs are not fully apportioned to the trading activity, so that the profit levels are artificially enhanced ...the arms-length trading company ha[s] given charity funds greater protection”.³⁶⁷

345. The Minister also told us that she did not support the proposal to extend charitable trading:

“Because the recommendation was to allow charities to not just trade to their charitable purpose but to create a completely different kind of trading. I envisage the risk that you could have within a charity someone who created some way of fund-raising for the charity, the small bar in the village hall, who then started running a chain of pubs, and that would be quite possible, and that could raise money which went to charities. They could benefit from tax relief in terms of non domestic rates, they could benefit from all the other tax reliefs... we do not think that you could be able to form an enormous company with all the tax benefits that would have which

366 Q424

367 Ev 521-2

could compete in the high street, which had charitable character. If you want your profits to give to charity you could covenant them to charity and get the tax breaks in that way and that would be the right way to do it”.³⁶⁸

346. When we asked if she would be willing to look at the question again, she replied:

“I am but I do think it would be very difficult to create a mechanism because we allow trading to charitable purposes. One could imagine that Fair Trade, for example, could become a very big brand, that would be perfectly permitted under the Bill as it stands and could be charitable but what we would not allow is trading which is not to charitable purposes. I think that would potentially not just compete unfairly but damage the brand”.³⁶⁹

Rebuttal

347. In response to the Government’s objection that tax-exempt trade would lead to unfair competition with private business, CFDG and others told us that allowing charities to trade within the charity would give them no tax advantage that they did not already enjoy.³⁷⁰

“...the reality is that charities that want to trade already do so through a trading company and avoid tax by transferring profits to the charity. It is unlikely that the competition to small businesses would increase if charities were allowed to trade through the charity”.³⁷¹

348. CFDG and ACEVO also sent us evidence addressing a number of other objections commonly made to further powers of trading by charities. These objections were:

- a) That trading might lead to increased risk to charity assets and exposure of trustees of unincorporated charities to greater personal liability. CFDG argued that, if charities followed the duty of care in the Strategy Unit recommendation, then risky forms of trading would be carried out through a trading company and charity assets would be protected.³⁷²
- b) That boards of charities lack trustees with the commercial acumen required for trading. CFDG pointed out that this objection would apply to trade as currently carried on through a trading company, since the same people would be running the trading company.³⁷³
- c) That some charities might develop trading to such an extent that it became their dominant activity, thereby bringing their charitable status into question and possibly damaging public confidence in charities. ACEVO argued that there was nothing to stop

368 Q1099 (Ms Mactaggart MP)

369 Q1101 (Ms Mactaggart MP)

370 Q394 (Mr Framjee); Ev 130, Annex 1; Ev 429, para 3.5; Ev 88, paras 157-161

371 Ev 130

372 Ev 129-130, Annex 1, sub-paras a) and c)

373 Ev 130, Annex 1, sub-para b)

this happening currently as a result of trading through a trading company.³⁷⁴ They told us:

“The concern that non-primary purpose trading might render charitable activity a sideline could be met by retaining a ceiling for trading, but making it more flexible. For example, trading ‘incidental’ to the charity could be permitted within the charitable structure. The threshold could be defined for all charities as it currently is for those with a turnover of between £20,000 and £200,000, as ‘less than 25% of the charity’s total incoming resources’”.³⁷⁵

(We assume that ACEVO meant to retain the current rule that a small charity can receive income from trade of up to £5,000 exempt from tax, even where this is more than 25% of total turnover).

Conclusion

349. This issue is the only major point on which the draft Bill does not follow the Strategy Unit’s proposals. Whatever recommendation this Committee makes, it is likely to be a key matter for debate in both Houses when the real Bill is brought forward. The Committee considered three options:

- a) to retain the present arrangements – as the draft Bill would do;
- b) to adopt the Strategy Unit recommendation – that is, to allow charities to carry out unlimited non-primary purpose trading within the charity (subject to trustees exercising such an appropriate duty of care and skill as is reasonable, a duty to assess risk and suitability and a duty to take proper advice³⁷⁶ and to provide that they should enjoy tax exemption on trading income; and
- c) to adopt the compromise proposal made by ACEVO (paragraph 348 (c) above) – that is, that charities should be allowed to trade within the charity and should enjoy tax exemption on trading income up to the point where income from trading equals 25% (or £5,000, if the greater) of the charity’s total turnover.

350. We accept the evidence which the Charity Advisory Trust have presented that there are some advantages in the present arrangements. A trading company can help ensure that profits and losses are more easily identified and highlighted and can act as a check on improvident trading by the charity. In addition, we were influenced by the argument that, if charities were allowed to conduct unlimited trading within the charity, charity assets might be put at risk. Avoiding this risk depends on charities complying with the duty of care and making astute use of the trading company option.

351. At the same time, like the Minister, we are conscious that changing the rules on trading within the charity might encourage charities to increase their trading activity significantly. This would carry a number of risks. Firstly there could be loss of focus on the

374 Ev 32, paras 4.1.4.1 and 4.1.4.2

375 Ev 32, para 4.1.4.3

376 Private Action, Public Benefit, September 2002, para 4.47

charitable activity as unrelated trading activities increased. Secondly, where that trade proved unsuccessful or even disastrous, with consequent loss of charitable funds donated by the public (which would not be insulated against those losses), there could be serious public disquiet. Another risk is that to justify increased unrelated trade, the boards of charities could become unbalanced. There would also be the risk that the more trading charities carried out, the greater the number of trading ventures that would fail or be subject to scandal, which would also damage the charity brand. The Charity Commission might wish to strengthen or issue guidance on procedures for charities engaged on non-primary purpose commercial activity to disclose fully what proportion of their income and expenditure relates to the costs of the commercial activity.

352. We consider, however, that the other evidence we have received suggests that there would be clear advantages to allowing charities to trade more extensively within the charity – in particular, the savings smaller charities will make through avoiding the administrative costs of having to run a trading company. We do not see that the Government's stated objection to further powers of charitable trading – unfair tax advantages to charities compared to private business – has been borne out.

353. On balance, we consider that further powers to trade are desirable provided there remains some limit to them. That limit should be higher than the existing limit of £50,000 a year.

354. The Committee recommends that the draft Bill should be amended to allow charities to trade within the charity and enjoy tax exemption on trading income up to the point where income from trading equals 25% (or £5,000 if the greater) of the charity's total turnover, but this should be subject to an overall limit higher than the current £50,000 and the Government should consult on the level at which that overall limit should be set.

10 Exempt and Excepted Charities

Exempt charities

Current position

355. Exempt charities are charities which are not registered with the Charity Commission because they are already being supervised by other regulators such as government departments or public authorities. There are about 10,000 exempt charities, including many universities, most housing associations and some schools. A list of exempt charities and their principal regulators appears on pages 202-205 of the draft Bill.³⁷⁷ They enjoy the status and fiscal benefits accorded to other charities and are required to comply with the key principles of charity law; however, they are not subject to the same accountability and transparency requirements as charities registered with the Commission.

356. The Strategy Unit review found that the regulators of these charities were often unaware of the requirements of charity law regarding governance arrangements and the stewardship of funds.³⁷⁸ In addition, there is no mechanism for monitoring the compliance of exempt charities with charity law and they do not have to demonstrate that they continue to merit the benefits offered by charitable status.³⁷⁹ Allowing these organisations and excepted charities (discussed below) to avoid regulation as charities creates anomalies; the Strategy Unit review found this was confusing for the public and threatened the integrity of the status of charities.³⁸⁰

Draft Bill changes

357. Clause 11 of the draft Bill enables the Secretary of State to prescribe a principal regulator for an exempt charity. Principal regulators will be required to do all that they reasonably can to ensure that exempt charities comply with charity law. The clause also allows for changes to be made in the statutory powers of principal regulators to enable them to take on this function.

358. Schedule 5 of the draft Bill gives the Charity Commission new powers in relation to exempt charities. For example, the Commission will have the power to investigate these charities at the request of their principal regulator. Clause 7 of the draft Bill (adding section 3A (4) to the 1993 Act) provides that exempt charities without a principal regulator should register with the Charity Commission.

359. The Home Office estimates that 7,800 of the 10,000 estimated exempt charities, would be required to register with the Charity Commission because they do not have an

377 Cm. 6199

378 Private Action, Public Benefit, September 2002, p87, para 7.94

379 Draft Charities Bill, p206, para 1.7

380 Private Action, Public Benefit, September 2002, p87, para 7.94

alternative main regulator and their income is above the £100,000 proposed threshold.³⁸¹ The vast majority of these are voluntary schools.

Evidence

360. We note four particular issues which were raised by the evidence presented to us on exempt charities.

361. First: the effect of the draft Bill on voluntary and foundation schools. Littlejohn Frazer (chartered accountants) drew our attention to a possible anomaly with respect to voluntary and foundation schools established under the *Education Reform Act 1988*. These schools are part of the state sector and are exempt charities. Other state schools are not exempt charities. Under the draft Bill, voluntary and foundation schools will have to register with the Charity Commission and will become subject to additional accounting and audit requirements, which, Littlejohn Frazer estimate, will cost them £20 million in total. Meanwhile, other state schools - not being exempt charities - will not have to meet these requirements and will not incur these costs. Littlejohn Frazer asked how it could make sense to treat the two types of schools differently: if more rigorous accounting and audit standards are required, they should apply to all state sector schools; if they are not required, they should apply to none, especially when they involve such heavy cost.³⁸²

362. Second: the potentially destabilising effect of the Commission's powers, under the draft Bill, on the position of the principal regulator. The Higher Education Funding Council (HEFCE) pointed out that under the draft Bill the principal regulator will be responsible for regulating the exempt charity, but the Commission will retain powers of enforcement and intervention over exempt charities and will be given new powers over them (e.g. to exercise the same powers as the High Court in charity proceedings). This made for greater regulation but it undermined the position of the principal regulator and made for uncertainty about the principal regulator's role. The solution to this problem, HEFCE told us, was that the draft Bill should include a provision requiring the Commission to consult with the principal regulator before exercising their powers over an exempt charity.³⁸³

363. Third: whether the proposal allowing principal regulators to regulate exempt charities was a good idea. The British Trust for Conservation Volunteers (BTCV) objected to the whole idea of exempt charities and 'principal regulators':

“it is quite wrong that charities should not be independent but be effectively owned by other non-charitable bodies, usually through controlling the appointment of their trustees...

“Determining a 'principal regulator' for such charities is window-dressing. These principal regulators are not knowledgeable of charity law – it's not their job.

381 See draft Charities Bill, discussion of voluntary and foundation schools, p218. Ev 226 (para 12), from the Charity Commission quotes a figure of 7,500 foundation and voluntary schools which would benefit from online registration.

382 Ev 337

383 Ev 461, para 8

“Giving the power to the Commission to investigate exempt charities if requested by the principal regulator is a sop. Why would a principal regulator want to call in the Charity Commission to expose the principal regulator’s own failure in regulating? It’s hard enough to persuade the Charity Commission to investigate charities which are connected to government or with strong links to the establishment even in the face of outrageous abuse within such a charity. Raising the extra hurdle of needing to be requested by another body which has every incentive not to call in the Commission guarantees that the existence of exempt charities will continue to stain the reputation of charity generally. We recommend that the Joint Committee firmly grasp [the] principle and do away with exempt charities in the interest of the reputation of the charity as a whole.”³⁸⁴

364. A similar point was made to us by the Wellcome Trust:

“The Trust believes it is desirable for all charities to be subject to the same legal and regulatory framework and that ideally they would fall under the same regulator – the Charity Commission. Having an overarching regulator is important for maintaining public confidence as the public needs to have a clear understanding of where it can access information, who is accountable and how they can make a complaint ... If the universities are not subject to the same regulator as the major charities that fund them, charity law, regulation and practice will continue to diverge, leading to confusion and inefficiencies ... We would like to see the Charity Commission become the ‘main regulator’ of exempt charities, so that all charities are subject to the same legal and regulatory framework. We believe that this would drive the development of a more flexible regulatory environment for the sector as a whole.”³⁸⁵

365. Fourth: the question of how the public benefit of exempt charities would be reviewed. The Association of Medical Research Charities (AMRC) in their written evidence raised the question of whether exempt charities would be subject to the same periodic public benefit reviews as other charities.³⁸⁶

366. The RIA attached to the draft Bill provisionally estimates that 7,800 previously exempt charities (mainly voluntary schools) may have to register with the Charity Commission.³⁸⁷ It estimates that the additional cost to the Charity Commission of initially registering such charities would be between £630,000 and £1,170,000 and that the annual costs of regulation would be between £250,000 and £450,000. Costs to the exempt charities themselves are unquantified and described as modest but the requirement for schools to register with the Charity Commission would, from the evidence of Littlejohn Frazer, be a significant burden.

384 Ev 433, para 15.3

385 Ev 518, paras 4.3, 4.9

386 Ev 238

387 Draft Charities Bill, p220

Conclusion

367. We recommend that the Home Office should consider designating a principal regulator for foundation and voluntary schools so that they can retain exempt charitable status.

368. The Committee also recommends that the Charity Commission should be given a duty in the Bill to consult with principal regulators before using any of its enforcement powers in respect of exempt charities.

Excepted charities

Current position

369. Excepted charities are charities which, in the 1960s, were excused the requirement to register with the Charity Commission because they were already registered with their own umbrella or support groups.³⁸⁸ They are, however, allowed to register if they want to.³⁸⁹ They include certain Armed Forces charities, particular religious denominations and Guide and Scout groups. Like exempt charities, they enjoy the status and fiscal benefits accorded to other charities and are required to comply with the key principles of charity law, but are not subject to the same accountability and transparency requirements as charities registered with the Charity Commission.

Draft Bill changes

370. Clause 7 of the Bill (adding section 3A (1) and (2) to the 1993 Act) provides that excepted charities with an annual income of £100,000 or more should be registered with the Charity Commission. The income threshold is designed to make the process of registering a large number of previously excepted charities manageable. The RIA accompanying the draft Bill states that the exact number of excepted charities is not known precisely, but that in 2000 it was estimated to be over 100,000.³⁹⁰ The Home Office estimates that, of these 100,000 excepted charities, approximately 5,000 will be required to register because their income is above the £100,000 threshold.³⁹¹ A breakdown in the explanatory notes accompanying the draft Bill suggests that this figure of 5,000 includes up to 2,000 Armed Forces charities, up to 2,000 Church of England parishes, 650 Methodist churches and up to 300 Baptist Union churches.³⁹²

371. Clause 7 of the Bill (adding clause 3A (7) and (8) to the 1993 Act) gives the Secretary of State the power to reduce the threshold to bring it closer to the general registration threshold. It is intended that the temporary threshold of £100,000 will be reviewed over a

388 Draft Charities Bill, p227, para 2.3.3

389 Charities Act 1993, s.3(2)

390 Draft Charities Bill, p226, para 2.3.1

391 Draft Charities Bill, p226, para 2.1.5

392 Explanatory notes, p243

period of time, possibly five years, with a view to lowering it to £5,000, in order to bring it into line with the threshold for other charities.³⁹³

372. The RIA attached to the draft Bill says that research indicates that “failure to ensure that information about excepted charities is readily available to the public and that those charities are held to account could result in the public having doubts about the probity and effectiveness of charities in general”.³⁹⁴ The draft Bill estimates the costs shown in the following table for the changes introduced in the draft Bill in regard to exempt and excepted charities:

	One-off costs	Continuing costs
Exempts		
Costs to main regulators		£19,820-£68,360
Costs to Charity Commission	£630,000-£1,170,000	£250,000-£450,000
Costs to charities	Modest	Modest
Excepted		
Costs to Charity Commission	£350,000-£650,000	£137,962-£252,214
Costs to charities	Modest	Modest

Source: *Draft Charities Bill*, pages 137-138

373. These estimates are based on the number of exempt and excepted charities the Commission would have to register initially and service under the draft Bill. The Commission has used figures of 10,000 and 5,000 respectively but these are subject to great uncertainty. The RIA says of the figure of 10,000 excepted charities: “a round figure of 10,000 was used. This seemed a reasonable figure leaving aside the uncertainties”.³⁹⁵ It admits it “does not have information about the number of charitable Industrial and Provident Societies and Registered Friendly Societies, nor about their annual income [which would partly determine whether they would be registered]”.³⁹⁶ The number of excepted charities subject to registration is set at the maximum of the estimate of those known but there are many unknown categories for which no estimate is made: for example, The Scout Association for which the RIA comments “Unable to estimate (no central figures)”.³⁹⁷ Further costs will emerge when the threshold for registration of excepted charities is reduced below the initial level of £100,000.

Evidence

374. Religions Working Together told us that there are as many as 46,000 places of worship in the country, all of whom would potentially have to register with the Charity

393 Draft Charities Bill, p239 para 11.1

394 Draft Charities Bill, p228, para 2.3.5

395 Draft Charities Bill, p218

396 Draft Charities Bill, p211, para 1.37

397 Draft Charities Bill, p243

Commission when the threshold is eventually lowered.³⁹⁸ According to the RIA, there are at least 5,000 excepted charities that will need to be registered at the £100,000 threshold. It estimates that the set-up costs for registering these charities will amount to between £350,000 and £650,000. This equates to set-up costs of between £70 and £130 per charity. When the threshold for excepted charities is reduced to coincide with the general registration threshold, the Charity Commission may have to register significantly more excepted charities. If the Commission ultimately has to register the 46,000 places of worship discussed above, this alone would result in additional registration costs of between £3,220,000 and £5,980,000 based upon the estimated set up costs per charity.

375. The Churches Main Committee told us that the initial registration threshold of £100,000 for excepted charities did not present a major difficulty, but that they were concerned about the proposal to lower it:

“...we regard the exception as being appropriate for the small ones [parochial church councils] and we are concerned that the process to equalise the income limits for excepted and non excepted should be quite protracted to give the small parishes time to get used to the idea and because it is a new role for them”.³⁹⁹

376. They said that churches with charitable incomes below the £100,000 threshold would require a long transition period: they told us a period of thirty years had been suggested.⁴⁰⁰ The Methodist Church told us that when applying the £100,000 threshold, a charity’s income should be averaged out over a period of three to five years, so that it would not be required to register for an unusual year. For example, if a church was undertaking a short-term project, such as building renovation, its income might exceed the £100,000 threshold and therefore would be required to register with the Charity Commission during this period, and then possibly de-register when the project was completed.⁴⁰¹ Similarly, the Churches Main Committee requested that the definition of ‘gross income’ be reasonably applied, so that from year to year excepted charities would not fall within and outside the requirement to register.⁴⁰²

377. The Independent Services Agency Ltd (which provides management services to Armed Forces charities) told us that currently excepted charities that “increase the efficiency of the Armed Forces” should become exempt charities. We were told that these charities are essentially unit funds, largely raised by servicemen and women gift aiding their pay for one or two days a year. The money is spent on unit social activities, sport and adventure training. The only tax advantage they enjoy is that interest on deposit account is paid gross. These funds are already adequately monitored by the Adjutant General whose “audit procedures and accounting practices are extremely effective and efficient”.⁴⁰³ Major Adler told us:

398 Q965 (Mr Rosser-Owen)

399 Q893 (Mr Britton)

400 Qq894-896 (Mr Britton)

401 Ev 477, para 3

402 Ev 265, para 3

403 Q911 (Major Adler)

“Our accounts are all the domestic accounts of units of the Armed Forces. There is absolutely no fund-raising effort to bring money into these accounts. They are domestic accounts dealing with the president of the Regimental Institute, for example, which is the soldiers’ club, the sporting activities fund or the sergeants’ mess, which is sergeants contributing a bit extra to make their rations a bit more palatable. So within these accounts there is nothing that I can see that is of the remotest interest to the general public.”⁴⁰⁴

Conclusion

378. We consider that a case has been made out for excluding small Armed Forces charities from the category of excepted charities which would in future have to be regulated by the Charity Commission. We do not think this issue can be solved by saying that there should be a specific charitable purpose “to increase the efficiency of the Armed Forces”. The situation is anomalous – they are described as “non-public” funds which distinguishes them from the taxpayer’s money used for the pay, equipment and facilities for the Armed Forces – essentially a way of keeping them separate. We have not received any evidence that these small funds are insufficiently regulated at present. We do not see how including them in regulation by the Charity Commission will contribute to the purposes of the draft Bill.

379. We recommend that, before the real Bill is brought forward, the Home Office and the Ministry of Defence explore ways of ensuring that these funds remain properly accounted for without bringing such a large number of small Armed Forces accounts within the remit of the Charity Commission.

380. We recommend that before any plans are drawn up to lower the threshold for the registration of excepted charities below the initial £100,000 income figure, the Home Office and the Charity Commission monitor and report on the actual costs and benefits of the registration of those charities with an income above that level.

11 Beyond the draft Bill

Consolidation

381. The draft Bill contains 48 clauses. Some 35 of these amend or add to the Charities Acts of 1992 and 1993. This makes it hard to understand the draft Bill on its own. It also means that when the new Act is in force, small charities – run by volunteers from the proverbial kitchen table – will have to study three different Acts and the relationship between them in order to know the current state of statute law. After the 1992 Act was passed, the 1993 Act was brought forward as a consolidation measure, but it did not replace all the aspects of the 1992 Act. The Charity Law Association and BTCV have asked for a consolidation Bill to bring together the new legislation with the 1992 and 1993 Acts.⁴⁰⁵ The PFRA wrote to “implore the Home Office to consolidate these changes into one Bill to improve the clarity of the new legislation”, echoing the National Housing Federation’s suggestion that “charity legislation [is] consolidated into one Act, to make it easier for charity trustees and others to understand the law”.⁴⁰⁶

382. We believe that the law should be as accessible as possible and that this new legislation should be consolidated with the 1992 and 1993 Acts as soon as possible. One radical way of achieving this would be a one stage process in which the Bill introduced in the next parliamentary session should contain not just the clauses in the draft Bill but also re-enact the surviving sections of the 1992 and 1993 Act. In terms of parliamentary procedure, this would not be a consolidation Bill which can pass through an expedited process. But it would produce for the charity sector a single Act setting out the statute law on this subject. Although such a Bill would be longer than the draft Bill we have considered, the additional provisions need not require extra parliamentary time because they have already been passed and on the statute book for more than a decade.

383. We recommend that the Bill to be brought forward by the Home Office in the next parliamentary session should combine the provisions of the draft Bill with the surviving sections of the 1992 and 1993 Charity Acts to enact a single Charity Act 2005.

384. If the Government do not accept the recommendation above, we recommend that a further consolidation Bill be brought forward subsequently to draw together all statute law on charities into a single Act.

385. With or without such a consolidation, there will be a need for the Government to explain to the sector what the new legislation changes – and what it does not. We envisage a booklet aimed at volunteer-run charities to be issued by the Home Office (not the Charity Commission) at the time the new legislation receives Royal Assent, setting out in plain English the effect of the new Act.

386. We recommend that the Home Office publishes a plain English guide to the new Act aimed at small volunteer-run charities.

⁴⁰⁵ Q241 (Mr Lloyd) Ev 89, paras 162 and 120

⁴⁰⁶ Ev 615, para 4

Success factors

387. Throughout our inquiry we have asked how the success of the draft Bill should be measured. The Home Office has produced two papers for us on this subject.⁴⁰⁷ They said:

“The legislation is founded on recommendations made by the Strategy Unit, in its report “Private Action; Public Benefit”, published in September 2002. The impact of the legislation will be assessed against the aims identified in that report, which are to:

- (a) modernise charity law and status to provide greater clarity and stronger emphasis on the delivery of public benefit;
- (b) improve the range of legal forms enabling organisations to become more effective and entrepreneurial;
- (c) develop greater accountability and transparency to build public trust and confidence;
- (d) ensure independent, fair and proportionate regulation.

388. Mr Etherington of the NCVO told us that a successful outcome from the Bill would be:

“A growing sector, growing levels of public confidence, as measured, I think, by growing levels of fund-raising income and growing levels of volunteer engagement....[more participation] ... but we do not think that there will be a huge burgeoning of numbers of charities as a result of this Bill”.⁴⁰⁸

389. We accept that the high-level objectives for the draft Bill are not susceptible to quantitative analysis. Nonetheless we would expect to see quite soon after enactment specific examples of the draft Bill either achieving the positive results forecast for it or failing to do so. Much will depend on how the Charity Commission conducts its tasks. There will be some figures which can be measured:

- a) The number of appeals to the Charity Appeal Tribunal – the Regulatory Impact Assessment envisages a very tentative figure of 50 cases a year – a substantial variation either way from that figure would require some explanation. Similarly, the success rate of appeals will merit closer study.
- b) The number of Charitable Incorporated Organisations set up – while a slow initial take-up might be expected, we would expect hundreds of charities to be using this model within three years.
- c) The number of mergers – it may be that there will be a large number of mergers initially falling to a lower rate after the backlog is cleared.

407 Ev 296-7 and p194

408 Qq4-6

390. All these figures should appear in the Charity Commission's annual report and all interested parties will be able to question whether the individual provisions of the Bill are living up to expectations.

391. We recommend that the annual reports of the Charity Commission should set out the measurable consequences of the provisions in the new legislation and explain any variations.

392. We have been told that the Home Office will monitor the impact of the legislation, and that it proposes to conduct a review of the legislation after a period of five years following enactment and that the review will assess the impact of the legislation, and will be published.⁴⁰⁹ While at first concerned that this five year review period seems long, we accept that the high-level objectives of the draft Bill probably cannot be judged properly over a shorter timescale.

393. We recommend that the Bill should contain a requirement for the Secretary of State to review and report to Parliament on the impact of the Act no later than five years after Royal Assent and that report should include an assessment of the effect of the legislation on public confidence in charities, the level of charitable donations and the willingness of individuals to volunteer.

394. We have referred in paragraphs 172-192 above to the accountability of the Charity Commission to the sector and to Parliament. Our firm impression from taking oral evidence from the Commission during this inquiry is that a more regular airing of the Commission's work before a parliamentary committee would be mutually beneficial. While the Commission's decisions will, under the draft Bill, be accountable to the Charity Appeal Tribunal, its overall operation will not. A regular annual evidence session with a departmental committee would provide an opportunity for the Commission to explain its finances, working methods and policy.

12 Lessons from the inquiry

Timescale

395. The draft Bill was announced in the Queen's Speech on 26 November 2003. The Joint Committee was set up on 10 May 2004. The draft Bill was published on 27 May 2004. The Committee was ordered to report by 30 September 2004.

396. The main consequence of the delay in publishing the Bill and the tight deadline for reporting was that those affected by the draft Bill had only a short period of time in which to submit written evidence. It also meant that we were only able to take oral evidence at eight meetings before starting to prepare a report. We have already paid tribute to the many organisations and individuals who nonetheless provided us with a wealth of experience and comment on the wide range of provisions in the draft Bill.

⁴⁰⁹ See p195

397. We understand that these tight deadlines are not uncommon in pre-legislative scrutiny and that other Joint Committees have drawn this problem to the attention of both Houses. The difficulty can be mitigated by appointing a Joint Committee as early as possible – even if publication of the draft Bill is slipping. This enables the Committee, as we did over two weeks, to undertake preliminary briefing. A minimum period for pre-legislative scrutiny of 12 sitting weeks would also enable such inquiries to be carried out with due respect for the rights of those who wish to submit evidence.

398. We recommend that when a draft Bill has been announced and scrutiny is to be conducted by a Joint Committee, the appointment of the Committee should take place well in advance and should not be delayed by any slippage in the timing of the draft Bill. We recommend that neither House should agree to deadlines in motions to appoint Joint Committees where the time for consideration of the draft Bill is less than 12 sitting weeks from the date of publication of the draft Bill.

Supporting Documents

399. Throughout this report we have drawn on figures contained in the Regulatory Impact Assessment (RIA) published with the draft Bill. At several points we have called for fuller figures to be included in the RIA with the real Bill. The RIA contains no proper estimate of the benefits and risks involved in the Bill. There are serious problems with the estimate of costs and no estimate of the impact of regulation.

400. There are two other aspects of a draft Bill which are normally considered in pre-legislative scrutiny: human rights and delegated powers. The Joint Committee on Human Rights normally reports on the ECHR implications of draft Bills and we understand that it will do so shortly on this draft Bill. It has not been possible within the tight timetable for that Committee to publish a report in time for it to be taken into account by us. We understand, however, that the Joint Committee on Human Rights, as well as welcoming the addition of the promotion of human rights to the list of charitable purposes intends to draw the Department's attention to two issues relating to the advancement of religion and the position of independent schools.⁴¹⁰ No doubt these points will be taken into account in debate on the real Bill.

401. The Lords' Committee on Delegated Powers and Regulatory Reform considers the delegated powers in real Bills. Like some previous Joint Committees we have obtained from the Home Office a memorandum on the delegated powers in the draft Bill.⁴¹¹ This lists some 18 order-making powers including:

- a) rules on appeal and procedure for the new Charity Appeal Tribunal
- b) changes to the financial thresholds at which excepted charities have to register
- c) appointment of principal regulator for exempt charities
- d) detailed provision on charitable incorporated organisations (CIOs)

⁴¹⁰ Not yet published at time of this report but will be available on www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm

⁴¹¹ See p186

e) reserve power to control fund-raising.

402. We expect that both Houses will want to debate any statutory instruments brought forward on the five subjects listed above. We defer to the Delegated Powers and Regulatory Reform Committee on whether the parliamentary procedures (affirmative, negative or none) applicable to the exercise of these powers are appropriate, with one exception. We note that the reserve power to control fund-raising – which would be used if self-regulation fails – is subject only to the negative procedure. This would not automatically require a debate, even in a standing committee in the Commons. If self-regulation fails to such an extent that the reserve power has to be invoked, we believe the seriousness of the situation would merit debate in Parliament.

403. We recommend that the reserve power for the regulation of fund-raising by charities in clause 36 of the draft Bill should be subject to the affirmative procedure.

404. In this report we have concentrated on the substantial policy issues raised in the evidence. That evidence also contains a large number of detailed points about the Bill. To ensure these are aired we have put together in a schedule all the points made in written evidence received by the end of June and have asked the Home Office to comment on them. This schedule is published with the report on pages 115-116. We also draw attention to several memoranda we have received also containing very detailed points on the report which we expect the Home Office to take into account when preparing the real Bill.

405. We have noted in paragraphs 100 and 249 the lack of information in the explanatory notes on the consequences of removing the presumptions of public benefit and the details of the Charitable Incorporated Organisation.. We have called for greater clarity in the explanatory notes accompanying the real Bill.

406. One further barrier to understanding this draft Bill has been mentioned in paragraphs 381-4 above in the context of consolidating the charity law. We sought and obtained from the Home Office a paper copy of how the legislation would appear if the draft Bill was passed and the 1992 and 1993 Acts amended. It was our intention to publish this on the Committee's website to aid understanding of the Bill. Unfortunately – and to our surprise – a publicly available electronic version of the previous and proposed legislation could not be obtained. The Home Office was only able to produce one from commercial sources and this could not be published without the permission of the publisher. We understand that while The Stationery Office does publish electronic versions of past Acts, it does not maintain an up-to-date version including changes made by subsequent legislation.

407. We recommend that when departments produce draft Bills for pre-legislative scrutiny they should make available an electronic version of how current legislation would be amended if the draft Bill is enacted, either to the relevant parliamentary committee or on the departmental website.

Conclusions and recommendations

1. We recommend that the Government consult the Scottish Executive on the implications for national charities of any differences between the two draft Bills, with the aim of avoiding anomalies and confusion. (Paragraph 41)
2. In light of evidence we have received, we recommend that the Government re-examine the provisions of the Government of Wales Act 1998 to ensure that charities in Wales will receive comparable financial assistance to charities in England. (Paragraph 44)
3. We recommend that the draft Bill includes a definition of religion in clause 2 making it clear that non-deity and multi-deity groups can satisfy the definition of ‘religion’ for charitable purposes. Any organisation would still be subject to the requirement of showing public benefit before it could attain charitable status. (Paragraph 54)
4. We recommend that an additional charitable purpose be added to 2(2) for “the provision of religious harmony, racial, harmony, and equality and diversity”. (Paragraph 56)
5. We recommend that the new charitable purpose on “the advancement of arts, heritage and science”, should include the word “culture” to bring it in line with the wording of the draft Charities Bill and Trustee Investment (Scotland) Bill. (Paragraph 57)
6. We recommend that “the saving of lives” be added to the new charitable purpose of the advancement of health. (Paragraph 58)
7. We recommend that the draft Bill be amended by adding to the general ‘any other purposes’ category, the words ‘or within the spirit or intent of the [11 specific] purposes’ listed in clause 2 (2) above. (Paragraph 60)
8. We recommend that the basic principles for a definition of public benefit should be those set out in the recent concordant between the Home Office and the Charity Commission (as in the box after paragraph 78) and that those principles should be replicated either in non-exclusive criteria included in the Bill or in non-binding statutory guidance issued by the Secretary of State. (Paragraph 102)
9. We recommend that the real Bill include provisions to clarify the effect of the loss of charitable status on the assets of a charity. The Government should consider whether the Bill should contain provisions enabling the Charity Commission to agree that trustees in such circumstances can elect to retain their assets and continue to run the organisation, as a not-for-profit organisation without charitable status, for the original purposes. (Paragraph 105)
10. We recommend that the Government commissions an independent review of the burden of regulation that charities face more generally, to ensure that regulation is fair and proportionate, especially to smaller charities. (Paragraph 127)
11. We recommend that the Government amend the public confidence objective in the proposed section 1B(3) 1 of the Charities Act 1993 to be inserted by clause 5 of the draft

Bill to read: “The public confidence objective is to increase public trust and confidence in charities and to stimulate philanthropy”. (Paragraph 139)

12. We recommend that the Government commissions an independent review of the burden of regulation that grant-making charities face more generally, to ensure that regulation is fair and proportionate. (Paragraph 140)

13. We recommend that in clause 5 the words “social and economic impact” be left out and the wording of the 1993 Act be retained, namely “promoting the effective use of charitable resources”. (Paragraph 150)

14. We recommend that, when exercising its powers to conduct inquiries under section 8 of the Charities Act 1993, the Commission should be required to tell the charity concerned why it is doing so, subject to any safeguards necessary to protect sources of information or to prevent delay in the inquiry. (Paragraph 160)

15. We recommend that the Bill should include a provision obliging the Charity Commission to use its powers proportionately, fairly and reasonably. (Paragraph 169)

16. We recommend that the Charity Commission be given the power to determine, either on the application of the charity or after the opening of a section 8 inquiry into the running of a charity, who the members of a charity are. (Paragraph 171)

17. We recommend that clause 4(1) (insertion 1A(3)), containing the phrase “on behalf of the Crown”, should be removed and replaced by a clear statement that the Commission shall be a body independent of Government. (Paragraph 180)

18. We recommend that the Home Affairs Select Committee have an annual evidence session with the Charity Commission. We recommend that the annual report of the Charity Commission be debated in each House every year. (Paragraph 186)

19. We recommend that there should be a greater number of people on the Charity Commission board with experience and knowledge of the charitable sector, in order to reflect its great diversity, particularly at grass roots level. This should be accompanied by adequate safeguards against conflicts of interest. (Paragraph 192)

20. We recommend that the Charity Commission should take steps to differentiate between its advisory and regulatory functions and make clear in all its communications the distinction between advice and instructions. (Paragraph 207)

21. The evidence we have heard has given us reason to question whether the Charity Commission is properly organised and properly resourced to make it effective in its new tasks. We recommend that professional advice be sought to review the ability of the Charity Commission to meet its new responsibilities under the draft Bill and in particular the quality of the processes, methods and organisation; the calibre of its staff; its resources; and whether the Commission should, like other regulators, be able to determine the number and conditions of its own staff. (Paragraph 215)

22. We recommend that the Home Office should review other areas of excluded decision-making with the aim of adding them to the Tribunal’s remit wherever a strong objection is not found. (Paragraph 230)

23. We recommend that the Tribunal be able to hear appeals against any decision of the Charity Commission (including 'non-decisions', such as a decision not to make a scheme or order), on any point of law, on any basis. (Paragraph 231)
24. We recommend that the Tribunal should have the power to award compensation and/or costs against the Charity Commission. (Paragraph 232)
25. We recommend that the Commission formally state that they will not seek to recover costs from an unsuccessful appellant (except where the Tribunal decides that the appeal amounted to an abuse of process). (Paragraph 239)
26. We recommend that consideration be given to including in the Bill a residuary power for Ministers to make regulations enabling financial assistance to be given to parties to the Tribunal if it becomes apparent in the light of experience that access to the Tribunal is being limited by cost. (Paragraph 240)
27. We recommend that the rules to be made by the Lord Chancellor on appeal to the Tribunal should include provision for either the Charity Commission or the Attorney General to refer matters to the Tribunal for interpretation without individual charities having to incur the costs of pursuing a specific case. (Paragraph 241)
28. We recommend that clause 26 and Schedule 6 are redrafted to reflect the intended elements of the Charitable Incorporated Organisation and in a far more understandable form. (Paragraph 251)
29. We conclude that cases should only be pursued where a trustee acts dishonestly or recklessly and recommend that a requirement of dishonesty or recklessness is added to the definition of the offence in 73 (c) 4. (Paragraph 265)
30. We consider that the imposition of a criminal penalty would be counterproductive and recommend that the Bill should impose a civil penalty without leaving someone with the stigma of a criminal conviction. (Paragraph 266)
31. We recommend that the Home Office review the proposed legislation to ensure these additional points on trustees are covered in the real Bill. (Paragraph 269)
32. We recommend that the explanatory notes published with the Bill set out more fully the criteria by which the Secretary of State will determine whether self-regulation is working effectively. (Paragraph 277)
33. We recommend that the Home Office revisit its financial estimates in discussion with the charitable sector and Local Government Association with a view to ensuring the real Bill is accompanied by a more thorough assessment of the costs and benefits of the scheme for public collections. (Paragraph 292)
34. We recommend that the Home Office consider both the regulatory burdens and the resource issues carefully in bringing forward proposals in the new legislation. (Paragraph 293)

35. We recommend that the Home Office urgently review its proposals on the regulation of fund-raising to ensure that the crimes described to us by Leeds City Council and Swindon Borough Council are adequately tackled by the real Bill. (Paragraph 303)

36. We recommend that the Home Office should review the notification arrangements before bringing forward the real Bill. We recommend that the Bill should include an order-making power to vary the time limits for notifications contained in clauses 39 and 41 of the draft Bill to enable these to be adjusted in the light of experience. (Paragraph 309)

37. We recommend that, while local authorities should retain powers of enforcement, the Charity Commission, rather than local authorities, should be the lead authority for granting certificates of fitness to carry out public collections. (Paragraph 316)

38. We recommend that the Home Office review these other points on fund-raising to ensure they are covered in the proposed legislation. (Paragraph 319)

39. We recommend that clause 35 of the draft Bill should be amended to require all those fund-raising on behalf of charities who are paid for their services (whether under a contract of employment or otherwise) to take all reasonable steps to make this status clear when they are making an appeal. The written material, provided at the time to those making donations by direct debit or standing order, should explain the nature of their remuneration (i.e. whether they are paid a salary, a fixed fee or whether they are paid on a commission basis). In addition, fund-raisers should be required to carry with them a collectors identity card from the charity for whom they are acting stating the remuneration fund-raisers are receiving and this should be available on application when a member of the public requests it. The Home Office should issue guidelines on the information required to be available, including information on remuneration and other information taking into account what is practical, workable and not unduly burdensome. This could be supplemented by requiring that the basis of remuneration of fund-raisers and the ratio of costs to funds raised should be reported in the annual report of the charity. (Paragraph 330)

40. We recommend that the Bill should be amended to say that commercial participators will be required to make as accurate a representation of the return from the venture as is possible in the circumstances. It should specify that new Home Office guidance will be produced covering the different forms of statement appropriate to different types of joint ventures between charitable institutions and companies and that this guidance should be based on extensive consultation with fund-raising organisations and commercial participators. (Paragraph 331)

41. In order for these proposals to have any impact there needs to be enforcement. We therefore recommend that the Home Office takes up the recommendation made by the Charity Law Association and considers giving either the Charity Commission or Trading Standards the power to prosecute when these measures are breached. (Paragraph 332)

42. The Committee recommends that the draft Bill should be amended to allow charities to trade within the charity and enjoy tax exemption on trading income up to the point where income from trading equals 25% (or £5,000 if the greater) of the charity's total turnover, but this should be subject to an overall limit higher than the current £50,000 and the

Government should consult on the level at which that overall limit should be set. (Paragraph 354)

43. We recommend that the Home Office should consider designating a principal regulator for foundation and voluntary schools so that they can retain exempt charitable status. (Paragraph 367)

44. The Committee also recommends that the Charity Commission should be given a duty in the Bill to consult with principal regulators before using any of its enforcement powers in respect of exempt charities. (Paragraph 368)

45. We recommend that, before the real Bill is brought forward, the Home Office and the Ministry of Defence explore ways of ensuring that these funds remain properly accounted for without bringing such a large number of small Armed Forces accounts within the remit of the Charity Commission. (Paragraph 379)

46. We recommend that before any plans are drawn up to lower the threshold for the registration of excepted charities below the initial £100,000 income figure, the Home Office and the Charity Commission monitor and report on the actual costs and benefits of the registration of those charities with an income above that level. (Paragraph 380)

47. We recommend that the Bill to be brought forward by the Home Office in the next parliamentary session should combine the provisions of the draft Bill with the surviving sections of the 1992 and 1993 Charity Acts to enact a single Charity Act 2005. (Paragraph 383)

48. If the Government do not accept the recommendation above, we recommend that a further consolidation Bill be brought forward subsequently to draw together all statute law on charities into a single Act. (Paragraph 384)

49. We recommend that the Home Office publishes a plain English guide to the new Act aimed at small volunteer-run charities. (Paragraph 386)

50. We recommend that the annual reports of the Charity Commission should set out the measurable consequences of the provisions in the new legislation and explain any variations (Paragraph 391)

51. We recommend that the Bill should contain a requirement for the Secretary of State to review and report to Parliament on the impact of the Act no later than five years after Royal Assent and that report should include an assessment of the effect of the legislation on public confidence in charities, the level of charitable donations and the willingness of individuals to volunteer. (Paragraph 393)

52. We recommend that when a draft Bill has been announced and scrutiny is to be conducted by a Joint Committee, the appointment of the Committee should take place well in advance and should not be delayed by any slippage in the timing of the draft Bill. We recommend that neither House should agree to deadlines in motions to appoint Joint Committees where the time for consideration of the draft Bill is less than 12 sitting weeks from the date of publication of the draft Bill (Paragraph 398)

53. We recommend that the reserve power for the regulation of fund-raising by charities in clause 36 of the draft Bill should be subject to the affirmative procedure (Paragraph 403)

54. We recommend that when departments produce draft Bills for pre-legislative scrutiny they should make available an electronic version of how current legislation would be amended if the draft Bill is enacted, either to the relevant parliamentary committee or on the departmental website. (Paragraph 407)

Annex 1: List of abbreviations

ACEVO	Association of Chief Executives of Voluntary Organisations
BTCV	British Trust for Conservation Volunteers
CAF	Charity Net (Charities Aid Foundation)
CFDG	Charity Finance Director Group
CLA	Charity Law Association
IOF	Institute of Fundraising
LGA	Local Government Association
NACVS	National Association of Councils for Voluntary Service
NCVCCO	National Council of Voluntary Child Care Organisations
NCVO	National Council of Voluntary Organisations
OSCR	Office of the Scottish Regulator
RIA	Regulatory Impact Assessment
SCVO	Scottish Council for Voluntary Organisations
SORP	Standard of recommended practice
SSAFA	SSAFA Forces help (Soldiers' Sailors', Airmen and Families Association)
TACT	The Association of Corporate Trustees

This schedule lists points made in written evidence to the Joint Committee, together with the Home Office response to each one. In many cases several people or organisations have made the same point. For the sake of brevity only the first organisation or individual to make that point is listed. Some comments have been paraphrased. The fact that a suggested change is listed here does not indicate that the Committee will include it in its recommendations. These comments are listed in the order the relevant clauses appear in the draft Bill.

Clause	Original text	Change/comment	Source*	Comments by HMG
2	Meaning of charitable purpose	The “defence of the realm/ efficiency of the armed forces of the Crown” should be included as a specific charitable head.	Independent Services Agency Ltd, DCH 12, para 4.a	The list of specific charitable “heads” in paragraphs (a) to (k) of subsection (2) of this clause is not, and is not meant to be, comprehensive of all charitable purposes. A comprehensive list would be very much longer. We aim in framing the definition to keep the list short enough to be memorable whilst containing all or most of the charitable purposes that have the widest public recognition. Those charitable purposes which do not have their own specific head will come under paragraph (l) of subsection (2). The defence of the realm is one such purpose. See paragraph 33 of the Charity Commission’s <i>Commentary on the Descriptions of Charitable Purposes in the Draft Charities Bill</i> at www.charitycommission.gov.uk/spr/corcom.asp#14 for more examples of purposes that will be charitable under paragraph (l).
2(1)	... a charitable purpose is a purpose which – (a) falls within subsection (2), and (b) is for the public benefit	Is it intended that the public benefit is applied to the charitable purposes, rather than to the way the organisation furthers those purposes?	Charitable Law Association, DCH 34, para 4	The purpose itself will have to be for the public benefit. For example, the provision of a school for pickpockets can never be a charitable purpose, even though it falls within the “advancement of education” head, because it is not for the public benefit to train people to steal others’ property. If a charity is capable of being run for the public benefit but in fact is being run in a way that provides no discernible public benefit – or even in a way that causes public harm – the remedy lies not in depriving the charity of its status as such but in ensuring that its trustees change the way they are running the charity.

Clause	Original text	Change/comment	Source*	Comments by HMG
2(2)(c)	The advancement of religion;	<p>This should read “the advancement of religion or belief”. This could be further defined as “the advancement of a religion or belief, where that religion or belief expresses a conception of what is ultimately important and of the implication of this in living, including an account of morality”.</p> <p>The criteria for judging the public benefit from organisations for the advancement of religion and those for the advancement of non-religious beliefs must not be discriminatory, otherwise it is not compatible with the European Convention on Human Rights and the Human Rights Act 1998. Relegation to the catch-all clause of 2(2)(l) leaves the public benefit of “advancing Humanism” in dispute and leaves the organisation open to unfavourable discrimination.</p>	The British Humanist Association, DCH 62	We do not believe there is any need to expand the advancement of religion head to “advancement of religion or belief” since organisations that promote serious non-religious belief systems, such as Humanism, can already be charities. The British Humanist Association itself has been registered as a charity for over 20 years. Other Humanist charities are also registered. The purpose they have in common is the mental and moral improvement of mankind by the advancement of Humanism. That is a charitable purpose now and will continue to be a charitable purpose if the Bill is enacted. It would fall within paragraph (l) of the list of charitable purposes in clause 2(2). We do not believe that there is any practical respect in which Humanist charities, or any other charities whose purposes fall within paragraph (l), are open to discrimination by comparison with charities whose purposes fall within the specific heads in paragraphs (a) to (k).
		Applying public benefit analysis to the advancement of religion will lead to an increased level of State entanglement in the activities of religious organisations, and carry a risk of unjustified differential treatment of religious communities already vulnerable because of unpopularity, novelty or small size.	Professor Peter Edge, DCH 21, para 14	Charities for the advancement of religion are already susceptible, like all other charities, to public benefit analysis. It is true that organisations for the advancement of religion enjoy, under the current law, a presumption of public benefit in their favour. But that presumption is rebuttable, so that if any doubt arises about the public benefit of a religious charity the Charity Commission can analyse and assess the extent to which the charity is in fact providing a public benefit. The abolition by the Bill of the presumption of public benefit for religious charities (and poverty relief and educational charities) would not change the nature of the Charity Commission’s analysis and assessment, nor the criteria by which that assessment is made. The Charity Commission is not under Ministerial direction or control.

Clause	Original text	Change/comment	Source*	Comments by HMG
2(2)(d)	The advancement of health;	Replace with "the advancement of good health".	Community Futures, DCH 158	We do not think this is necessary or desirable. The advancement of health covers the prevention or relief of sickness, disease or human suffering, as well as the promotion of health.
2(2)(e)	The advancement of citizenship or community development;	This should be expanded to include the promotion of racial harmony and equality of opportunity.	Jonathan Dawson, DCH 74	The promotion of racial harmony and the promotion of equality and diversity for the benefit of the public are already charitable purposes and would continue to be so under the Bill. They would fall under paragraph (l) of clause 2(2).
		This has long been held not to be charitable and it is unclear why it has been included now.	R L Glasspool Charity Trust, DCH 152	We do not agree that this has "long been held not to be charitable". We agree with the Charity Commission's view that "the advancement of citizenship or community development covers a broad group of charitable purposes directed towards support for social and community infrastructure which is focused on the community rather than the individual" (see paragraph 15 of the Commission's <i>Commentary on the Descriptions of Charitable Purposes in the Draft Charities Bill</i> .) The Bill would preserve these as charitable purposes.
2(2)(f)	The advancement of the arts, heritage or science;	This should expressly include a reference to "culture", as the advancement of culture is an accepted charitable purpose and is broader in scope than arts and heritage.	Dickinson Dees Law Firm, DCH 132	The Strategy Unit proposed that this heading should include culture with arts and heritage. We could not, however, think of any purposes for the advancement of culture which would not be covered by the advancement of the arts or heritage. If "culture" could be shown to add something to "arts and heritage" we would reconsider including it.
2(2)(g)	The advancement of amateur sport;	Amend this to "the advancement of physical recreation or amateur sport" to ensure that uncompetitive recreational activity (cycling, walking, horse riding) is also covered.	Open Spaces Society, DCH 98, para 2.2	Cycling, walking, horse-riding and other physical sporting activities that are capable of being pursued non-competitively could qualify under the draft Bill's wording. "Sport" is not limited to competitive activity.

Clause	Original text	Change/comment	Source*	Comments by HMG
2(2)(i)	The advancement of environmental protection or improvement;	This should be amended to “the advancement of environmental protection, <i>improvement or enjoyment</i> ”.	Open Spaces Society, DCH 98, para 2.3	The advancement of environmental protection and improvement is charitable only if it is for the public benefit. An essential element of public benefit is public access – either direct physical access or, if that is not feasible (e.g. because of the remoteness of the conserved environment) or desirable (e.g. because of the fragility of the conserved environment), access by other means. See the Charity Commission’s publication <i>Preservation and Conservation</i> – available at www.charitycommission.gov.uk/publications/rr9.asp – for a fuller discussion of the public access in this context.
2(2)(j)	The relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;	This uses the concept of relief of need rather than emphasising the positive in terms of advancement. The definition suggested in <i>Private Action, Public Benefit</i> is preferred: “Social and community advancement”, which had a footnote “including the care, support and protection of the aged, people with a disability, children and young people”. The term “older people” is preferable to “aged”.	Age Concern, DCH 133, para 3.1	We think it important that each of the charitable heads in clause 2(2) should give a clear picture of the purposes it encompasses. In our view the Strategy Unit’s wording “social and community advancement” would not achieve that. The purposes encompassed by paragraph (j) are directed at meeting the different and particular needs of individual people in a variety of ways and it is difficult to think of a wording using the “advancement” formulation that would mean the same thing. The term “aged” is not used in this subsection.
2(3)	In subsection (2) – (a) paragraph (d) includes the prevention or relief of sickness, disease or human suffering; (b) paragraph (e) includes – (i) rural or urban regeneration, and	A further paragraph should be added to 2(3) which confirms the right to manage land in a manner appropriate for the protection of a particular environment.	Open Spaces Society, DCH 98, para 3.3	We do not think it appropriate in a clause which aims to define the scope and meaning of charity to include detailed provision about the rights of proprietors of land. For protection of the environment to be charitable, the land or habitat must be worthy of preservation or conservation for the public benefit.
2(3)(c)	In paragraph (g) “sport” means sport which involves physical skill and exertion;	This should be deleted.	Dickinson Dees Law Firm, DCH 132	Subsection (3)(c) of this clause is necessary to distinguish between sports and other activities, games, pastimes or hobbies.
2(4)	The purposes within this subsection (see subsection (2)(l)) are –	Add that “the purposes within this subsection” ... “fall within the letter, the spirit or intentment of the Charities Act 2005 and subsequent case law”.	NCVO, DCH 2, para 2.3	The effect of this proposed addition to subsection (4) is already brought about by the subsection as drafted.

Clause	Original text	Change/comment	Source*	Comments by HMG
3	The “public benefit” test	As a general principle this test should be applied to the 180,000 odd charities already on the Commission’s register.	R L Glasspool Charity Trust, DCH 152	The public benefit test in clause 3 would apply to all existing charities – registered or unregistered - as well as to charities formed after the date on which the clause took effect.
3(2)	In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.	Add in 3(2)“and in the application of precedent and otherwise in determining whether the requirement of public benefit is satisfied full account shall be taken of changes in social and other relevant circumstances”. A new subsection (5) should also be added: “It shall be the duty of any charity trustee so to execute the trusts of his charity as to secure the fullest public benefit consistent with the terms of his trust and furthermore to seek a scheme of the modification of any term which may reasonably be regarded as preventing him from securing that public benefit to a material degree”.	Christopher McCall (c/o Charity Law Association), DCH 175	We believe that this is already the law. The proposed amendment would not change anything. It is already the duty of charity trustees to promote the purposes of their charity. A charity’s purposes are, by definition, for the public benefit. The trustees of a charity whose purposes have been fulfilled, or cannot for some other reason be carried out, are already under a duty (section 13 of the Charities Act 1993) to apply for a scheme to change those purposes. It is not clear what change to the law this proposed amendment aims to make.
		All organisations with charitable status should be required to demonstrate that they provide public benefit on an on-going basis, not just at registration. Occasional use of facilities by the community should not qualify as delivering public benefit. The Charity Commission must undertake a rolling programme to check that public benefit is being delivered.	NCVO, DCH 2, para 2.5 Community Action Hampshire, DCH 52, para 1 – 1.1	We confirm that under the Bill as drafted all charities, not just charities applying for registration, would be required to demonstrate public benefit. The Charity Commission has, and would continue to have, the power to make checks on charities – both new and existing charities – to ensure that they continue to provide public benefit.
4	The Charity Commission	There is concern that the draft Bill extends the role and powers of the Charity Commission without placing any limits or responsibilities in terms of how it exercises those powers.	Tom Levitt MP, DCH 189	The Bill would not extend the Charity Commission’s basic role and functions. As a public body the Commission must exercise its powers reasonably and is subject to judicial review. It also comes within the remit of the Parliamentary Ombudsman. The Bill seeks to give the Commission a new accountability framework based on clear strategic objectives. Charities and trustees affected by its decisions will have new opportunities to challenge these decisions through an authoritative and legally binding independent Tribunal.

Clause	Original text	Change/comment	Source*	Comments by HMG
1A(3)	The functions of the Commission shall be performed on behalf of the Crown.	<p>There should be clarification of the underlying constitutional basis of these changes. How would the Commission be accountable if it acts on behalf of the Crown – will it be accountable to Parliament and if so, how? What are the implications of this in relation to scheme-making and other judicial acts undertaken by the Commission on behalf of the High Court, given that the Crown has no functions in these areas?</p> <p>There should be greater clarification regarding the lines of accountability for the Commission and reassurance that this will not represent a risk of greater political interference.</p> <p>It is not appropriate for the Charity Commission to report to Ministers.</p>	<p>NCVO, DCH 2, para 2.10</p> <p>Charity Finance Directors' Group, DCH 129, para 3.2</p> <p>RNID, DCH 5, para 1</p>	<p>The Commission will be accountable to Parliament through the laying of an annual report on its operations, on the extent to which it has met its objectives and on the management of its affairs. It will continue to be subject to scrutiny by the National Audit Office and the Public Accounts Committee.</p> <p>The Commission would become a statutory body corporate, operating at arm's length from Ministers whose advisory relationship with it would be clearly defined.</p> <p>The Commission would report to Ministers, in the sense of making an Annual report but, as at present, it would not be under the direction or control of Ministers. It would continue to give information or advice, or make proposals, to any Minister of the Crown on any matters affecting the Commission's functions. This would include advice by the Commission both to the Home Secretary, to inform him in his role as the Secretary of State with responsibility for charity law, and to other Secretaries of State promoting legislation that will or might affect charities.</p> <p>The functions of the Commission would continue to be discharged on behalf of the Crown.</p>
1A(5)	Any enactment passed or made before the coming into force of this section has effect... as if any reference to the Charity Commissioners... were a reference to the Charity Commission	The Bill could be more explicit in prescribing the accountability and supervisory elements of the relationship between the board and senior management. At present the Commissioners are active in the work of the Commission. Restructuring the Commission into a body with a Chief Executive accountable to a larger board may lead Commissioners taking more 'non-executive' approach. This would be a retrograde step.	Charity Law Association, DCH 34, para 5	The intention behind a larger board is to achieve wider representation to better reflect the views of stakeholders. The board would continue to include at least two legally qualified Commissioners, and a Commissioner appointed by the Secretary of State for Wales. The day to day running of the Commission would be the responsibility of the Chief Executive but the overall responsibility for the operation of the Commission would rest with the Board.

Clause	Original text	Change/comment	Source*	Comments by HMG
5	The Commission's objectives, general functions and duties	The objectives should be defined in an objective way. The objectives are open-ended, with no concept of a standard to be achieved.	Nuffield Hospitals, DCH 81	The proposed objectives are defined, in our view, in terms which cover what the Commission is required to do and what it is permitted to do. It is a specific statement of the purposes of charity regulation which sets out what it exists to achieve and presents its aims and activities clearly to charities and the public and provides a clearer framework of accountability. The Charity Commission will have to agree performance indicators (see Strategy Unit recommendation 38)
1B	The Commission's regulatory objectives	The four proposed regulatory objectives of the Commission should not apply to grant-making charities in the same way as they should to fund-raising charities. Grant-making charities should not be accountable to donors, beneficiaries or potential beneficiaries in the same way as fund-raising charities. The differences between fund-raising charities and grant-making charities should be included in the Commission's regulatory objectives.	Association of Charitable Foundations, DCH 23, para 7	The Commission is already working towards proportionate regulation. Where appropriate, it would regulate different parts of the sector in different ways – this would take into account the differences between grant-making charities and fund-raising charities.
1B(2)3	The regulatory objectives are – 3. The social and economic impact objective	Social and economic impact is not a part of charity law. Parliamentary draftsmen may have sought to translate 'public benefit', which is a different concept. Reference to social and economic impact should be replaced with an obligation relating to public benefit. This would extend the possible field of charity work well beyond the traditional accepted role of charities and could exclude the work of charities like the Thalidomide Trust. These terms "social" and "economic" are capable of very wide interpretation and without clearer definition have the potential to cause considerable confusion in their application. Replace this objective with "the public benefit objective". Economic impact should not be included in the Charity Commission's objectives – action for the public benefit can have either positive or negative economic impact in both the short and the long term.	Charity Law Association, DCH 34, para 6 The Thalidomide Trust, DCH 68, para 2 NSPCC, DCH 4, paras 5 – 6	This is an enabling objective intended to allow the Commission to encourage charities to use their resources more effectively and is essentially a rewording of the 1993 Act objective on the effective use of charitable resources. The Bill would retain the current common law definition of public benefit. See above. See above.
1B(3)(1)	The public confidence objective is to increase public trust and confidence in charities.	"Increase" should be replaced by "maintain". The level of trust in charities is higher than trust in other bodies.	Joseph Rowntree Charitable Trust, DCH 135, para 4	An effective and efficient regulator will increase public trust and confidence in charities.

Clause	Original text	Change/comment	Source*	Comments by HMG
1B(3)(2)	The compliance objective is to increase compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.	"Increase" should be changed to "ensure".	Joseph Rowntree Charitable Trust, DCH 135, para 5	It is unreasonable to set a regulator an objective which almost certainly could not be met, ie 100% compliance. An effective and efficient regulator will increase compliance with charity law.
1B(3)3	The social and economic impact objective is to enable and encourage charities to maximise their social and economic impact.	This attempts to define public benefit. It goes beyond any legal requirement placed on charities. An organisation that is able to maximise its social and economic impact will not necessarily be able to demonstrate that it provides public benefit or has a public character, or vice versa. This is an entirely new objective, not prefigured in any previous consultation document, not adequately explained in this clause, and open to widely varying interpretation.	NCVO, DCH 2, para 2.7 Joseph Rowntree Charitable Trust, DCH 135, para 6	See response to IB(2)(3) above. This sets out the Commission's role in helping charities to maximise social and economic potential. The Commission would not interfere in the independent governance of charities but it does have a duty to promote the efficiency and effectiveness of the sector and to ensure that charitable objects are being served most effectively. This is not a new objective. It was discussed and recommended by the Strategy Unit review.
1C(2)	The general functions are – 1. Determining whether institutions are, or are not, charities.	Why does this refer to "institutions" when section 1(1) refers to "body or trust"?	Charles Russell, DCH 84	We are happy to consider this.
1C(2)3	Identifying and investigating apparent misconduct or mismanagement in the administration of charities...	Will the Commission have the regulatory clout to enforce these directions? The Commission staff do not have the training or understanding of the world in which charities operate. An inspection process which takes a rigid view of trustees' duties as being those encompassed only within charity law will not help charities or beneficiaries.	Council for Voluntary Service, DCH 58	The Commission has powers to remedy misconduct and protect charity assets. The Commission is concerned with trustees' duties as charity trustees, not with, for example - their compliance with service standards, which are for other regulators.
1D(2)2	In performing its functions the Commission must have regard to the need to use its resources in the most efficient and economic way.	This should read: "In performing its functions the Commission must have regard to the need to use its resources in the most <i>effective</i> , efficient and economic way".	Charity Law Association, DCH 34, para 7	We are happy to consider this.
1D(2)3	In managing its affairs the Commission must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it.	The Bill must also contain a provision obliging the Commission to use its powers proportionately, fairly and in accordance with the principles of natural justice. This could be included as part of 1D(2)3. There should be a general duty placed upon Ministers and the Commission to have regard to the effect on charities of pursuing their objectives and using their powers, and the need to use charity resources efficiently and economically.	Charity Law Association, DCH 34, para 3.1 Nuffield Hospitals, DCH 81	The Commission would as a matter of general law be under a duty to act proportionately, fairly and in accordance with natural justice and this duty would be enforceable by judicial review. It would not be appropriate to provide expressly for this duty. Charities are independent of the State and the likely impact of any regulation on the sector is always carefully considered. This is built in to the process of regulatory impact assessment.

Clause	Original text	Change/comment	Source*	Comments by HMG
6	The Charity Appeal Tribunal	There is nothing to define the Tribunal's terms of reference.	Donald Troup, DCH 65, para 4	<p>Clause 6 would introduce a new Part 1A to the 1993 Act setting out the details of the Charity Appeal Tribunal. An appeal is to be by way of a re-hearing (section 2B(2)).</p> <p>Schedule 3 of the draft Bill would insert a new Schedule 1B into the 1993 Act, which covers the membership of the Tribunal and appointments to it; its staff and facilities; the composition of panels, who are to exercise its functions; and its practices and procedures.</p> <p>The proposed jurisdiction and powers of the Tribunal are set out in Schedule 4, which would also amend the 1993 Act. This sets out the decisions of the Commission which give rise to an appeal to the Tribunal.</p>
		<p>The Tribunal's jurisdiction should be enlarged to cover the range of decisions taken by the Charity Commission.</p> <p>The Tribunal should be able to hear appeals against any decision of the Commission (including "non-decision" or any point of law on any basis). The Commission should also be able to refer matters to the Tribunal for interpretation.</p> <p>The scope for appealing against a decision by the Commission to institute an inquiry should be extended to include the ground that there was no reasonable basis for instituting the inquiry.</p>	<p>NCVO, DCH 2, para 2.17</p> <p>Charity Law Association, DCH 34, paras 8- 9</p> <p>Nuffield Hospitals, DCH 81</p>	<p>The right of appeal to the Tribunal would arise from the Commission's exercise of specified decision-making powers. The Tribunal's jurisdiction would extend only to such decisions.</p> <p>In the course of such an appeal, points of law, or other matters could require the interpretation of the Tribunal.</p> <p>The Commission has its own internal review process for complaints about administration, which includes an Independent Complaints Reviewer. This process would include appeals against decisions to institute an inquiry on the grounds that it was unreasonable. Where the appellant was not satisfied with the outcome of such a complaint, it would be open for him/her to ask an MP to refer the complaint to the Parliamentary Ombudsman, or consider judicial review proceedings.</p>

Clause	Original text	Change/comment	Source*	Comments by HMG
		The Tribunal should be given clear powers to award compensation where the Commissions' interference has been destructive. It is not clear that the Tribunal will be free to trustees or charities appealing to it – it should be.	BTCV, DCH 120, para 1.2	There would be no charge for an appeal to the Tribunal. The Tribunal would be subject to the Lord Chancellor's rules, which would govern the award of costs. The powers of the Tribunal would not extend to the award of compensation. Where appropriate, the Commission's internal review process can recommend compensation, as can the Independent Complaints Reviewer and the Parliamentary Ombudsman.
7	Registration of charities			
3(5)	If the removal of an institution under subsection (4)(a) above is due to any change in its trusts, the removal shall take effect from the date of that change.	This should refer to "any change in... trusts <i>or purposes</i> " (also in s.3B(3)(a)).	Dickinson Dees Law Firm, DCH 132	The word "trusts" would attract the definition in section 97(1) of the Charities Act 1993. It is unnecessary to refer to a charity's purposes, as these would be included in the definition of "trusts".
3(9)	Copies (or particulars) of the trusts of any registered charity as supplied to the Commission... shall, so long as the charity remains on the register...	Delete "trusts" and replace with "governing instruments" (also in s.3B(2)(a) and s3B(3)(b)).	Dickinson Dees Law Firm, DCH 132	See answer above. The definition of "trusts" here would include "governing instruments".
3A(2)	The following are not required to be registered – (a) any exempt charity; (b) any charity which for the time being – (i) is permanently or temporarily excepted by order of the Commission, and (ii) ... whose gross income does not exceed £100,000;	In principle, exempt and excepted charities should also be registered with the same registration thresholds as for other charities. It is illogical and confusing to have different registration thresholds. It is accepted that currently excepted charities should be required to register by gradual reduction in the threshold set for them. The merging of the threshold set for excepted charities and the general threshold for small charities should not take place before 20 years from when the legislation takes effect. The administration for the threshold and the definition of "gross income" should be reasonably applied.	Kingston Smith, DCH 117 Churches Main Committee, DCH 160, para 3	The proposed registration threshold for exempt and excepted charities is an initial threshold, which would reduce over time to bring it into line with the threshold for other charities. A higher initial threshold is proposed so as not to swamp the Commission with new registrations, and to give smaller exempt and excepted charities more time to prepare for registration. Decisions about lowering these thresholds would be based on the capacity of the Commission and the charities concerned, and would be subject to full consultation. It is proposed that these thresholds be reviewed after a period of five years. The definition of "gross income" is taken from section 97(1) of the Charities Act 1993.

Clause	Original text	Change/comment	Source*	Comments by HMG
		Exempt charities should be removed altogether in the interest of the reputation of charity as a whole.	BTCV, DCH 120, para 15	<p>The proposal is to ensure that exempt charities are properly regulated in accordance with charity law.</p> <p>The proposal is designed so that the body regulating the exempt charities will already have a strong working relationship with the charities. Otherwise the Charity Commission would act as regulator.</p>
3A(2)(d)	The following are not required to be registered – (d) any charity (other than one constituted as a CIO) whose gross income does not exceed £5,000.	This should be set at £10,000 as recommended by the Strategy Unit.	BTCV, DCH 120, para 1.4	<p>The Strategy Unit's original proposals would have raised the registration threshold to £10,000 and would have removed the right of voluntary registration. Those proposals were very unpopular with small charities on consultation.</p> <p>The provisions in the draft Bill are a modified version of the Strategy Unit's proposals which take full account of the views expressed in consultation.</p>
		It is unclear why the existing requirement that an organisation that uses or occupies land must register has been removed. The existing requirement as to the use or occupation of land (s.3(5)(c) of the 1993 Act) should stay. It is important that village halls with security of tenure should be required to register as charities (whatever their gross income).	Jonathan Dawson, DCH 74	The process of registration with the Commission can be unduly burdensome for small organisations. This proposal aims to avoid imposing a duty to register on organisations until they are better resourced to negotiate the registration procedure. Charities that do use/occupy land but have a gross income below £5,000 would still be subject to the Commission's regulatory powers, and would still be able to register voluntarily.
9	Changes in exempt charities	There should be a schedule setting out a timetable for the registration of exempt charities.	Centrepoint, DCH 85, para 2.2	The time-table for the registration of exempt charities is under discussion. Setting out a schedule within the Bill would remove the possibility of flexibility in terms of timing and potentially cause administrative problems for the Charity Commission.

Clause	Original text	Change/comment	Source*	Comments by HMG
9 (7)	Schedule 2 to the 1993 Act (exempt charities) is amended as follows. (7) Omit paragraph (x) (Church Commissioners and institutions administered by them).	A regulated charity whose objects include the provision of pensions should fall wholly within the scope of regulation of the Charity Commission. If regulation meant that the Commissioners were required to divide their fund into separately regulated parts it would considerably reduce the amount of money available for application to their purposes. The proposal for regulation should not undermine the C of E's status as the Established Church in England.	Church Commissioners for England, DCH 75, para 6	We have discussed this matter with the Charity Commission during the course of the preparation of the draft Bill and understand from them that the division of the fund would not be necessary. We can see no way in which the regulation would undermine the C of E's status.
11	General duty of principal regulator in relation to exempt charity	This clause should charge the principal regulator with all the regulatory objectives referred to in the proposed new section 1(B) CA 1993, not just the compliance objective.	Dickinson Dees Law Firm, DCH 132	The purpose of the principal regulator was deemed to be of a narrower, purely regulatory, focus compared to that of the Charity Commission. As such it was felt that only the compliance objective would be relevant to them.
		The Bill must clearly delineate between the charity law regulatory responsibilities of HEFCE, as principal regulator, and those of the Charity Commission, both for reasons of legal certainty and to maintain clarity and trust in the relationship of HEFCE with higher educational institutions. Clause 11 should oblige the Commission to consult the principal regulator in the exercise of all Commission powers in relation to exempt charities.	Higher Education Funding Council for England, DCH 137, para 6	It was felt that too precise a definition of the relationship between the main regulator and the Charity Commission would lack the flexibility required for good working relationships. The memorandum of understanding between the two would clearly set out the terms of the relationship without the need for excessive legislation on this matter.
		The draft Bill provides that all exempt charity schools under the Schools Standards and Framework Act would be required to register with Charity Commission and adhere to the Charities Act part relating to accounts and audit requirements. It is illogical that a significant proportion of the total state school population should be regulated in some respects by the Charity Commission (auditing and reporting) and in others (principally educational) by the LEAS and DfES	Littlejohn Frazer, DCh 49	The exempt schools were declared charitable by the Schools Standards and Framework Act 1998 and as such are charities confirmed by statute. It is upon this basis that the Charities Bill deals with them separately from the remainder of the state school sector
		How can a body regulate unknown exempt charities, as is proposed here?	R L Glasspool Charity Trust, DCH 152	The main regulator principal is designed so that the body regulating the exempt charities will already have a strong working relationship with the charities. Otherwise the Charity Commission would act as regulator.
11(3)	The compliance objective is to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity.	The word "promote" should be substituted for "increase" – an obligation on principal regulators to "increase" compliance per se is unworkable, as it does not adequately define the limits or nature of the statutory duty. Recent Scottish legislation contains an obligation on a public office to "promote compliance".	Higher Education Funding Council for England, DCH 137, para 9.3	The Home Office is prepared to take this into consideration when the Bill is published.

Clause	Original text	Change/comment	Source*	Comments by HMG
12	Application cy-pres by reference to current circumstances			
1A	In subsection (1) above “the appropriate considerations” means – (a) (on the one hand) the spirit of the gift concerned, and (b) (on the other hand) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.	The LGA would like to see “environmental” added to the social and economic circumstances prevailing at the time of any alterations to purposes in clause 12. This too narrow. Other circumstances may be relevant, for example legal, scientific or technological developments.	LGA, DCH 44 Stone King, DCH 86, para 5	The phrase “social and economic circumstances” is intended to be understood broadly, to encompass all the circumstances that the trustees of a particular charity, and the Charity Commission, would need to take into account when deciding how the purposes of the charity should be altered. Those circumstances would vary from one charity to another, depending on their purposes. Certainly for some charities - but not all - environmental, legal, scientific, and technological circumstances should be taken into consideration.
15	Cy-pres schemes			
14A	Application cy-pres of gifts made in response to certain solicitations	The element of reasonableness in 14(4) of the 1993 Act does not apply to the proposed new 14A and we are concerned about the financial and administrative implications of the new 14A(5). There could be disputes over what constitutes the property to be returned, or its value, under the definition in 14(1), which may be avoided by amending to read “property in question (or a sum equal to its value at the time of the gift)” where appropriate.	Charity Finance Directors’ Group, DCH 129, para 3.26	We take this as a proposal to add the words “at the time of the gift” after the word “value” at the end of new section 14A(3). We think this is a helpful suggestion.
14A(2)(b)	A solicitation is within this subsection if – (b) it is accompanied by a statement to the effect that property given to it will, in the event of those purposes failing, be applicable cy-pres as if given for charitable purposes generally, unless the donor makes a relevant declaration at the time of making the gift.	This may create unnecessary confusion for donors who are unlikely to understand the concept of cy-pres. The statements usually employed in appeals are currently adequate for cy-pres purposes – for example: “This appeal is to raise funds for X hospital for its proposed maternity wing. If for any reasons this project does not go ahead, your donation will be applied for other charitable purposes as hospital X”. The provisions for repayment would disapply Gift Aid and be a disincentive to charitable giving.	Stone King, DCH 86, para 6	The statement would not have to use the word “cy-pr s” which, we agree, would not be understood except by a small minority of donors. New section 14A(2)(b) would specify not the wording of a statement but the effect of it. The person making the solicitation could choose his or her own words to the specified effect. Provisions for repayment would not disapply Gift Aid. If the donation had to be returned to the donor then the tax relief would have to be repaid to the Inland Revenue.

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14B(1)	The power of the court or the Commission to make schemes for the application of property cy-pres shall be exercised in accordance with this section.	An additional section should be added so as not to allow the use or disposal for any other purpose of recreational land held under a charitable trusts, except with the consent of the Secretary of State of the Environment, Food and Rural Affairs under a procedure analogous to section 194 of the Law of Property Act 1925 (restrictions on enclosures of commons).	Open Spaces Society, DCH 98, para 3.8	We do not think this is necessary. Land held by a charity on trusts which specify that the land is to be used for a certain purpose – recreational or other – may not be used for any other purpose. If it is sold, the proceeds of sale must be used to buy replacement land which must be used for the same purpose.
14B(3)(c)	The matters are – “the need for the relevant charity to be able to make a significant social and economic impact”.	The Charity Commission’s existing objective of “promoting the effective use of charitable resources” is much more appropriate.	NCVO, DCH 2, para 2.9	See comment on point above about the Charity Commission’s social and economic impact objective in new section 1B(3) of the Charities Act 1993.
16	Power to give specific directions for protection of charity	It is unclear what situation would justify giving the Commission such draconian powers in clauses 16 and 17. These provisions could result in the award of unconfined, undefined and apparently arbitrary power to the Commission and should be reviewed.	The Thalidomide Trust, DCH 68	It is not intended that the making of an order should confer on the Commission the status of charity trustee (within the meaning of section 97 (1) of the 1993 Act) or, where the power is exercised in relation to a charitable company, that of shadow director (within the meaning of section 741 of the Companies Act 1985), and it is not thought that the new power will have any implications for the Commission’s position under these provisions. The Commission’s exercise of these powers could be challenged at the Tribunal.
		This was introduced without any public consultation and should be rejected. The proposed additional powers are arbitrary, unconfined and undefined. The clause can only be used in the context of a section 8 inquiry – surely in this context it would be sufficient to point out to trustees that failure to take the advice of the Commission may lead to a section 18 Receiver and Manager.	BTCV, DCH 120, para 16	See answer above.
19A(2)	The Commission may by order direct -	This runs counter to the principle that the Commission should not take over the administration of charities (reiterated in new section 1E(2)).	Charity Law Association, DCH 34, para 14	It is not intended that the Commission would take over the administration of any charity. This clause would confer on it a new power to secure the proper administration of charities by directing existing trustees to take any necessary remedial action where it is satisfied that there has been misconduct or mismanagement, or it is necessary or desirable to act to protect the property of the charity or secure a proper application of its property, other than one which is expressly prohibited by the trusts of the charity or in statute. The Commission’s exercise of these powers could be challenged at the Tribunal.

Clause	Original text	Change/comment	Source*	Comments by HMG
17	Power to direct application of charity property	This was introduced without any previous public consultation and should be rejected. The Charity Commission does not have the competence to run charities.	BTCV, DCH 120, para 17	It is not proposed that the Charity Commission will run charities. This power will enable the Commission to act where it is necessary or desirable to do so for the purpose of securing a proper application of the property of the charity for purposes of the charity. The Commission's exercise of these powers could be challenged at the Tribunal.
18	Relaxation of publicity requirements relating to schemes etc. (20A(3) – The time when any such notice is given is to be decided by the Commission)	Allowing the Commission discretion as to when schemes or orders are published does not accord with the premise of “open Government”.	Hilary Phillips, DCH 22	The purpose of relaxing publicity requirements is to reduce, for the benefit of charities rather than the Charity Commission, the length of time and the bureaucracy involved in making a scheme or order. The Charity Commission would decide that publicity was not required if it believed that there was not enough public interest in the proposed scheme or order to justify the time and expense of giving publicity. The Commission would always give its reasons for disapplying (or not disapplying) the publicity requirement. We see no inconsistency in this with the principles of Open Government.
20	Power to give advice and guidance	This should be included under clause 5 “The Commission’s general functions”.	R L Glasspool Charity Trust, DCH 152	This is a power not a function. Clause 20 is part of Chapter 5 of the draft Bill which covers the assistance and supervision of charities by the court and the Charity Commission whereas clause 5 covers the Commission's objectives, functions and duties. It preserves the existing powers under section 29 of the 1993 Act and adds a more general power for the Commission to give advice.
		The two roles of regulation and advice should be combined within one Commission. If they are split they may get out of step. An effective appeals mechanism would of course be required.	St Andrew’s Group of Hospitals, DCH 10, para 8	There is no intention to split these roles and we believe the continuum is helpful. The Commission's advisory role is defined in the draft Bill to give a clearer focus on regulatory issues.
		This clause, together with 1C(2) gives the Commission very wider powers to give advice. This may end up blurring the boundaries between the Commission’s advisory and regulatory roles even more than at present.	Association of Charitable Foundations, DCH 23, para 9	See above.

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		Consideration should be given to contracting out the advisory service, possibly to an organisation such as the NCVO at national level, but preferably to the lowest level possible. The Bill gives the Commission considerable additional regulatory powers and at the same time it is expected to act as an advisory service to the sector. If charities suspect the Commission is going to leap on them for a misdemeanour they may be more unlikely to contact them.	Community Action Hampshire, DCH 52, para 2	We believe there are good reasons why the Commission should have an advisory as well as a regulatory role. A responsible and enabling regulator should communicate with its stakeholders to recommend good practice and help to make them more competent - to prevent problems arising, rather than waiting until problems have taken hold before having competence to act.
		Most councils for voluntary service want to see the Commission's advisory role strengthened not weakened.	National Association of Councils for Voluntary Service, DCH 64, para 4.1	We believe the draft Bill reinforces the Commission's advisory role, strengthening it in statute.
21	Power to enter premises	<p>This seems to set an odd precedent, given that there is no equivalent provision for staff of Companies House or agencies in the public sector.</p> <p>This is draconian and unjustified. However if it is retained, the person making the entry should be required (a) to provide a copy of the warrant under which he enters to the occupier of the premises and (b) provide the person with a copy of any statement he makes under proposed new s.31A(7) [The authorised person must make a written record of...].</p>	<p>R L Glasspool Charity Trust, DCH 152</p> <p>Bircham Dyson Bell, DCH 166, para 14</p>	<p>The Commissioners have the power under section 9 of the Charities Act 1993 to call for documents and search records relating to a charity and any person who wilfully conceals or destroys any document which he is liable to be required to produce to the Commissioners is guilty of an offence under section 11 (2). However, experience has shown that some documents have been destroyed or concealed following the institution of an inquiry under section 8 and the making of an order. Other regulators have equivalent powers - not Companies House, which is not a regulator, but DTI which is the investigator of companies; the Financial Services Authority; OFT etc.</p> <p>This is a wide power although the circumstances of its use would be strictly controlled by an external authority. We are happy to consider this.</p>

Clause	Original text	Change/comment	Source*	Comments by HMG
22	Annual audit or examination of accounts of unincorporated charities	These changes may have a limited impact on smaller charities in receipt of grants from statutory bodies and trusts, which are currently required by their funders to undergo a full audit (even though this is not required by law). There should also be strong guidance to funding bodies, especially local authorities, about this issue.	Volunteering England, DCH 8, para 3.3.1 – 3.3.1.3	It would be inappropriate for the Government to interfere unduly in the grant-making process. The statutory and departmental funding provided to charities and reporting requirements are outside the scope of this Bill.
		The draft Bill proposes that the reports of charities are subject to differing level of external assurance, particularly between charitable companies (established under the Charities Act) and other charities (including the new CIO). The proposals will be confusing and unnecessary complex. The thresholds are different again from those required for registration. The regime for charitable companies, as compared to other charities, is stricter in the £90,000 to £250,000 range, while it is laxer in the £10,000 to £90,000 range. There does not appear to be a reason for these differences.	ACCA, DCH 176, para 4	The CIO would be subject to Part VI of the Charities Act 1993, therefore no anomalies would exist in respect to audit thresholds. While there would be some discrepancy in the figures, the original strategy unit report did not indicate a sector desire for the threshold of £10k to be increased. The advantages of increasing the threshold would be tempered by the loss of assurance for those charities whose income is between £10k and 90K.
		<p>The provisions as applied to independent examiners should be extended to reporting accountants of charitable companies, in each case below the £250,000 threshold.</p> <p>The thresholds should be harmonised at £10,000/ £250,000/ £500,000 for an independent examiner's/ accountant's report and the qualification of the examiner/ reporting accountant for both charitable companies and other charities. It might highlight the distinctions and avoid confusion if the phrases "independent examiner" and "independent examination" applied only within the £10,000 - £250,000 band, and "reporting accountant" and "accountant's report" only within the £250,000 - £500,000 band, for all charities.</p> <p>The heading should be amended to read "annual audit or examination of accounts of unincorporated charities or CIOs".</p>	Michael Gwinnell, DCH 180, para 10	Charitable companies with incomes below £90k are not required to have an Audit Exemption Report, while unincorporated charities are required to have an Independent Examination at £10k. It has been estimated that while there are just over 26,000 charitable companies on the Charity Commission's register only 6,168 of them have incomes between £10k and £90k. In contrast, the number of unincorporated charities with incomes between £10k and £90k has been estimated at approximately 37,000. To align the requirement for both charitable companies and unincorporated charities the Government would either have to lower the threshold for Audit Exemption Reports for charitable companies or alternatively remove the requirement for unincorporated charities to have an Independent Examination. The former would impose unnecessary burdens on charitable companies whilst the latter would have a negative impact on the accountability and transparency of the sector and might lead to a reduction in public trust and confidence in

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				<p>the charity brand.</p> <p>The Auditing Practices Board produce standards applicable to the work of preparing an Audit Exemption Report, effectively setting out the procedural basis for undertaking such an assignment. Independent Examination was designed specifically for charities, and the procedural basis for such assignments are set by Directions of the Charity Commissioners made under Section 43(7)(b) of the Charities Act 1993.</p>
22(2)(1)	<p>For subsection (1) substitute - subsection (2) below applies to a financial year of a charity if – (a) the charity’s gross income in that year exceeds £500,000; (b) the charity’s gross income in that year exceeds the accounts threshold and at the end of the year the aggregate value of its assets (before deduction of liabilities) exceeds £2.8 million.</p>	<p>The thresholds are too low. The new asset threshold of £2.8 million will mean some relatively small charities with income in the £10,000 to £250,000 range will be required to have an audit where previously they may have had an independent examination or accountant’s report.</p> <p>Charities will incur extra costs as a result of having their annual accounts fully audited instead of merely independently examined. Clause 22(2)(1)(b) should apply only if assets valued at above a reasonable threshold are disposed of during the relevant period and this disposal took place without supervision by the Commission.</p>	<p>PricewaterhouseCoopers, DCH 138</p> <p>Cardiff Further Education Trust, DCH 79, para 2</p>	<p>The asset threshold would apply only to unincorporated charities with incomes above the £100k threshold. That was deliberate so as to avoid charities such as playing fields, recreational fields and other special land charities being caught by the asset threshold. The asset threshold has been proposed as a result of feedback to the Strategy Unit report and is consistent with the asset threshold under the Companies Act. It would be hard to justify a higher asset threshold applying to charities than the generality of companies.</p> <p>The effect of the asset and income thresholds is deregulatory. There would be a cost impact to asset rich charities with income in the range of £100k-£250K but assets as well as income increase public accountability needs.</p>
		<p>This clause should be removed in order to simplify the regime and provide a big financial saving in the associated regulatory costs for charities and the Charity Commission.</p>	<p>Association of Charity Independent Examiners, DCH 94, para 4.6</p>	<p>Removal of this clause could mean that malpractice remains undiscovered within medium-sized charities, potentially lowering public confidence in the sector. Responses to the Strategy Unit report indicated that the sector wanted a lower threshold than that proposed, causing the proposed threshold to be lowered from £1million to £500,000.</p>

Clause	Original text	Change/comment	Source*	Comments by HMG
		If the provisions for the audit thresholds are to have any consistency then there must also be statutory provisions for group accounts included in the draft Bill. The Charities Act 1993 is based on the premise that charities produce entity or individual accounts – this is out of date and the Act should address this issue.	Charity Finance Directors' Group, DCH 129, para 2.2	While the SORP recommends the preparation of group or consolidated accounts there is no legal basis in charity law for their preparation or filing. This is an issue that the Home Office will consider and take forward within the Bill.
22(5)(3A)	If subsection (3) above applies to the accounts of a charity for a year and the charity's gross income in that year exceeds £250,000, a person qualifies as an independent examiner... if (and only if) he is an independent person who is a member of (a) a body for the time being specified in section 249D(3) of the Companies Act 1985.. or (b) the Chartered Institute of Public Finance and Accountancy.	<p>This is unnecessarily restrictive. The following accountancy bodies should be added to the list – the Institute for Financial Accountants and the Association of Charity Independent Examiners.</p> <p>This will impact on auditors who will inevitably become fewer in number and charge higher fees to cover their costs. Unincorporated charities will also have to meet the fairly stringent requirements of the SORP 2000, while incorporated charities with an income of up to £90,000 are not subject to any form of external scrutiny.</p>	<p>Howard Sanderson, DCH 76</p> <p>Sovereign Management Services Ltd, DCH 39</p>	<p>This issue revolves around whether these bodies can demonstrate the usual criteria for assessing eligibility of professional bodies: membership criteria, training, regulatory supervision etc.</p> <p>The Association of Charity Independent Examiners has made a valuable contribution to the sector and the Home Office has sympathy for their wish to be included, though this may not be easy with the application of the above criteria.</p> <p>The Government is aware that concerns have been expressed in relation to a possible decrease in the number of registered auditors as a result of the increase in the audit threshold for registered companies. It was considered in the Regulatory Impact Assessment which accompanied the change in the audit threshold for registered companies at the beginning of this year. The Government believes that the impact on charities has been minimised by the provision of a rise in the audit requirement threshold for charities in the draft Charities Bill.</p> <p>See comments above in relation to aligning the audit requirements below £250k level.</p>
24	Relaxation of restriction on altering memorandum etc. of charitable company	This clause should be replaced by a simple amendment to the Companies Act to bring the scrutiny of the accounts of charitable companies within the provisions of s.43 of the Charities Act 1993 (as amended). Clause 22(5) could then be simplified to list the relevant qualifications directly, rather than by reference to the Companies Act.	Association of Charity Independent Examiners, DCH 94, para 5.5	There remain practical difficulties in exporting the Charities Act regime to Charitable Companies. The Home Office will consider if it is possible to overcome these difficulties, at which point it will consider this point.

Clause	Original text	Change/comment	Source*	Comments by HMG
25	Annual audit or examination of accounts by charitable companies			
25(1)	In section 249A(4) of the Companies Act 1985 (c.6) (circumstances in which charitable company's accounts may be subject to an accountant's report instead of an audit) – (a)... for "£1.4 million" substitute "£500,000" and (b)... for £1.4 million" substitute "£2.8 million".	The draft Bill has not sought to properly regulate the accounts of small charitable companies. A charitable company with gross income below £90,000 is not subject to any independent scrutiny of its accounts. Independent examination should replace the accountant's report requirement for charitable companies at the same level of gross income applicable to unincorporated charities.	Howard Sanderson, DCH 76	Please see the comments above. These measures are intended to be de-regulatory and have strong support as witnessed by the consultation feedback. They ensure that regulation is proportionate to the risks involved.
26	Charitable incorporated organisations	This is welcomed but the aim should be to add this to the range of legal forms available to charities, not to make this the only option available.	NCVO, DCH 2, para 2.20	The CIO would be an additional legal form for charities: the Bill would not limit charities' ability to use any of the other forms already available. The Government would review in five years' time whether or not the legal form of company limited by guarantee (CLG) should continue to be available alongside the CIO. If the CLG fell into disuse among charities, because the CIO was found by charities to have all the advantages of the CLG and none of its disadvantages, there might be a case for withdrawing the CLG as an option. The paramount consideration would be the interests of charities.
		There is concern that all corporate charities will be forced to adopt this legal form whether it is good for them or not. The CIO should have both membership and non-membership forms.	BTCV, DCH 120, para 8.1	See above. The CIO would have both membership and non-membership forms.
		The RSPCA is incorporated by a special Act of Parliament and does not appear to fall within the definition of "charitable company" provided in the draft Bill. The Bill should be amended to provide all charities with the power to convert into a CIO.	RSPCA, DCH 140, para 9	Bodies incorporated by Act of Parliament or by Royal Charter are not charitable companies within the meaning of the Charities Act 1993. We will explore the possibility of a mechanism allowing such bodies to convert to a CIO.

Clause	Original text	Change/comment	Source*	Comments by HMG
27	Remuneration of trustee etc providing services to charity	This is welcome but there should also be provision for the remuneration of trustees under certain circumstances purely in return for their fulfilling the capacity of trustee. Allowing charities to offer reasonable remuneration will give another option to ensure boards are of the best calibre and as diverse as possible.	RNID, DCH 5, para 5	Consultations and surveys have consistently shown high levels of support among charities for maintaining the voluntary principle of trusteeship. It is seen as epitomising the ethos of the charitable sector, and as distinguishing it from other sectors. We agree. The Bill would therefore introduce only a modest relaxation of the general rule against payment of trustees, to allow payment to be made for services which are outside the duties of trusteeship. Where a charity can show that there will be a clear benefit to it, in terms of cost or otherwise, that will outweigh the disadvantages of having one or more paid trustees, the Charity Commission can authorise payment(s) of trustees for carrying out the duties of trusteeship. In exercising any statutory or constitutional power to pay a trustee, or in seeking the Commission's authority, the trustee body should consider the implications for the charity of having some trustees paid and some unpaid, and should go down that route only if they are satisfied that it is in the charity's best interests.
		The proposed conditions under which payments to trustees could be made are fairly loose and should not happen. Once one trustee on a board is paid, it would be difficult to prevent others applying and could lead to a 'two-tier'; board mentality. At the very least, the Commission should be involved in authorising any payments to trustees, to ensure there is a genuinely independent review of the need for payment.	Ian Clark, DCH 53	See above.
73A	Remuneration of trustees etc.	This clause should explicitly preserve existing schemes or orders of the Charity Commission which already authorise remuneration to be paid to volunteer trustees of a charity, or the continued validity of existing schemes made by the Commission will be put in doubt.	WEC International, DCH 84	This is not necessary. The validity of existing schemes and orders would not be affected by the new statutory power.
		Conditions A to D in clause 73A should be the subject of audit whenever trustees' are remunerated for providing services to a charity.	Charity Finance Directors' Group, DCH 129, para 3.13	Exercise of the new statutory power would be at trustees' discretion. We believe that requiring an audit of every exercise of the power would be unduly burdensome. - but larger charities would continue to be required to report instances and amounts of trustee remuneration in the notes to their accounts.

Clause	Original text	Change/comment	Source*	Comments by HMG
73A(5)	Condition C is that if immediately after the agreement is entered into there is, in the case of the charity, more than one person who is a charity trustee and.... the total number of them constitute a minority of the persons for the time being holding office as charity trustees of the charity.	This should be amended to make it transparently clear that the proposed "minority of the persons" qualification should only generally apply to substantial charities with an annual income in excess of, say, £500,000 per annum. This would be of great practical benefit to smaller charities and would be unlikely to promote misuse of this proposed provision.	Alan Meyer, DCH 56	The dangers of having a majority of the trustee body receiving payments would in our view be as real in a small charity as in a large one. We do not think that it should be routinely possible in any charity for paid trustees to be able to outvote unpaid trustees.
		This is convoluted and may be unhelpful to charities with a small number of trustees. It would be better to use the wording already used by the Charity Law Association in its model documents: "no more than [number or proportion up to one half] of the Trustees are interested in such a contract in any financial year".	Stone King, DCH 86, para 8	This provision would prevent all charities – including those with a small number of trustees - from having a majority of paid trustees. A charity with one or two trustees could have no paid trustees. A charity with three or four trustees could have one paid trustee.
73A(6)	Condition D is that the trusts of the charity do not contain any express provision that prohibits the relevant person from receiving the remuneration.	This seems to put charities formed after the coming into force of the new Act in an advantageous position, with regard to recruiting trustees, when compared to existing charities with a very limited power to pay trustees contained in their governing documents. Given that section 73B directs the charity to Commission guidance, condition D does not appear to serve any useful purpose.	Manches LLP, DCH 167, para 3	The new statutory power would operate as an addition to any constitutional power a charity might have, and would be available equally to charities formed before and after the commencement date of the provision. The purpose of Condition D is to ensure that the new power would not override any express prohibition that the founders of a charity had decided at the outset to include in its constitution.
73A(7)(a)	Nothing in this section applies to – (a) any remuneration for services provided by a person in his capacity as a charity trustee or trustee for a charity or under a contract of employment,	This appears to undermine the entire clause 27 and conflicts with sub-clause (1) ["This section applies to remuneration for services provided by a person to or on behalf of a charity where – (a) he is a charity trustee or trustee for the charity, or (b) he is connected with a charity trustee or trustee for the charity and the remuneration might result in that trustee obtaining any benefit"].	Monro Fisher Wasbrough, DCH 37, para 2	The new statutory power is meant to cover only payments for services which are provided to a charity occasionally by one of its trustees – conveyancing work, for example, by a trustee who is a solicitor. It is not meant to cover payments to a trustee for carrying out the duties of trusteeship, or payment of a salary to a trustee who is also an employee of the charity. Subsection (7) achieves this limitation, which was welcomed on public consultation.
		The exemption should be extended to apply to remuneration for services performed as an office holder, in order to remove doubt in the case of Heads of Colleges and other office-holders who are not necessarily employed under a contract of employment.	Colleges of Cambridge University, DCH 88, para 4	The provision as drafted would cover the remuneration of a person who provided a service otherwise than under a contract of employment.

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73B(6)	For the purposes of section 73A the following persons are “connected” with a charity trustee or trustee for the a charity - ...	The Bill should also be explicit about whether a trustee of a charity and a member of staff can be allowed with relationships described in 73B. A charity should not appoint a member of its staff where a relationship exists as defined in section 73B, nor should it be able to appoint a trustee where it already employs a member of staff who has a relationship with the proposed trustee as defined within this section.	Volunteering England, DCH 8, para 3.6.3	The payment of a salary to a person “connected with” a trustee would need legal authority if it could be said to provide the trustee with an indirect but material benefit. That would be so if, for example, the trustee and employee were spouses with shared finances – a payment to one benefits the other.
73B(6)(d)(i)	A body corporate in which – (i) any connected person falling within any of paragraphs (a) to (c) has a substantial interest,	There is no definition of “substantial interest”.	Monro Fisher Wasbrough, DCH 37, para 3	By virtue of subsection (7) the definition in paragraph 4 of schedule 5 to the 1993 Act applies.
28	Disqualification of trustee receiving remuneration by virtue of section 27			
73C(4)	A person who does any act which he is disqualified from doing by virtue of subsection (2) above is guilty of an offence and liable – (a) imprisonment for a term not exceeding six months or to a fine not exceeding the statutory minimum, or both;	This is too severe a penalty. At the least the defence allowed in 28(5) should extend a defence to those who unwittingly put themselves in that position. Existing provisions are adequate to the breach of trust provisions and the new section is disproportionate to the mischief it seeks to remedy.	Hilary Phillips, DCH 22 Stone King, DCH 86, para 9	New section 73C(4) is to penalise trustees who, although disqualified from making decisions about their own remuneration by the charity, do so. We believe that trustees who look after their own financial interests at their charity’s expense should be penalised – it is a fundamental abuse of charity. The penalty could range from a small fine to imprisonment, depending on the circumstances and the seriousness with which the court viewed the matter. We now propose to add this offence to the list in s. 94(2) of the 1993 Act to provide a safeguard that no prosecution could take place without the Director of Public Prosecution’s consent.
33	Power to spend capital	There is no half-way house between a total restriction on expenditure of capital and a complete relaxation of that restriction. This new power may discourage potential donors who might be willing to set up a charity in reliance on the freedom to provide for a permanent endowment, since they could not be confident that their gift would be retained indefinitely. This measure should possibly be modified in relation to larger charities.	NCVO, DCH 2, para 2.23	This provision allows charities to resolve to spend small sums (up to £10,000) of permanent endowment without the need for any regulatory consent. For the expenditure of larger sums the interests of donors are safeguarded by the requirement on the charity to obtain the Charity Commission’s concurrence before it spends the endowment. In deciding whether or not to allow the charity to spend the endowment the Commission must take into account any evidence of the donor’s wishes.

Clause	Original text	Change/comment	Source*	Comments by HMG
75(1)	This section applies where – (a) a charity... has an endowment fund which does not consist of or include designated land,	The decision to exclude land held on special trusts in inequitable because a charity should not be precluded from spending any of its capital simply because it holds some land on special trusts. An alternative could be to allow a charity to spend capital other than such land. There should also be some mention of the total return approach to investments, which is supported by the Commission.	Stone King, DCH 86, para 11	The purpose of this is to ensure that land or property – such as an almshouse – which was given to a charity for some specific charitable use continues to be used for the purpose specified by the donor. We do not believe that the total return approach to investments requires any statutory underpinning.
		The Bill should permit Permanent Endowments to be expended on new land or buildings (at present it can only be expended where it is on new land and buildings, rather than new buildings on existing land). The ability to commit such expenditure could be made subject to the approval of the Commission.	The Fellowship of Independent Evangelical Churches Limited, DCH 126, para 5	The Bill would allow permanent endowment funds to be expended on new buildings, once a charity had validly resolved under clause 75 or 75A to free the endowment from restrictions on its expenditure.
75(3)	The financial condition in this subsection is met if – (a) the relevant charity's gross income in its last financial year did not exceed £1,000, or (b) its gross income in that year exceeded that amount but the market value of the endowment fund does not exceed £10,000.	The de minimis limit for conversion should be set at £25,000. The provision to change the threshold by secondary legislation is welcomed.	Charity Finance Directors' Group, DCH 129, para 3.24	The figure of £10,000 was supported by 94% of respondents to the public consultation on the Strategy Unit's review. It could be raised by the Home Secretary by order if it proved too low in practice.
75A	Power of larger charities to spend capital	This is overly restrictive. Instead, what is needed is a comprehensive general provision to permit charity trustees to adopt a total return investment policy which defines appropriate safeguards to protect the real value of the endowments of a charity and the wishes of donors. It unclear why corporate bodies such as Cambridge Colleges are excluded from the ambit of this section.	Colleges of Cambridge University, DCH 88, para 5	This would be a relaxation, not a restriction, by comparison with the present position. Subject to the Charity Commission's agreement, there would be no upper limit on the value of a permanent endowment fund that a charity's trustees could resolve to spend as if it were income. Corporate bodies are excluded because they do not hold permanent endowment as part of their corporate property.
34	Merger of charities	Decisions about mergers are properly the responsibility of trustees; the Charity Commission should not direct trustees to merge (ie because they think it would maximise social and economic impact).	NCVO, DCH 2, para 2.24	We agree.
		This section removes some of the legal barriers to merger, but does not actively encourage charities, once they have fulfilled their need, to merge or dissolve. The role of facilitating the merger and closure of charities should be explicitly defined as a function of the Charity Commission.	NSPCC, DCH 4, para 14	We believe that the Commission's role should be to facilitate mergers, and other forms of collaborative working, between charities, but not to procure mergers or otherwise put pressure on charities. Decisions to merge, or to collaborate, with other charities are for the trustees of the charities involved to make.

Clause	Original text	Change/comment	Source*	Comments by HMG
75C	Register of charity mergers	There is some anomaly in these provisions, which provides for a declaration akin to that under s.40 Trustee Act 1925, to transfer all the property of a transferring charity to the recipient without the need for any further document (new s.75D(5)). New section 75C(5) allows for registration of a merger only when all the transfers of property have taken place.	The Law Society, DCH 162, para 10	We accept that there may be an anomaly here, and will consider an amendment. The intention of new sections 75C and 75D is to enable a declaration to be made in contemplation of a merger taking place, and for notification to be made to the register of mergers after the merger has taken place.
75D(2)	Any gift which – (a) is expressed as a gift to the transferor, and (b) takes effect on or after the registered termination date, takes effect as a gift to the transferee.	These provisions should also apply to incorporation of existing unincorporated charities (including CIOs, Royal Charter corporations or companies limited by guarantee) to ensure consistency.	Stone King, DCH 86, para 12	These provisions could apply in such cases.
35	Statements indicating benefits for charitable institutions and fund-raisers	Implementation of this may lead to a significant decrease in funds donated by prospective donors. If the investment of a donation is viewed on a short-term basis it can appear a very expensive method of fundraising, although over a 3-5 year period it is apparent that it is very profitable indeed.	John Grooms, DCH 125, para 1.1	The aim of this proposal is transparency. Providing information to the public would enable them to make informed choices about donating to charities. Not disclosing this information in an open and transparent way could lead to a loss of confidence in the sector and a decrease in funds. It is recognised that there are methods of fundraising which are more beneficial in the long term, and it is considered that donors who sign up to these ways of giving are aware of the long-term benefits they provide.
35(2)	In subsection (1)... substitute – (c) the method by which the fundraiser's remuneration in connection with the appeal is to be determined and the notifiable amount of that remuneration.	Public collections disclosure should only seek to clarify if a fundraiser is paid or a volunteer. Although the declaration distinguishing paid fundraisers from volunteers is welcome, we question the rationale of requiring comprehensive financial information to be offered at this point. Why should public collections costs be declared when there is no such burden on press, direct marketing or TV activity.	Public Fundraising Regulatory Association, DCH 59, para 5	The rationale behind providing this type of information is to provide full, comprehensive information for the donor, so they can make an informed decision at the time of solicitation. Regulation for press, direct marketing and TV is covered in section 60 of the 1992 Act. Section 61(4) also applies in some circumstances to TV and radio marketing.

Clause	Original text	Change/comment	Source*	Comments by HMG
		The Commission (or Trading Standards) should be given the power to prosecute commercial organisations or professional fundraisers who are in breach of their obligations under the 1992 Act.	Charity Law Association, DCH 34, para 17	<p>The Commission already provides advice to local authorities and the police dealing with organisations that breach their obligations under the 1992 Act. However, enforcement would remain a matter for local authorities and the police.</p> <p>The opportunity for the sector to develop and manage self-regulation of fundraising was strongly supported in consultation, with the prospect of statutory regulation kept in reserve.</p>
35(5)	... a reference to the “notifiable amount” of any remuneration or other sum is a reference – (a) to the actual amount of the remuneration or sum, if that is known at the time when the statement was made;	The Bill should clarify whether the object of this clause is to ensure the total return or estimated total return on an exercise in commercial participation as stated in contracts. If this is the intention, further consultation on the reporting structures necessary to achieve this will be essential. A commitment to consultation should be included in the Bill.	Institute of Fundraising, DCH 60, para 4.0	It is proposed that Guidance on the appropriate form of statements to be drawn up in consultation with charities and their commercial partners.
36	Reserve power to control fundraising by charitable institutions	This measure is supported, but the criteria against which the Home Secretary intends to measure the success of a self-regulatory scheme should be published. This should not be set out in statutory guidance because relevant research on the range and scale of organisations is not yet available; meaningful targets cannot be set until the scheme’s scope is established; Government and the sector should work together to develop the criteria, and flexibility should be retained to account for fundraising as an innovative discipline.	Institute of Fundraising, DCH 60, para 3.0	In its response to the Strategy Unit, the Government stated its intention to publish the criteria by which the Home Secretary will judge the self-regulatory scheme. Government will work with the sector to develop the criteria, and take into account the need for flexibility for future changes within the fundraising sector.

Clause	Original text	Change/comment	Source*	Comments by HMG
37	Regulation of public charitable collections	The Bill provides very little detail on how the licensing system will work. The detail is to be left to guidance notes, which should be given statutory force. Otherwise what is conceived as a uniform system in principle may be far from uniform in execution, as local authorities make different decisions on issues like the period of permits to be issued, the definition and capacity of a site for the purposes of public collections and the use of the powers which they retain to refuse permits.	Public Fundraising Regulatory Association, DCH 59, para 2.1 - 2.3	It is proposed to set up a group to include the local government associations, the police service, charities, charity sector umbrella organisations and the Charity Commission to oversee the preparation of regulations and Guidance and ensure effective implementation and delivery of the proposed arrangements. The proposals are for a two-stage process, requiring a Certificate of Fitness, and then a permit to collect. Once an organisation had acquired a Certificate of Fitness (either from the relevant local authority or a lead local authority), local authorities would only be able to refuse a permit on the grounds of capacity. Capacity will vary from one area to another. Factors to be taken into account in determining capacity will be dealt with in the Guidance, to ensure a consistent approach.
65(2)(a)(ii)	In this Part – (a) “public charitable collection” means... a charitable appeal which is made – (ii) by means of visits to houses or business premises (or both);	Clarification is needed that payroll giving and other workplace fundraising activities are not caught in the definition of ‘business premises’ by this clause.	Centrepoin, DCH 85	Fundraising that takes place <i>within</i> the workplace would not fall within the meaning of a ‘door to door’ collection. Collections made by visiting a number of workplaces ‘door to door’ would fall within this provision.
65(2)(b)	“Charitable appeal” means an appeal to members of the public to give money or other property.. which is made in association with a representation that the whole part or any part of its proceeds is to be applied for charitable, benevolent or philanthropic purposes;	This should read “to give or <i>promise to give</i> ”, in order to resolve whether the solicitation of direct debit details from the public is also included. The Bill should explicitly say that direct debit fundraising requires regulation.	Royal Borough of Kensington and Chelsea, DCH 142, para 11 Swindon Borough Council, DCH 36, para 1	The proposed wording of this clause would include the solicitation of direct debits. The clause was drafted so that it could include other types of fundraising that might evolve in the future, thereby avoid the situation we have now of outdated legislation that does not specifically fit with new forms of fundraising such as direct debit solicitation. We will consider whether direct debit fundraising could be specifically included in the clause.
65(2)(d)	A “door to door collection” is a public charitable collection that is made by means of visits to houses or business premises (or both),	This provision could include recruitment campaigns using payroll giving and direct debit which are carried out in the workplace.	Cancer Research UK, DCH 127, para 5.2.2	See response to para 65(2)(a)(ii), above.

Clause	Original text	Change/comment	Source*	Comments by HMG
65(5)(b)(ii)	“public place” means – (b) ... any other place to which, at any time when the appeal is made, members of the public have or are permitted to have access and which either – (i) if within a building, is a public area within any station, airport or shopping precinct or any other similar public area.	This will increase administrative burdens and costs. There does not seem to have been any consultation with the owners of these sites. These changes aim to regulate fundraising by location rather than type of fundraising. It is inappropriate for cash collections to be regulated in the same way as direct debit solicitation.	Caring for Life, DCH 116	In responses to the consultation, some local authorities suggested that bogus fundraisers have exploited the current exclusion from the licensing scheme of these places. There was support for this proposal in the consultation on Public Collections, with 62% of respondents in favour. Leaving these places out of the scope of licensing would be inconsistent and leave them open to abuse. The proposed scheme introduces appropriate regulation both by type of collection, and according to the place of collection.
65A	A Charitable appeal is not a public charitable collection if the appeal – (a) is made in the course of a public meeting; or (b) is made – (i) on land within a churchyard or burial ground...	This should also include clothing banks and recycling bins which are placed in supermarket, public house and local authority car parks. Enquires have estimated that 200 bins for one company will generate an income in excess of approximately £468,000 per annum. It is important to incorporate these receptacles within the Bill to ensure that profits made from such collections reach the intended charities and are not used as a tool to provide profit to non-charitable organisations.	The Institute of Licensing, DCH 61, paras 6 – 7	It is not proposed to change the existing regulations relating to unattended receptacles (Clause 65(2)(c) of the 1992 Act. It would be open for potential donors to examine the intended destination of goods at the time of donating.

Clause	Original text	Change/comment	Source*	Comments by HMG
38	Restrictions on conducting collections			
66(1)	A collection in a public place must not be conducted in the area of a local authority unless – (a) the promoters of the collection hold a certificate of fitness... (b) the collection is conducted in accordance with a permit issued by the authority under section 68	<p>All registered charities should be automatically deemed fit to carry out public collections so as to dispense with the need for the certificate of fitness (COF). This would simplify the law and make the whole operation cheaper. The Bill does not oblige local authorities to issue COFs within a certain time frame.</p> <p>As well as the COF, collections in public places will only be allowed with a permit from the local authority. In London charities would have to negotiate with 32 London Boroughs. At present they only have to deal with the Metropolitan Police authority.</p>	Charity Law Association, DCH 34, paras 18 – 20	<p>The application for a Certificate of Fitness proposes checks that are more thorough than simply checking a charity's registration with the Charity Commission. These would include checks on the promoter(s) of the collection, and their due diligence in organising collections.</p> <p>It is intended that the time frame for local authorities to issue Certificate of Fitness would be outlined in the Guidance to be developed with key stakeholders.</p> <p>The Regulatory Impact Assessment recognises that the transition to local authority licensing in London could prove difficult. We propose further discussions with key stakeholders in London to determine whether there are any arrangements needed over and above the lead authority proposals for collections taking place in more than one London Borough.</p>
		A two-tier process of the Certificate of Fitness and a licence application is an excessive burden. A more simple and effective solution may be to list those who have committed an offence or are ineligible, against which applications for licences could be checked.	Save the Children, DCH 119, para 2.1	<p>Once a Certificate of Fitness is obtained from one lead local authority, an organisation would then only be required to obtain a permit from the local authorities where they wish to operate, which would be subject to a capacity check. The Certificate of Fitness could be in force for up to five years.</p> <p>Currently Exemption Orders apply to house-to-house collections. Current holders, like Save the Children, are asked to notify local authorities when and where they wish to collect house-to-house, so the proposals for the new scheme should be no different – they would just have to notify the local authority.</p> <p>A process where applications are checked against a list of those who have committed offences or were ineligible, was not considered to be a sufficiently effective form of regulation.</p>

Clause	Original text	Change/comment	Source*	Comments by HMG
		The proposal that no fee should be charged for licence application is not acceptable to local authorities. The cost of a public collections licence would be yet another tax deductible business expense. There should be a fee which is payable but could be waived at the discretion of the local authority in line with local policy. The development of policy, allocation of licenses, monitoring and enforcement against bogus collectors is costly and time consuming and must be properly funded. A separate policy to identify local capacity is not necessarily needed – the issue could be addressed through the Local Compact.	LGA, DCH 44	Fees cannot be charged for licenses at present, and the analysis in the Public Collections RIA concluded that the proposals should be cost neutral. However, we would welcome evidence from the LGA that would not support the conclusion in the RIA. Capacity checks would be developed with local authorities and other key stakeholders, and following consultation would form part of the published Guidance. This would ensure a consistent approach across local authorities.
66A	Restrictions on conducting door to door collections	Unlike collections in a public place, door to door collections will not need a permit, only to notify the local authority. If collection of direct debits began to be collected through a door to door basis this could damage public confidence.	NCVO, DCH 2, para 2.28	Collections of goods would only require notification as it was established that house-to-house collections do not raise issues of capacity. Door to door direct debit solicitations would be required to obtain a Certificate of Fitness, and to notify the local authority of the proposed collection. (Also refer to responses above to Clause 35 re. Statements)
66A(2)(b)	Subsection (1) does not apply to a door to door collection which is an exempt collection in relation to the area the authority by virtue of – (b) Section 66C (door to door collection of goods)	This section undermines efforts made to eradicate fraudulent collections. Clothing collections are exploited by large organised non charitable cartels who undertake these collections across England and Wales. Clothing and other goods are sold either for rag for flocking or wiping cloths at approximately £150-200 per tonne, with quality used clothing and accessories sold in the Easter Block for about £550 per tonne or in Africa for £600 per tonne. The largest charitable fraud is undertaken through unlicensed house-to-house collections of clothing and other goods.	The Institute of Licensing, DCH 61, paras 9 – 14	We are aware that there have been problems with these types of collections. Although it is proposed that the door to door collection of goods would only require notification to the local authority, this notification would be mandatory. Therefore if such collections take place without notification to the local authority, they could be investigated and where appropriate, prosecuted.

Clause	Original text	Change/comment	Source*	Comments by HMG
39	Exemptions from requirement to obtain certificates of fitness or permits in respect of collections			
66B	Exemption for local, short-term collections	<p>This is rather broad and could have the unintended consequence of allowing unlicensed charitable collections to compete with licensed collections.</p> <p>There should be no exemptions on the requirement of all collections to have a permit to enhance public confidence.</p>	<p>Hospital Broadcasting Association, DCH 82, para 3</p> <p>Crawley Borough Council, DCH 110, para 4</p>	<p>This proposal is to ensure that regulation is proportionate and appropriate. It would enable local, short-term collections to take place in communities, without risking the stifling of voluntary action through over-prescriptive regulation.</p> <p>Further details of what would constitute a 'local short-term collection' would be set out in the Guidance to be developed in consultation with the sector.</p> <p>If the local authority was not satisfied that the collection was local and short term, the organisation could be required to apply for a Certificate of Fitness and a permit, if undertaken in a public place.</p>
66B(1)(a)	A public charitable collection is an exempt collection in relation to the area of a local authority if – (a) the appeal is for a purpose that is local in character	The loose use of the term “purpose that is local in character” will lead to abuse. It should state explicitly that the fact that there will be some local beneficiary does not make the purpose “local in character” and that the purpose taken as a whole must be “local”.	Swindon Borough Council, DCH 36, para 5	<p>See the response to section 66B above.</p> <p>The Guidance would include an explanation of what types of collections would be deemed 'local in character'.</p>

Clause	Original text	Change/comment	Source*	Comments by HMG
66C(1)(b) and 66C(2)	A door to door collection is an exempt collection in relation to the area of local authority if (b)The promoters of the collection have notified the local authority of the matters mentioned in subsection (2) not later than 14 days before the day on which the collection commences (but not more than six months before that day).	<p>This takes no account of how house-to-house collections are made and is unworkable. It would cost charities significant sums of money in administration and result in shops running out of stock, suffering reductions in sales and the sums they raise for charity. There is no proportionate benefit. In the draft Charities and Trustee Investment (Scotland) Bill collections of goods for charity shops will not be regulated in Scotland, as there is no evidence of public nuisance or confidence issues associated with such collections and they remain outside the scope of the definition in Scotland of 'public benevolent collections'.</p> <p>This should be amended so that the notification is only required on a periodic basis (ie. annually) and is in more general terms as regards timing/ frequency and location. This current provision will prevent TR Aid from collecting from the most amount of households possible – valuable time and money will be wasted complying with these conditions and not collecting clothes and shoes. The new penalty fine (66C(3)(b)) will be detrimental to TR Aid's mission of funding overseas development projects.</p> <p>Greater distinction should be made between small-scale, local activities and more structured national collecting campaigns. A shorter notification period for small scale collections and collections of goods should be allowed. However, a longer notification period of two months (as recommended in the Draft Charities and Trustee Investment (Scotland) Bill) should be applied to house-to-house collections.</p> <p>This should be extended to 18 months before the intended collection day, in line with the proposals in Scotland. This will make planning of annual campaigns much easier. Local authorities should be required to issue or refuse permits well ahead of the intended collection day, to allow charities to plan in advance.</p>	<p>Association of Charity Shops, DCH 50, paras 4 – 5</p> <p>TR Aid, DCH 51</p> <p>Institute of Fundraising, DCH 70, para 4.3</p> <p>Hospital Broadcasting Association, DCH 82, para 5</p>	<p>The proposals outlined in the draft Bill for the collection of goods door to door represent a significant deregulation. Evidence showed that this type of collection did not present capacity issues and therefore the requirement to notify the local authority would be sufficient. However, any less regulation could result in abuse and create difficulties for local authorities to conduct effective enforcement (See comment for section 66 A (2b)).</p> <p>We do not feel that the minimum period of two weeks for notification is unreasonable. Any less would not be workable for local authorities. There is also the provision for notification significantly in advance, up to 6 months. However, we would be willing to consider representations for different forms or periods of notification for the collection of goods door to door.</p> <p>Longer notification periods for door to door collections of goods could be detrimental to smaller organisations.</p> <p>See responses above.</p>
66C(2)	The matters referred to in subsection (1)(b) are – (a) the purpose for which the proceeds of the appeal are to be applied; (b) the date or dates on which the collection is to be conducted; (c) the locality within which the collection is to be conducted; and (d) such other matters as may be prescribed.	The removal of collection made house-to-house from the licensing regime is welcomed. However, the benefit of this de-regulatory measure is totally negated by the specific notification requirements set out in 66C(2). The time restrictions take no account of how these collections are organised and is totally unworkable. It would cost significant sums of money in administration and lead to shops running out of stock and reductions in sales.	Acorns Children's Hospice, DCH 73	Refer to comment on new section 66C(1)(b) from the Association of Charity Shops above.

Clause	Original text	Change/comment	Source*	Comments by HMG
40	Certificates of fitness	There is no definition of "fitness" on the Bill. A clear definition of "capacity" needs to be stated in order to ensure a fair playing field (if local authorities can refuse licenses to collect on grounds of capacity).	Kingston Smith, DCH 117	The grounds on which an application for a certificate of fitness may be refused are set out in new section 66F (inserted by clause 40). It is proposed that the determination of capacity be set out in the Guidance to be developed with key stakeholders. This Guidance would ensure a consistent approach across local authorities.
		A statutory fee should be set to cover the cost of administration etc. (A statutory fee is currently set at £35 for 'small lottery' permits and £17.50 on renewal).	Crawley Borough Council, DCH 110, para 1	Refer to comments for Clause 38 section 66(1); source LGA para 44 above.
		There should be a duty on local authorities to promote responsible fundraising, as referred to in earlier stages of the consultation process. Without this protection local authorities may choose to prioritise unsubstantiated fears about alleged "public nuisance" over the proven social value of F2F fundraising.	Fruitful, DCH 150, para 2.3	The proposal is that local authorities could only refuse permits on the grounds of capacity and not arbitrary reasons. Capacity having been clearly set out in the Guidance developed in liaison with the sector. The promotion of responsible fundraising would be a matter for the proposed self-regulation of fundraising, which would aim to promote good practice and public confidence in fundraising.
66D	Applications for certificates	The promoter will have to apply to the local authority for the certificate of fitness (the 'lead authority concept'). Particular concerns have been raised with regards to the hand over of this function from the Metropolitan Police to the London boroughs. Local authorities with the least experience of licensing public collections will have the greatest responsibility laid upon them. Additional costs to administer the scheme within London boroughs would be approx £103,583 pa. Not imposing a fee for the administrative function of issuing a 'Certificate of Fitness' will place an extra burden on London boroughs.	The Institute of Licensing, DCH 61, paras 16 - 18	We have recognised that there may be difficulties in the transition to the new scheme in London. Further discussions with key stakeholders are proposed in London, and consideration would be given as to whether there are any arrangements needed over and above the lead authority proposals for collections taking place in more than one London Borough. The overall impact in public expenditure terms is expected to be neutral. However, in the case of the London local authorities, funding would be made available to cover the new duties which would fall to them under these proposals. Details are set out in the Regulatory Impact Assessment.

Clause	Original text	Change/comment	Source*	Comments by HMG
		Adopting the lead authority model means the burden of unified regulation falling disproportionately heavily in certain areas. A limited number of London boroughs will receive a significant volume of applications reflecting the concentration of charities in certain areas. As London boroughs currently have no responsibility for charitable fundraising this may present significant management challenges for some of the boroughs involved.	Public Fundraising Regulatory Association, DCH 59, para 3.1	Refer to comment above.
		Local authorities are best placed to carry out the enforcement functions but a central authority, such as the Charity Commission, should be responsible for licensing public collections. Local authorities would not be able to carry out the licensing function without very significant additional funding.	Royal Borough of Kensington and Chelsea, DCH 142, para 4	Licensing authorities are best placed to regulate collections in their area. There was overwhelming support (95%) for a new scheme to be administered by local authorities in the Strategy Unit review. If the Charity Commission were to take on this function it would represent an extension of their remit. Many local authorities already undertake this function very effectively and would wish to continue to do so.
		The lead authority scheme should be abolished and licenses issued by each authority with knowledge of their local area.	Crawley Borough Council, DCH 110, para 3	The proposal is that local authorities would be able to issue permits provided there is capacity. A consistent set of criteria for determining local capacity would be developed in consultation with key stakeholders and the sector, and published. The lead local authority scheme is designed to reduce the burdens on local authorities, as only one local authority would need to assess applications for a Certificate of Fitness.
66D(1)	A person or persons proposing to promote public charitable collections (other than exempt collections) in the area of one or more local authorities may apply for certificate of fitness	Clarification should be given as to the definition of "promoter" in the Bill. It should include an organisation, individuals or one individual. All fundraising activities on the street should be subject to the requirement for a permit, even if a Certificate of Fitness is not required because the collection will be small and local.	Institute of Fundraising, DCH 70, para 2.2	The definition for promoter is outlined in Clause 37 which would provide new sections 65B(1)(a) and (b) of the 1992 Act. It would allow for more than one individual or an incorporated organisation to be a promoter. Refer to comments for new section 66B, above.

Clause	Original text	Change/comment	Source*	Comments by HMG
		It would be more practical if once a COF has been secured a council is simply notified. If the council has any concerns about the charity then the onus will be on the council to act.	John Grooms, DCH 125, para 1.4	<p>Only collections taking place in public places would require a Certificate of Fitness and a permit to collect.</p> <p>House-to-house collections other than goods would require a Certificate of Fitness, but would only need to notify the local authority. House-to-house collections of goods, and local short-term collections would not require a certificate of fitness, but would need to notify the local authority.</p> <p>Without this proposed form of control, sites could become saturated with collectors, leading to public nuisance, and a reduction in public confidence.</p>
66(3)(a)	The application must – (a) be made not less than one month before the first of the collections commence;	It would not be possible to carry out all the necessary inquiries during this tight timetable. It is questionable whether the police, who will be responsible for carrying out the checks required by new section 66H, will have the resources to comply with these time limits.	Royal Borough of Kensington and Chelsea, DCH 142, para 21	<p>The proposed checks are very basic and not thought unreasonable. A Certificate of Fitness could last for up to five years.</p> <p>Further detail on the checks would be set out in the Guidance which would be developed with key stakeholders.</p>
66D(3)(c)	The applicant must – (c) specify the period for which the certificate is sought (which must be no more than 5 years);	This should be extended to 10 years. Setting a maximum of 5 years would seem to make the process unnecessarily burdensome.	Cancer Research UK, DCH 127, para 5.2.6	It is our opinion that a Certificate of Fitness should not last longer than five years. Organisations evolve and change over time and this proposal aims to strike a balance between the need to ensure proper regulation, viewed against the burden on promoters applying for Certificates, and the issuing authorities in determining applications.
		Guidance is required to state the conditions for a license being granted for less than five years, otherwise there will be inconsistencies in the implementation of the scheme.	Charity Finance Directors' Group, DCH 129, para 3.17	The Guidance to be developed would set out the criteria by which a Certificate of Fitness could be granted for less than five years.

Clause	Original text	Change/comment	Source*	Comments by HMG
66D(5)(c)	This subsection is satisfied in relation to a local authority and such a person if – (c) the person is a body (other than a charity) and the authority is the local authority for the area in which the body has its principal place of business or where it principally conducts its activities.	The issue of where a charity “principally conducts its business” may prove a difficult one to resolve.	Royal Borough of Kensington and Chelsea, DCH 142, para 24	It is proposed that registered charities would have to apply in the area in which they have their registered correspondence address. The issue is more complex for organisations that are not charities, although in the first instance, they would be expected to apply in the area in which the promoter’s address is located. The Guidance (to be developed in consultation with key stakeholders and the sector) would provide further details on interpreting this clause.
66E(1)(a)	On receiving an application for a certificate under section 66D in respect of any proposed public charitable collections, the local authority (a) must consult the chief officer of police for the police area which comprises or includes the area of the local authority	Concerns have been raised over the resourcing issues with the local police authorities and the time implications for the Chief of Police to vet the applications to a suitable standard. Clear guidance needs to be put in place to ensure consistency, transparency and proportionality across the Police Forces in England and Wales.	The Institute of Licensing, DCH 61, para 10	Refer to comment to clause 66D (3)(a).
66G	Withdrawal etc of certificates	It should be stated that local authorities have an obligation to pass on information to lead authorities with regards to offences committed under the Act with due regard to this section and initial grant of the ‘Certificate of Fitness’.	The Institute of Licensing, DCH 61, para 20	This would be taken into consideration in developing the Guidance.
66H	Appeals	In the instance of local authorities blocking certain charities there should be a higher authority to which the matter can be referred, in order to avoid repeated and costly appeals to magistrates courts. The Home Office may be the appropriate authority.	Barnardo’s, DCH 80, para 7.2.4	The proposal should not lead to arbitrary refusals for permits as in many cases local authorities would only be considering refusal on capacity grounds, where the promoter is already in possession of a Certificate of Fitness. The criteria for determining capacity would be in published Guidance, developed in consultation with the sector. The Home Office would not be an appropriate higher authority for appeal. See response to Crawley Borough Council’s comments below.

Clause	Original text	Change/comment	Source*	Comments by HMG
		The adoption of a scheme where any refusal for the grant of such a licence may be appealed to the Home Secretary for decision, as in accordance with other present legislation, would save costs and eliminate the need for unnecessary legal representation.	Crawley Borough Council, DCH 110, para 2	There was strong support (63%) for the Magistrates court being the avenue for appeal in the Consultation on Public Collections, which aligns it with the procedures for other licensing schemes. It was not considered appropriate for decisions of this kind to be taken by Central Government.
41	Permits to conduct collections in a public place	The clause should include provision for refusal on the grounds that the high street will be swamped with competing or inappropriately grouped collectors. The draft infers that local authorities must grant whatever is asked. Charities will suffer if the local authority is unable to act as a referee to schedule charitable collections so that the tolerance of givers is not stretched and charities have their intended site to themselves.	Swindon Borough Council, DCH 36, para 6	This is not the case. Section 69(1) of the 1992 Act, as amended by clause 41 of the draft Bill, would provide that a permit may be refused on capacity grounds. The intention is that capacity for street collections would be determined consistently, based on criteria set out in Guidance. Organisations could only be refused a permit to collect if there was not sufficient capacity. See the response to Clause 40 above.
		The Government's estimate of London-wide resource requirements for local authorities processing permit applications is unrealistic. It is based on the cash collections licensed by the Metropolitan police, who do not view F2F as licensable under the terms of the 1916 Act and has made no allowance for this in its figures.		The cost estimates in the Regulatory Impact Assessment were based on evidence provided by both the Metropolitan Police, and the Public Fundraising Regulatory Association (PFRA). The Regulatory Impact Assessment recognises that the police did not licence face-to-face fundraising, which is why figures from the PFRA on the 148 sites that they manage across London, were taken into account in calculating the cost estimates.

Clause	Original text	Change/comment	Source*	Comments by HMG
44	The Secretary of State may give financial assistance by way of grants or loans to any charitable, benevolent or philanthropic institution whose operations are carried [out] wholly or mainly in England.	It appears that an incorrect assumption was made about corresponding powers held by the National Assembly for Wales. The powers under s85 of the GWA 1998 [which covers expenditure of the Welsh Assembly] are not available to the Assembly for the purposes of providing assistance to voluntary organisations. This situation should be remedied in this Bill in relation to Wales.	Wales Council for Voluntary Action, DCH 131, para 3.38	This clause proposes to give the Secretary of State power to fund charities and other organisations set up for benevolent or philanthropic purposes. Extending this power only to the funding of such organisations which operate wholly or mainly in England is to avoid cutting across the Welsh Assembly's devolved funding functions for such organisations in Wales. The Welsh Assembly has a duty under s. 114 of the Government of Wales Act 1998 to make a scheme specifying, among other things, how it proposes to provide assistance (including financial assistance) to voluntary organisations in Wales. The Assembly does have its own power to give assistance of that sort, in s. 85 of the 1998 Act.
45	Consequential amendments, repeals and transitional provisions			
45(3)(a)	The Secretary of State may by order made by statutory instrument make such incidental, consequential, transitional or supplementary provision as he considers necessary or expedient – (a) for the general purposes, or any particular purposes, of this Act, or (b) in consequence of any of its provisions or for giving full effect to it.	This is too wide. Under these powers the Secretary of State could define by regulation which religious organisations qualify as charities [Henry VIII clause].	Thomas Helwys Centre for the Study of Religious Freedom, DCH 159, para 4	We do not agree. Introducing a new definition of religion or of a religious charity would not count as “incidental, consequential, transitional or supplementary” and would be outside the scope of this regulation-making power.
	Schedules			
Schedule 1	The Charity Commission			
1(3)(b)	The Secretary of State shall exercise the power in subparagraph (2) so as to secure that - so far as is reasonably practicable, at least one member has knowledge of the interests of persons in Wales...	Remove the words “so far as is reasonably practicable”.	Wales Council for Voluntary Action, DCH 131, para 3.8	These words are needed to cater for the circumstances in which no-one with a knowledge of the interests of persons in Wales comes forward as a candidate for membership of the Commission.

Clause	Original text	Change/comment	Source*	Comments by HMG
Schedule 6	Charitable Incorporated Organisations	There is concern about the lack of sufficient interaction of the proposed new provisions with the Companies Act and the Insolvency Act. It seems the trustees of a CIO would be dealt with under the Charities Act while the directors of its captive trading company would be subject to the Companies Act regime. This creates unnecessary complexity in an already difficult area.	The Law Society, DCH 162, para 8	<p>It is not clear what the point is here. The CIO framework will be distinct from that of company law, although many features of the framework are, or will be, derived from company law. A CIO, and those managing it, will be regulated by the CIO framework.</p> <p>The Insolvency Act 1986 does not only apply to companies, it applies to other entities as well, see for example section 55 Industrial and Provident Societies Act 1965. The provisions of the 1986 Act can be applied to CIOs by regulations under proposed section 69M.</p> <p>Many charities at present with connected trading companies are not themselves constituted as companies. This does not seem to present any difficulty; it is not clear why it is thought that the position should be any different in the case of a charity which is constituted as a CIO.</p>
		It is difficult to determine what genuine advantage a CIO will offer until the regulations relating to CIOs are published. It is unclear what incentive exists for existing charities to convert to this new entity, given the administrative effort and novelty of compliance.	Barnardo's, DCH 80, para 8.1.4	<p>It is proposed that dummy regulations will be prepared.</p> <p>The CIO has been devised as method of incorporation for charities. It is designed to be the most suitable method for incorporating non-profit bodies of this nature. If this eventually proves to be generally accepted, the desirability of allowing charities to incorporate in other, less suitable, ways may eventually have to be re-considered, as was recognised in the government's response to the SU Report. But, subject to that, incorporation as a CIO is an additional option for charities. The option of incorporating as a company will still be available for charities. It is, however, thought that the CIO will, for example, have the following advantages:-</p> <ul style="list-style-type: none"> • A single registration. A charitable company has to register with the registrar of companies and with the Commission. The CIO will only need to

Clause	Original text	Change/comment	Source*	Comments by HMG
				<p>register with the Commission;</p> <ul style="list-style-type: none"> • Less onerous accounts preparation requirements. Small CIOs will be able to prepare receipts and payments accounts, larger ones will prepare standard Charities Act accounts. All charitable companies, regardless of their size, have to prepare accruals accounts, the form and contents of which must comply with the general requirements of company law; • Less onerous reporting requirements. CIOs will only prepare an annual report under the 1993 Act. Charitable companies have to prepare a directors' report as well; • Only one annual return. Charitable companies have to prepare an annual return under company law and (if they are over the £10K threshold) a separate annual return under charity law; • Less onerous filing requirements. CIOs will only have to send accounts/reports/returns to the Commission. Charitable companies have to send them both to the Commission and to the Registrar of Companies; • Less onerous requirements relating to the reporting of constitutional and governance changes. CIOs will be subject to a less extensive range of reporting requirements than are charitable companies, and will only have to report to the Commission, rather than both to the Commission and to the Registrar of Companies; • Lower costs. The Commission, unlike the Registrar of Companies, does not make any charges for registration, and filing of information;

Clause	Original text	Change/comment	Source*	Comments by HMG
				<ul style="list-style-type: none"> • Simpler constitutional forms. Because the CIO will not be sharing a framework with commercial bodies, it will be possible to provide statutory default provisions covering ground which might otherwise need explicit constitutional provision; • Greater constitutional flexibility. Whilst it is too early to consider precisely what entrenched governance provisions will be eventually considered suitable for the CIO, it will not be necessary to follow the scheme considered in the Companies Act 1985 to be suitable for the generality of companies; • More straightforward arrangements relating to merger and reconstruction. The draft bill contains a number of provisions designed to facilitate merger and reconstruction which are not available in the case of charitable companies; • An enforcement regime which does not penalise the charity for the misconduct of its directors; • Codified duties for directors and members which specifically reflect the charitable nature of the CIO.
		No requirement, indication or guidance is given in relation to existing registration as a company at Companies House. Will this automatically terminate? Will notice be required by Companies House for removal? Will Companies House registration continue?	Monro Fisher Wasbrough, DCH 37, para 4	Charitable companies will not be required to convert to CIOs. Only if they choose to convert under proposed section 69H will their registration with the registrar of companies cease as provided for by section 69I(3)(b).

Clause	Original text	Change/comment	Source*	Comments by HMG
		The stipulation that CIOs satisfy the Commission that it would be able to carry out its purposes properly may create a greater barrier than those that already exist.	RNID, DCH 5, para 2	<p>The scheme of proposed sections 69J, 69K and 69L is that the liabilities of the dissolving CIO are assigned to the new CIO without the agreement of the parties to whom the liabilities are owed. This is not ordinarily possible under the English law of contract, but such a regime facilitates the process of corporate reconstruction.</p> <p>There are corresponding arrangements under other statutory incorporation regimes, but they all involve some independent assessment of the viability of the transferee of the liabilities, in order to protect the interests of creditors whose liabilities are unilaterally transferred to another entity. Hence proposed sections 69J(9) and 69L(6).</p> <p>An assessment of viability will not be part of the ordinary conditions relating to the formation of a CIO.</p>
		If a CIO is to be a corporate body with limited liability then this should be made clear on the writing paper and all publications of it. The “wrongful trading” provisions of company law should be imported. If the CIO has no limited liability then this should be made clear. Many lawyers are currently unclear of its status after reading the Bill.	Hilary Phillips, DCH 22	<p>The members of a CIO will be liable for the debts of the CIO only to the extent that the constitution provides for this –see proposed section 69B(5) and 69C(1)(d).</p> <p>This is effectively a proposal that something similar to section 351(1)(d) Companies Act 1985 should be exported to the CIO regime. This is something which could be achieved by regulations under proposed section 69P; consideration will be given to this.</p> <p>Importing ‘wrongful trading’ provisions of company law is something that could be achieved by regulations under proposed section 69P; consideration will be given to this.</p>

Clause	Original text	Change/comment	Source*	Comments by HMG
		There is very little detail about the CIO in the Bill – including rules relating to insolvency, winding up and dissolution; charges for converting to a CIO; and whether the CIO will be a limited liability company. Provisions for secondary legislation for the CIO should be put out to full consultation.	Charity Finance Directors' Group, DCH 129, para 3.7	This will be addressed in regulations made under proposed section 69M. It is not envisaged that any charges will be made by the Charity Commission as CIO registrar. The question of charges by the registrar of companies has not yet been discussed. It is proposed that provisions for secondary legislation be put out to full consultation. See also the answer to the previous question.
69B(4)	A CIO shall have one or more members	The CIO should be available as a structure with both limited liability (as with a charitable company) and a single tier of management (as with a charitable trust). There should not be, as currently, a requirement for, or a necessary assumption that there is a membership. The CIO should have both membership and non-membership forms.	Charity Law Association, DCH 34, para 15 BTCV, DCH 120, para 8.1	The clauses reflect this proposal, we disagree that they have some different effect. Under English law every corporate body has members. The constitution of the CIO may provide for its affairs to be managed directly by its members, or it may provide for the members to elect a separate body to manage the affairs of the CIO on their behalf
		A definition of member should be included.	Jonathan Dawson, DCH 74	No, anything beyond what is already in proposed section 69C(2)(a) would be at the expense of flexibility.
69C	Constitution	A new provision should be inserted similar to s.14 of the Companies Act 1985 so that the CIO constitution binds the CIO and its members to the same extent as if they respectively had been signed by each member, and contained covenants on the part of each member to observe all the provisions of the constitution.	Community Matter, DCH 95	This is covered by paragraphs 2 to 4 of schedule 5A.
69L(6)	The Commission shall refuse to confirm the resolution if it considers that there is serious risk that the transferee CIO would be unable property to pursue the purpose of the transferor CIO.	This power does not exist in relation to other forms of charity.	The Law Society, DCH 162, para 8	Please see the answer to the RNID question above.
69M	Regulations about winding up, insolvency and dissolution	A new provision should be inserted similar to s.15 and 263 of the Companies Act 1985, stating that any provision in the constitution or any resolution of the CIO to give any person a right to participate in distribution of profits or assets is void.	Community Matter, DCH 95	This is unnecessary, in view of the requirement that a CIO must be a charity.

Clause	Original text	Change/comment	Source*	Comments by HMG
Schedule 5A	Further provision about charitable incorporated organisations	This effectively gives third parties dealing with a CIO the same protection as those dealing with a normal commercial company, where no such protection exists for those dealing with a company limited by guarantee. This anomaly should be addressed.	The Law Society, DCH 162, para 8	The provisions of paragraphs 5 to 8 of schedule 5A may have been misread. Their effect is the same as that of the corresponding provisions in section 65 Charities Act 1993 in relation to charitable companies.
	Regulatory Impact Assessment (RIA)	The RIA should address the costs implications of all aspects of the Commission's increased role, including the funded needed to carry out its rolling public character review.	Charity Law Association, DCH 34, para 3.2	The figures for the Charity Commission have been produced in consultation with the Commission and are as full as possible given the available information on all the aspects of the Commission's increased role.
9.4.2	We have estimated (rough guide) that the current licensing scheme costs local authorities, on average £7,067.50 per annum to administer.	The cost estimates are wildly inaccurate, having been extrapolated from poor and incomplete data.	Fruitful, DCH 50, para 2.5	This figure was produced as a result of consultation with a fairly large number of local authorities. The wide range of costs given has been taken into account. No comprehensive data is available in this area.
	Other issues			
	Trading	The recommendation that charities can undertake all trading within the charity should be added to the Bill. The power to undertake trade would be subject to a specific statutory duty of care. Regardless of whether this recommendation is reinstated, there should be a relaxation of administrative burden for charities with trading subsidiaries.	ACEVO, DCH 3, para 4.1 & 4.5.1	The recommendation on trading was removed from the Bill on the advice of the Small Business Service on grounds of unfair competition. We would be concerned about the effect any relaxation of administrative burden for charities would have on the small business sector.
		Charitable trading would not impact on any competition issues. If there is no change in the Government's position regarding the need to use trading companies, serious consideration should be given to allowing donation which are presently treated as taxable sponsorship to go through the charity without having to set up a trading company.	Charity Finance Directors' Group, DCH 43	In the absence of any clear evidence to the contrary, we support the position of the Small Business Service on competition issues.

Clause	Original text	Change/comment	Source*	Comments by HMG
		If the trading clause is not included the Government should revise rules on sources of income such as sponsorship (funds from sponsorship, which are effectively donations, should be received directly by the charity).	Charity Finance Directors' Group, DCH 129, para 2.1	The Inland Revenue accepts that sponsorship arrangements can be pure donations, where there is merely notional acknowledgement, but arrangements can also amount to trading. At some point payments received by a charity cease being pure donations and become either payments for use of name/logo or trading receipts for provision of services (typically advertising). The nature of a sponsorship payment is a question of fact in each case. General tax principles are applied to determine whether a trade exists or whether payments are donations.
		The requirement to have a trading company is an imposition for charities and uses funds that could be better used for the primary purposes of the charity. Concerns about competition on an unfair basis is really only a problem in the south, as councils in the north normally exempt charity shops from paying rates anyway.	National Coal Mining Museum, DCH 6, para 1.2	Again this is a matter of possible unfair competition between the Private and Charitable sectors. The exemption from rates is a matter for individual councils.
		There have been many complaints from commercial retailer members that the tax breaks that charity shops enjoy represent unfair competition. This is based on the increasing tendency of charity shops to sell brand new goods, particularly in the catering sector (coffee shops).	Federation of Small Businesses, DCH 69	This is an operational matter for those regulating the charity shops and would be inappropriate to consider within primary legislation.
	Schools	Independent schools cannot be held to afford a general public good. Rather it has a negative effect for the majority of schools.	Eileen Brown, DCH 27, para 3	The Charity Commission will carry out reviews of independent schools, and other fee-charging charities, to establish whether or not they are providing a public benefit. An institution which is not for the public benefit cannot be a charity.

Clause	Original text	Change/comment	Source*	Comments by HMG
		Charitable status should be based on the main functions of an organisation, not on minor, peripheral activities it chooses to undertake; otherwise football clubs and many businesses would have it.	Clr D Mitchell, DCH 38	An organisation's charitable or non-charitable status is now, and would continue to be under the Bill, determined by its purposes as set out in its constitution, not by the minor or peripheral activities it chooses to undertake. An organisation's purposes are central to its existence, and no organisation can be a charity unless its purposes are for the public benefit. A business, or other organisation, whose purpose is make profits for distribution to shareholders can never be a charity, for lack of public benefit.
		The definition of the term "public" should mean that service or provision is available to all members of the public on an equal basis. All private schools should be examined on its merit, with careful estimation of what constitutes public benefit and what does not.	The Socialist Educational Association, DCH 45	The "public" element of public benefit requires the benefits to be available to a sufficient section of (not necessarily the whole of) the public. Any charity that charges fees for its services or facilities – and very many do – limits the availability of its benefits, since there will always be some people who cannot afford to pay what to someone of average means is a modest fee. The public benefit of independent schools, and other fee-charging charities, will be reviewed by the Charity Commission.
		Loss of charitable status by abolition or by raising the public benefit bar unreasonably high would reduce access to the school by cutting the number of scholarships and bursaries and severely limit the assistance given to others.	Eton College, DCH 46, para 7.1	Whether or not the loss of charitable status did have the effect of limiting access would surely vary from school to school, depend on how each school reacted to make up for the loss of its tax reliefs.
		Indirect public benefit (ie. saving money to the taxpayer) is not enough to secure charitable status, though it is factor to be taken into account.	Independent Schools Council, DCH 47	Reducing the burden on the taxpayer can be a charitable purpose in its own right. But an organisation with a different purpose – for example, a purpose for the advancement of education – would not be a charity if the <u>only</u> public benefit it provided was to reduce the burden on the tax payer.

Clause	Original text	Change/comment	Source*	Comments by HMG
	Consolidation	<p>The final draft of the Charities Act should be presented as one coherent and consolidated document. The format of the draft Bill has proved to be highly inaccessible, in particular for smaller charities with little experience in or resource for responding to a consultation such as this.</p> <p>It would be helpful if a consolidated Bill was provided as currently the draft is difficult to follow and confusing to read.</p>	<p>Institute of Fundraising, DCH 60, para 2.0</p> <p>Institute of Licensing, DCH 61, para 5</p>	<p>We are intending to publish on our website as soon as possible a consolidated version of the Bill and the Charities Act 1992 and 1993, which the Bill amends.</p>
	Grammar	<p>There should be consistency about whether the Charity Commission is referred to in the singular or plural tense throughout the Bill.</p>	<p>Stone King, DCH 86, para 15</p>	<p>The intention is to refer to the Commission in the singular throughout the Bill. We would be glad to know of any specific references which are in the plural.</p>

Formal minutes

Extract from House of Lords Minute of 6 April 2004

Charities—It was moved by the Lord President (Baroness Amos) that it is expedient that a Joint Committee of Lords and Commons be appointed to consider and report on any draft Charities Bill presented to both Houses by a Minister of the Crown, and that the Committee should report on the draft Bill by 30th September 2004; the motion was agreed to.

Extract from the Votes and Proceedings of the House of Commons 29 April 2004

Draft Charities Bill (Joint Committee), — *Ordered*, That the Lords Message of 19th April relating to a Joint Committee of both Houses to consider and report on any draft Charities Bill presented to both Houses by a Minister of the Crown, be now considered.

That this House concurs with the Lords that it is expedient that a Joint Committee of Lords and Commons be appointed to consider and report on any draft Charities Bill presented to both Houses by a Minister of the Crown, and that the Committee shall report on the draft Bill by 30th September 2004.

That a Select Committee of six honourable Members be appointed to join with the Committee appointed by the Lords to consider the draft Charities Bill.

That the Committee shall have power-

- (i) to send for persons, papers and records;
- (ii) to sit notwithstanding any adjournment of the House;
- (iii) to report from time to time;
- (iv) to appoint specialist advisers;
- (v) to adjourn from place to place within the United Kingdom; and

That the quorum of the Committee shall be two.

That Mr Alan Campbell, Mr George Foulkes, Ms Sally Keeble, Mr Alan Milburn, Mr Andrew Mitchell and Bob Russell be members of the Committee. — (*Paul Clark.*)

Extract from the House of Lords Minute of 10 May 2004

Charities—It was moved by the Chairman of Committees that the Commons message of 4th May be now considered, and that a Committee of six Lords be appointed to join with the Committee appointed by the Commons to consider and report on any draft Charities Bill presented to both Houses by a Minister of the Crown;

That, as proposed by the Committee of Selection, the Lords following be named of the Committee:

L. Best	B. McIntosh of Hudnall
E. Caithness	L. Phillips of Sudbury
L. Campbell-Savours	L. Sainsbury of Preston Candover;

That the Committee have power to agree with the Commons in the appointment of a Chairman;

That the Committee have leave to report from time to time;

That the Committee have power to appoint specialist advisers;

That the Committee have power to adjourn from place to place within the United Kingdom;

That the quorum of the Committee shall be two;

That the reports of the Committee from time to time shall be printed, notwithstanding any adjournment of the House; and

That the Committee do report on the draft Bill by 30th September 2004;

the motion was agreed to and a message was ordered to be sent to the Commons to acquaint them therewith.

Proceedings of the Joint Committee

Wednesday 12 May 2004

Present:

Lord Best	Mr Alan Campbell
Lord Campbell-Savours	Rt Hon George Foulkes
Earl of Caithness	Rt Hon Alan Milburn
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	
Lord Sainsbury of Preston Candover	

The Orders of Reference are read.

The declarations of relevant interests are made:

Lord Best declared an interest as Director (Chief Executive) of the Joseph Rowntree Foundation and the Joseph Rowntree Housing Trust (both bodies are charities), member of the Foundation Forum, the Advisory Council of the National Council of Voluntary Organisations and the Council for Charitable Support.

The Earl of Caithness declared an interest as Trustee and Chief Executive, Clan Sinclair Trust, Trustee, Castle of Mey Trust and Chairman, Caithness Archaeological Trust.

Baroness McIntosh of Hudnall declared an interest as Trustee – National Endowment for Science, Technology and the Arts (NESTA), Theatres Trust, South Bank Sinfonia, Art Inter-Romania, Peggy Ramsay Foundation; Board Member – The Roundhouse Trust, Almeida Theatre, Welsh National Opera, Foundation for Sports and the Arts; Chairman and Trustee, Royal National Theatre Foundation.

Lord Phillips of Sudbury declared an interest as self-employed partner in Bates, Wells and Braithwaite (London) Solicitors acting for a substantial number of charities; Gainsborough's House, Sudbury, Suffolk; President, Citizenship Foundation (a charity); President, Solicitors Pro Bono Group (a charity); Trustee, Phillips Fund (a charity); Trustee, ICNL Trust (a charity); President, Sudbury Society (a charity); Committee, Council for Charitable Support; Trustee, Me-Too (a charity); a few client trusts and client executorships/trusteeships in relation to wills; Age Concern Funeral Trust.

Lord Sainsbury of Preston Candover declared an interest as Chairman of the Trustees of The Royal Opera House Endowment Fund; Trustee of: the Linbury Trust (a grant-giving charitable trust founded in 1970's), the Ashmolean and the Rambert School of Ballet and Contemporary Dance.

Rt Hon George Foulkes declared an interest as Trustee of Burns House; former Director of Age Concern (Scotland)

Rt Hon Alan Milburn declared an interest as a Member of Amnesty International; Honorary President of Darlington YMCA, Darlington Mencap and Darlington Arthritis Care

Mr Andrew Mitchell declared an interest as Trustee of GAP (Gap Activity Projects); Management Committee SOS SAHEL; ESU International Debate Committee; Vice Chairman of Alexandra Rose Day; President Norman Laud Association (all charities)

It is moved that the Rt Hon Alan Milburn do take the Chair.—(*Earl of Caithness.*)

The same is agree to.

The Joint Committee deliberate.

Ordered, That Strangers be admitted during the examination of witnesses unless otherwise ordered.

Ordered, That the uncorrected transcripts of oral evidence given, unless the Committee otherwise orders, be published on the Internet.

Ordered, That the Joint Committee be adjourned to Wednesday 19 May at 9.00 a.m.

Wednesday 19 May 2004

Present:

Lord Best	Mr Alan Campbell
Lord Campbell-Savours	Rt Hon George Foulkes
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 12 May are read.

The following declaration of relevant interests is made:

Bob Russell declared an interest as Secretary of the all-party Scout Group and trustee of the St Mary Magdalen Almshouses Charity.

The Joint Committee deliberate.

Ordered, That Professor Jean Warburton be appointed as Specialist Adviser to assist the Committee in its inquiry into the Draft Charities Bill.

Ordered, That the Joint Committee be adjourned to Wednesday 26 May at 9.00 a.m.

Wednesday 26 May 2004

Members present:

Lord Best	Mr Alan Campbell
Earl of Caithness	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 19 May are read.

The following declaration of relevant interests is made:

Ms Sally Keeble declared an interest as a member of a commission of inquiry for the Association of Chief Executives of Voluntary Organisations, membership of the management committee of a young persons charity and Patron of the Friends of the Lakes.

The Joint Committee deliberate.

Ordered, That Margaret Bolton be appointed as Specialist Adviser to assist the Committee in its inquiry into the Draft Charities Bill.

Ordered, That the Joint Committee be adjourned to Wednesday 9 June at 9.00 a.m.

Wednesday 9 June 2004

Present:

Lord Best	Mr Alan Campbell
Earl of Caithness	Rt Hon George Foulkes
Lord Campbell-Savours	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 26 May are read.

The following declaration of relevant interests is made:

Bob Russell declared an interest as a parliamentary adviser to the Royal British Legion.

The Joint Committee deliberate.

The following witnesses are examined:

Mr Stuart Etherington, National Council of Voluntary Organisations; Mr Stephen Bubb, Association of Chief Executives of Voluntary Organisations; Ms Mary Marsh, National Society for the prevention of Cruelty to Children; Dr John Low, Royal National Institute for the Deaf and Hard of Hearing People.

Ordered, That the Joint Committee be adjourned to Wednesday 16 June at 9.00 a.m.

Wednesday 16 June 2004

Present:

Lord Best	Rt Hon George Foulkes
Lord Campbell-Savours	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

In the absence of the Chairman, Mr George Foulkes is called to the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 9 June are read.

The following declaration of relevant interests are made:

Lord Sainsbury and Lord Best declared interests in relation to the Association of Charitable Foundations.

Lord Phillips declared an interest as a member of the Charity Law Association.

The Joint Committee deliberate.

The following witnesses are examined:

Mr Christopher Spence, Volunteering England; Mr David Emerson, Association of Charitable Foundations and Ms Rhona Howarth, Governance Works;

Mr Stephen Lloyd and Ms Judith Hill, Charity Law Association.

Ordered, That the Joint Committee be adjourned to Wednesday 23 June at 9.00 a.m.

Wednesday 23 June 2004

Present:

Lord Best	Mr Alan Campbell
Lord Campbell-Savours	Rt Hon George Foulkes
Baroness McIntosh of Hudnall	Ms Sally Keeble
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 16 June are read.

The Joint Committee deliberate.

The following witnesses are examined:

Mr Andrew Watt, Institute of Fundraising; Mr Owen Watkins, Public Fund-raising Regulatory Association; Councillor Ian Green, Local Government Association; Ms Pippa Coombes, Institute of Licensing;

Mr Pesh Framjee and Ms Helen Verney, Charity Finance Directors' Group;

Mr Stephen Alambritis, Federation of Small Businesses.

Ordered, That the Joint Committee be adjourned to Wednesday 30 June at 9.00 a.m.

Wednesday 30 June 2004

Present:

Lord Best	Mr Alan Campbell
Lord Campbell-Savours	Rt Hon George Foulkes
Baroness McIntosh of Hudnall	Ms Sally Keeble
Lord Phillips of Sudbury	Mr Andrew Mitchell
Lord Sainsbury of Preston Candover	Bob Russell

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 23 June are read.

The Joint Committee deliberate.

The following witnesses are examined:

Dr Martin Stephen, Manchester Grammar School and Chairman of the Headmasters' and Headmistresses Conference; Dr Anthony Seldon, Brighton College; Sir Ewan Harper, Church Schools Council; Mr Jonathan Shephard, Independent Schools Council and Mr Jack Jones, Nuffield Hospitals.

Ordered, That the Joint Committee be adjourned to Wednesday 7 July at 9.00 a.m.

Wednesday 7 July 2004

Present:

Lord Best	Rt Hon George Foulkes
Lord Campbell-Savours	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 30 June are read.

The Joint Committee deliberate.

The following witnesses are examined:

Ms Geraldine Peacock, Chair designate, Ms Rosie Chapman, Director of Policy and Strategy, and Mr Kenneth Dibble, Director of Legal Services, Charity Commission.

Ordered, That the Joint Committee be adjourned to Wednesday 14 July at 9.00 a.m.

Wednesday 14 July 2004

Present:

Earl of Caithness	Mr Alan Campbell
Lord Campbell-Savours	Rt Hon George Foulkes
Baroness McIntosh of Hudnall	Ms Sally Keeble
Lord Sainsbury of Preston Candover	Mr Andrew Mitchell
	Bob Russell

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 7 July are read.

The Joint Committee deliberate.

The following witnesses are examined:

Mr Kevin Curley, National Association of Councils for Voluntary Service; Mr Jonathan Moore, Suffolk Council for Voluntary Service; Mr Mark Lattimer, Minority Rights Group International, Ms Ila Chandavarkar, Minority Ethnic Network Eastern Region and Mr Peter Finney, Myasthenia Gravis Association.

Ordered, That the Joint Committee be adjourned to this day at 2.30 p.m.

Wednesday 14 July 2004

Present:

Earl of Caithness	Mr Alan Campbell
Lord Campbell-Savours	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Sainsbury of Preston Candover	Bob Russell

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 14 July are read.

The Joint Committee deliberate.

The following witnesses are examined:

Major Michael Adler; Mr Daoud Rosser-Owen, Religions Working Together and Mr Andrew Britton, Churches Main Committee.

Ordered, That the Joint Committee be adjourned to Wednesday 21 July at 9.00 a.m.

Wednesday 21 July 2004

Present:

Lord Best	Mr Alan Campbell
Earl of Caithness	Rt Hon George Foulkes
Lord Campbell-Savours	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 14 July are read.

The Joint Committee deliberate.

The following witnesses are examined:

Fiona Mactaggart MP, Parliamentary Under-Secretary of State for Race Equality, Community Policy and Civil Renewal and Mr Richard Corden, Bill team manager, Home Office.

Ordered, That the Joint Committee be adjourned to Wednesday 8 September at 9.00 a.m.

Wednesday 8 September 2004

Present:

Lord Best	Mr Alan Campbell
Earl of Caithness	Rt Hon George Foulkes
Baroness McIntosh of Hudnall	Ms Sally Keeble
Lord Phillips of Sudbury	Mr Andrew Mitchell
Lord Sainsbury of Preston Candover	Bob Russell

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 21 July are read.

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to this day at 2.45 p.m.

Wednesday 8 September 2004

Present:

Lord Best	Mr Alan Campbell
Earl of Caithness	Rt Hon George Foulkes
Baroness McIntosh of Hudnall	Ms Sally Keeble
Lord Phillips of Sudbury	Mr Andrew Mitchell
Lord Sainsbury of Preston Candover	Bob Russell

Rt Hon Alan Milburn, in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 8 September are read.

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to Wednesday 15 September at 9.00a.m.

Wednesday 15 September 2004

Present:

Lord Best	Mr Alan Campbell
Lord Campbell-Savours	Rt Hon George Foulkes
Earl of Caithness	Ms Sally Keeble
Baroness McIntosh of Hudnall	Mr Andrew Mitchell
Lord Phillips of Sudbury	Bob Russell
Lord Sainsbury of Preston Candover	

In the absence of the Chairman, Mr George Foulkes is called to the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 8 September are read.

The Joint Committee deliberate.

It is moved that the draft Report before the Committee be read.

The same is agreed to.

Paragraphs 1 to 407 are agreed to

Resolved, That the draft Report be the Report of the Committee to both Houses.

Ordered, That the following paper be appended to the Report:

Schedule of detailed points made about the draft Bill by witnesses, together with the Government response.

Ordered, That the memoranda received by the Committee be appended to the Minutes of Evidence.

Ordered, That the provisions of Commons Standing Order No. 134 (Select committees (reports)) be applied to the Report.

Ordered, That Mr George Foulkes do make the report to the House of Commons and The Earl of Caithness do make the report to the House of Lords.

Ordered, That the Joint Committee be now adjourned.

Witnesses

Wednesday 9 June 2004

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Stuart Etherington, Chief Executive, National Council of Voluntary Organisations, **Dr John Low**, Chief Executive, Royal National Institute for Deaf People, **Stephen Bubb**, Chief Executive, Association of Chief Executives of Voluntary Organisations, **Mary Marsh**, Chief Executive National Society for the Prevention of Cruelty to Children

Ev 10

Wednesday 16 June 2004

Christopher Spence, Chief Executive, Volunteering England, **Rhona Howarth**, Director, Governance Works, and **David Emerson**, Chief Executive, Association of Charitable Foundations

Ev 39

Stephen Lloyd, Chairman and **Judith Hill**, Charity Law Association

Ev 61

Wednesday 23 June 2004

Andrew Watt, Head of Policy, Institute of Fundraising; **Councillor Ian Green**, Vice-Chair, Economic Regeneration Committee, Local Government Association; **Owen Watkins**, Vice-Chair, Public Funding Regulatory Association; and **Pippa Coombes**, Institute of Licensing.

Ev 107

Pesh Framjee, Special Adviser to the Charity Finance Directors' Group and **Helen Verney**, Deputy Chair, Charity Finance Directors' Group.

Ev 131

Stephen Alambritis, Head of Parliamentary Affairs, Federation of Small Businesses.

Ev 138

Wednesday 30 June 2004

Dr Martin Stephen, High Master, Manchester Grammar School, Chairman of Head Masters' and Mistresses' Conference; **Dr Anthony Seldon**, Headmaster Brighton College; **Sir Ewan Harper**, Chief Executive, Church Schools Council; **Jonathan Shepherd**, General Secretary, Independent Schools Council (ISC); and **Jack Jones**, Finance Director, Nuffield Hospitals.

Ev 152

Wednesday 7 July 2004

Geraldine Peacock, Chairman designate, **Rosie Chapman**, Director of Policy and Strategy, and **Kenneth Dibble**, Director of Legal Services, Charity Commission.

Ev 203

Wednesday 14 July 2004 (morning)

Kevin Curley, Chief Executive, National Association of Councils for Voluntary Service (NACVS); **Jonathan Moore**, Chief Executive, Suffolk Association of Voluntary Organisations (SAVO); **Mark Lattimer**, Director, Minority Rights Group International; **Ila Chandavarkar**, Black Minority Ethnic Network Eastern Region, and **Peter Finney**, Chairman, Myasthenia Gravis Association.

Ev 240

Wednesday 14 July 2004 (afternoon)

Major Michael Adler, **Daoud Rosser-Owen**, Religions Working Together and **Andrew Britton**, Churches Main Committee.

Ev 266

Wednesday 21 July 2004

Fiona Mactaggart MP, Parliamentary Under-Secretary of State for Race Equality, Community Policy and Civil Renewal, Home Office and **Richard Corden**, Bill Team Manager, Home Office.

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203	Memorandum from Charity Administration Resourcing & Accountability (DCH 317)	Ev 645
204	Memorandum from Voluntary Sector Forum (DCH 318)	Ev 646
205	Memorandum from The Sainsbury Family Charitable Trusts (DCH 329)	Ev 647
206	Memorandum from Art Council England (DCH 336)	Ev 648
207	Further memorandum from the Royal Television Society (DCH 340)	Ev 648
208	Memorandum from Rodney Buse (DCH 341)	Ev 649
209	Further memorandum from Henry Broadbent (DCH 342)	Ev 651
210	Further memorandum from the Higher Education Funding Council for England (DCH 343)	Ev 653
211	Memorandum from The Association of Charity Officers (DCH 344)	Ev 654
212	Memorandum from Charity Trustee Networks (DCH 345)	Ev 655
213	Memorandum from British Humanist Association (DCH 346)	Ev 657
214	Memorandum from Peter Woolford (DCH 347)	Ev 657
215	Further memorandum from the National Trust (DCH 349)	Ev 658
216	Note by Professor Nicholas Deakin (DCH 359)	Ev 659
217	Note by Margaret Bolton - Specialist Adviser (DCH 360)	Ev 660

List of unprinted written evidence

Additional papers have been received from the following and have been reported to the House but to save printing costs they have not been printed and copies have been placed in the House of Commons Library where they may be inspected by Members. Other copies are in the Record Office, House of Lords and are available to the public for inspection. Requests for inspection should be addressed to the Record Office, House of Lords, London SW1. (Tel 020 7219 3074) hours of inspection are from 9:30am to 5:00pm on Mondays to Fridays.

Memorandum from Frederick and Joan Lavender (DCH 90)
Memorandum from Mrs E M Houliston (DCH 91)
Memorandum from Professor J L Stollery (DCH 93)
Memorandum from RAEC Association (DCH 101)
Memorandum from Groundwork Leeds (DCH 102)
Memorandum from The Institute of Chartered Accounts (DCH 106)
Memorandum from Roman Catholic Diocese of Southwark (DCH 115)
Memorandum from Vernon Jones (DCH 121)
Memorandum from Dr David M Herbert (DCH 122)
Memorandum from Bedford Borough Council (DCH 123)
Memorandum from Bedford Borough Council (DCH 124)
Memorandum from Age Concern (DCH 133)
Memorandum from St Augustine's Priory (DCH 141)
Memorandum from The Fellowship of Independent Evangelical Churches Ltd (DCH 146)
Memorandum from The Soldiers, Sailors, Airmen and Families Association - Forces Help (DCH 147)
Memorandum from R L Glasspool Charity Trust (DCH 152)
Memorandum from Bristol Baptist College (DCH 159)
Memorandum from Shelter (DCH 164)
Memorandum from Canon Martin Lee (DCH 165)
Memorandum from Bircham Dyson Bell (DCH 166)
Memorandum from Manches LLP (DCH 167)
Memorandum from South Hams Voluntary Sector Forum Members (DCH 172)
Memorandum from Ms Christine Ridgeway (DCH 173)
Memorandum from Mr Vic Moreland - Charity Accountancy Services (DCH 178)
Memorandum from Mr Clive Gordon (DCH 179)
Memorandum from Verity (DCH 182)
Memorandum from New Economics Foundation (DCH 184)
Memorandum from Bristol Baptist College (DCH 186)
Memorandum from YMCA England (DCH 188)
Memorandum from Alan Milburn (DCH 198)
Memorandum from Hastings Wade (DCH 209)
Memorandum from Rev and Mrs M Braybrooke (DCH 210)
Memorandum from KM Chartered Accountants (DCH 212)
Memorandum from Alan Bullock & Co (DCH 214)
Memorandum from Samaritans (DCH 220)

Memorandum from John C Hale (DCH 221)
Memorandum from A M J Ball (DCH 223)
Memorandum from South East Advocacy Projects (DCH 224)
Memorandum from David R Ralph (DCH 227)
Memorandum from Patricia Choral (DCH 229)
Memorandum from Independent Examiners Ltd (DCH 233)
Memorandum from Jesus College (DCH 237)
Memorandum from George Conway (DCH 240)
Memorandum from Caladine Stevens (DCH 242)
Memorandum from Wales Council for Voluntary Action (DCH 245)
Memorandum from Free Churches Group (DCH 247)
Memorandum from Nicola Anderson (DCH 249)
Memorandum from The Karuna Trust (DCH 250)
Memorandum from Temple Smith Associates (DCH 258)
Memorandum from Martin W Payne (DCH 261)
Memorandum from Carlisle Council for Voluntary Service (DCH 262)
Memorandum from The Rockhouse Baptist Centre (DCH 263)
Memorandum from George Smith (DCH 266)
Memorandum from J S Coduri (DCH 268)
Memorandum from Christ's Hospital Foundation (DCH 269)
Memorandum from CPRE - Campaign to Protect Rural England (DCH 279)
Memorandum from Dogs Trust (DCH 287)
Memorandum from Education for Choice (DCH 290)
Memorandum from Action for Blind People (DCH 298)
Memorandum from Scope (DCH 303)
Memorandum from Worcestershire Wildlife Trust (DCH 306)
Memorandum from Friends of the Earth (DCH 309)
Memorandum from Friends of the Earth (DCH 319)
Memorandum from Crisis (DCH 320)
Memorandum from Mind (DCH 321)
Memorandum from Sussex Wildlife Trust (DCH 322)
Memorandum from Amnesty International UK Section (DCH 323)
Memorandum from Assn of Charity Independent Examiners ACIE (DCH 354)

Written evidence

Supplementary memorandum from the Home Office (DCH 350)

1. *What extra resources does this year's Spending Review settlement give the Charity Commission to implement the Bill? Do you consider these sufficient?*

The Regulatory Impact Assessment sets out the expected costs to the Charity Commission of implementing the measures in the Bill. The Charity Commission estimates these costs as £1.70 million in one-off costs, with ongoing costs of £1.02 million per annum.

The following table sets out the Charity Commission's budget for the current year and its settlement for the three years covered by the 2004 Spending Review.

<i>Year</i>	<i>Cash budget (£m)</i>	<i>Annual Increase</i>
2004–05	29	0%
2005–06	31	6%
2006–07	31	0%
2007–08	31	0%

The first year of the Spending Review gives the Commission an increase of £2 million (6%) in its budget compared with the previous year. The Chancellor announced in the Budget 2004 that departmental administration costs would be capped in 2006–07 and 2007–08 at 2005–06 nominal levels. The Commission's settlement includes agreed efficiency savings, to be recycled into service development, following Sir Peter Gershon's efficiency review.

The Charity Commission will absorb the costs of implementing the Charities Bill within its resource allocation, prioritising its use of resources as necessary to ensure effective implementation. It has already made significant progress in implementing some of the Strategy Unit recommendations that do not require legislation (such as opening an office in Wales, and consulting on a proposed Standard Information Return).

The recently appointed Chair and Chief Executive will shortly conduct a strategic review of the organisation, to determine its strategic direction and equip it effectively to implement the measures of the Charities Bill and to discharge its future responsibilities. This will be a challenging period for the Commission, but it does provide opportunities for it to develop innovative solutions and improve its focus on frontline delivery.

We are confident that the Commission has sufficient resources to implement the Bill effectively.

2. *How many extra staff will the Charity Commission need to implement the Bill? What evidence do you have that the Commission will be able to recruit enough qualified staff to implement the Bill?*

The Charity Commission currently employs some 570 staff in four offices: London, Liverpool, Taunton, and Newport (Wales).

Staffing levels are a matter for the Commission. It is planning to undertake a strategic review of the organisation, in the light of the proposed new statutory objectives set out in the draft Bill and its recent Spending Review settlement. The settlement incorporated efficiency savings following Sir Peter Gershon's efficiency review, the principles of which are being applied across Government departments.

The Commission's strategic review will include consideration of more efficient and effective ways of working, which could include:

- greater prioritisation of resources on a risk basis;
- streamlining its procedures and reducing paperwork;
- increasing its use of electronic delivery of services;
- dissemination of the Commission's knowledge to others, enabling them to use it more effectively.

The Commission, as a Government department, must keep salaries broadly in line with the civil service generally. It does, however, have a good track record in recruiting and retaining staff. It has made significant progress in its staff training programme, which it plans to continue. The Commission will use the strategic review to identify its post-Bill staffing requirement, including the appropriate mix of skills required, and the salary levels required, to retain existing staff and to attract new staff of the necessary calibre.

Supplementary memorandum from the Home Office (DCH 351)

DRAFT CHARITIES BILL

Memorandum on delegated powers

INTRODUCTION

1. The draft Charities Bill is in four parts. Part 1 defines “charity” and “charitable purpose”. Part 2 deals with the regulation of charities and consists of 11 chapters. Chapter 1 provides for the establishment of the Charity Commission for England and Wales, chapter 2 provides for a Charity Appeal Tribunal, chapter 3 deals with the registration of charities, chapter 4 amends the law relating to cy-pres occasions and schemes, chapter 5 confers new powers in relation to the assistance and supervision of charities by the court and the Commission, chapters 6 and 7 deal with the audit or examination of accounts of charities, chapter 8 provides for charitable incorporated organisations to be established, chapter 9 amends the law relating to the remuneration of trustees and the relief of trustees and others from liability for breach of trust or duty, chapter 10 provides for a number of changes to the rules governing the administration of small unincorporated charities, and chapter 11 relaxes the law relating to the spending of capital endowment funds by charities and the registration of mergers between charities. Part 3 deals with the funding of and fundraising by charities and other benevolent or philanthropic organisations. Part 4 makes miscellaneous and supplemental provisions.

2. This memorandum identifies the provisions in the Bill that confer powers to make delegated legislation. It seeks to explain in each case the purpose of the power, the reason why the Department considers its subject matter to be suitable for delegated legislation, and the nature of and explanation for any Parliamentary procedures that apply.

PART 1 OF THE BILL—DEFINITION OF “CHARITY” AND “CHARITABLE PURPOSE”

3. Part 1 contains no powers to make delegated legislation.

PART 2—REGULATION OF CHARITIES

Chapter 2

Clause 6—new sections 2B(3) to (6) and 2C(3)(b): Power to make rules regulating the exercise of the right of appeal to the Charities Appeal Tribunal and about the practice and procedure to be followed in relation to proceedings before the Tribunal.

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Rules made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

4. Clause 6 creates a new tribunal to decide appeals against certain decisions of the new Charity Commission. As is generally the case in relation to a court or tribunal, the Lord Chancellor is given the power to make rules relating to the Tribunal. The provisions in the Bill contain considerable detail as to the types of matters that may be covered by the rules. In particular, subsection (4) sets out various matters that may be included in relation to the exercise of the right to appeal to the Tribunal and subsection (5) lists matters relevant to practice and procedure to be followed by the Tribunal. The new section 2C(3)(b) enables the rules to deal with who is to be treated as a party to proceedings before the Tribunal for the purposes of an appeal to the High Court from the Tribunal on a point of law.

5. The proposed rules will deal with matters of detail relating to the issues listed in the Bill and other matters of a similar nature. In the circumstances, and in accordance with the usual practice in relation to rules of court, we consider that the negative resolution procedure will provide the appropriate level of parliamentary scrutiny.

Chapter 3

Clause 7—new section 3(9): Power to exclude the duty on the Commission to retain and make available for public inspection copies of the trusts of a registered charity.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

6. Section 3B of the Charities Act 1993 (“the 1993 Act”), which is inserted by clause 7 of the Bill, provides that trustees, when they apply for a charity to be registered, must supply to the Charity Commission copies of the trusts of the charity or, if there is no document containing details of the trusts, particulars of them. Under section 3(9), the Commission is required to keep these details of the trusts that have been supplied to them so long as the charity remains a registered charity and make them available for public inspection at all reasonable times. There is, however, a power for the Secretary of State to exclude particular trusts from both the requirement to retain and the requirement to make available for inspection. This power exists in the same terms in section 3 of the 1993 Act, as presently enacted. The provision might be used to withhold a trust instrument from public inspection to allow the settlor of a charitable trust to remain anonymous, if he or she so wished. It could also be used to withhold a trust instrument from public inspection to protect the personal safety of the charity trustees, for example in the case of a women’s refuge the trustees of which include women who have been subject to domestic violence. We consider that the negative resolution procedure is appropriate for any regulations made under this provision, given the limited nature of the enabling power.

Clause 7—new section 3A(2)(b) and (3): Power for the Charity Commission to provide for a charity to be temporarily or permanently excepted.

Power conferred on: *The Charity Commission*

Power exercisable by: *Order*

Parliamentary procedure: *None*

7. Section 3A(2)(b) gives the Charity Commission the power by order to provide that any charity will be either permanently or temporarily excepted. This power is, however, limited by subsection (3) which has the effect that the power may only be exercised so as to amend or revoke an existing exceptions order. The Charity Commission is not given the power to create any new excepted charity.

8. This is not a new order-making power; it exists in the current section 3 of the 1993 Act. As is the case with the current order-making power, orders of the Commission are not to be subject to any parliamentary procedure. This seems to us appropriate, particularly given the very limited scope under the Bill of such orders.

Clause 7—new section 3A(2)(c) and (4): Power for the Secretary of State to provide that particular charities or descriptions of charities will be excepted charities.

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

9. Section 3A(2)(c) gives the Secretary of State the power to make regulations providing for particular charities or particular descriptions of charities to be excepted from registration, provided that the gross income of the charity does not exceed £100,000. However subsection (4)(c) provides that the Secretary of State may only exercise this power in accordance with subsection (4)(b). That subsection requires the Secretary of State to make regulations excepting the institutions defined as “formerly specified institutions” in subsection (5). These include various educational institutions, in particular the governing body of foundation, voluntary or foundation special schools. Under the existing law these “formerly specified schools” are exempt charities, but they will cease to be exempt under the Bill, but instead will become excepted charities, provided that they are within the financial limit set out above.

10. Since both the institutions to whom these regulations may apply and the nature of the provisions that may be included are set down in the Bill, the negative resolution procedure appears to us to provide the appropriate level of parliamentary scrutiny.

Clause 7—(a) new section 3A(7) and (8): power to lower the financial limit below which a charity may be an excepted charity and to raise the financial limit below which a charity is not required to register; (b) new section 3A(11): power to appoint a day when the provisions relating to excepted charities will cease to have effect.

Power conferred on: *The Secretary of State*

Power exercisable by: *Order made by statutory Instrument*

Parliamentary procedure: *Negative resolution*

11. Subsections 3A(7)(a) and (8)(a) relate to the powers described in paragraphs 7 to 10 above. These provisions empower the Secretary of State by order to reduce the financial limit of £100,000 referred to above. This would have the effect of reducing the number of charities that would qualify as excepted charities. Those charities that thereby lost their excepted status would be required to register in the usual way. The intention is that excepted charities will eventually cease to exist as a category. To effect this, the Secretary of State is given the power in section 3A(11) by order to appoint a day when the provisions relating to excepted charities will cease to have effect. Due to administrative difficulties that would be encountered

by the Charity Commission if it were required to register a substantial influx of charities and also in order to enable charities to prepare for the requirements of registration it is thought appropriate that this should take place over a period of time. The intention is gradually to lower the threshold of £100,000 until it reaches £5,000, or such other sum as has been substituted for that amount in section 3A(2)(d) (ie the level below which no charities, other than charitable incorporated organisations, are required to register).

12. Section 3A(7)(b) and (8)(b) relate to the threshold of £5,000 specified in 3A(2)(d). This figure is set as the amount of gross income in a relevant financial year below which a charity, other than a charitable incorporated organisation, is not required to register. Subsections (7)(b) and (8)(b) enable the Secretary of State by order to substitute a different figure for the figure of £5,000, in order to reflect a change in the value of money or so as to extend the scope of the exception.

13. Given the very limited scope of these order-making powers, whether exercised in relation to the £100,000 or the £5,000 threshold, or whether exercised in order to cause the provisions on excepted charities to cease to have any effect, we consider that the negative resolution procedure provides the relevant level of parliamentary scrutiny.

Clause 7—new section 3B(2)(b): power to prescribe documents or information which trustees must supply to the Commission when applying for registration.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

14. This is not a new power; it already exists in section 3(6) of the 1993 Act. It is a power by regulations to specify what documents and information should be supplied to the Commission, in addition to copies of the charity's trusts, when the trustees are applying for registration. The current enabling power has not been exercised and we are presently considering with the Charity Commission whether it is necessary to retain this power or whether subsection (2)(c), which enables the Commission to require further documents or information to be supplied, is sufficient.

Clause 8: power to amend section 3(5)(c) of the 1993 Act (threshold for registration of small charities) at any time before the commencement of clause 7 of the Bill.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

15. Clause 8 gives the Secretary of State the power by order to amend section 3(5)(c) of the 1993 Act in its current form by changing the definition of the threshold for registration of small charities. This is a limited power in that it provides that a new definition must be in terms of a charity whose gross income does not exceed the prescribed amount. The power is only exercisable while clause 7 is not in force, since clause 7 introduces a new section 3, which includes a new definition of the threshold along these lines and which also includes a power (referred to above) to increase the threshold. In view of the limited terms of the power given, we consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny.

Clause 11: Power to specify a body or Minister of the Crown as the principal regulator of an exempt charity.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>

16. Clause 11(4)(b) gives the Secretary of State the power to specify that a body or a Minister of the Crown will be the principal regulator for an exempt charity. A principal regulator has the duty placed on it by clause 11, which is to do all that he or it reasonably can to meet the compliance objective in relation to the charity in question. Clause 11(3) provides that the compliance objective is to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity. We have decided to specify principal regulators in regulations, rather than listing them in the Bill, as we think it desirable that the Secretary of State should have some flexibility in changing the identity of the principal regulator in due course. For example it may be that the functions of one of the principal regulators will change so that it is no longer appropriate for it to act as principal regulator for the particular charity.

17. Clause 11(5) provides that regulations under clause 11(4)(b) may make such amendments of any enactment as the Secretary of State considers appropriate to facilitate, or otherwise in connection with, the discharge by the principal regulator of his duty. This power is necessary because a body specified as a

principal regulator may not have the power under the statute which established it to carry out that regulatory function. We have provided for the affirmative resolution procedure to apply as we consider that is appropriate given that the enabling power allows the Secretary of State to amend primary legislation.

Chapter 4

Clause 14—new section 14A(5): power to prescribe steps to be taken by the trustees where specific charitable purposes have failed and where a donor has made a relevant declaration.

<i>Power conferred on:</i>	<i>Charity Commission</i>
<i>Power exercisable by:</i>	<i>Regulations not made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>None</i>

18. Clause 14 inserts a new section, section 14A, into the 1993 Act. This applies to property given for specific charitable purposes in response to a solicitation which contains a statement that property given in response to it will, if the purposes fail, be applicable *cy-pres* unless the donor makes a relevant declaration at the time of making the gift. A relevant declaration is a declaration to the effect that, in the event of the charitable purposes failing, the donor wishes the charity trustees to give him the opportunity of requesting the return of the property in question.

19. Section 14A(5) read together with subsection (9) provides for the Charity Commission to prescribe by regulations the steps the trustees must take (a) to inform a donor who has made such a declaration of the failure of the purposes, (b) to enquire whether he wishes to have the property returned, and (c) to return the property, if so requested. The regulations should also specify a period within which a request for the return of the property should be made.

20. It seems to us that these matters of detail are appropriately left to delegated legislation by the Charity Commission. Section 14 of the 1993 Act, as currently enacted, provides for the Commission to prescribe by regulations steps to be taken in the case of unknown donors where specific charitable purposes fail. Those regulations are not subject to any parliamentary procedure but are to be published by the Commission in such form as they think fit. It seems to us that the same procedure should apply to the regulations to be made under the new section 14A(5), which are of a similar nature to those provided for in section 14.

Chapter 6

Clause 22—new section 43(8): Powers to amend the thresholds applying to the annual audit and examination of accounts of unincorporated charities and to amend the list of persons who may qualify as an independent examiner.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

21. Section 43(8) gives the Secretary of State the power first to amend the amounts of the thresholds governing the audit and independent examination of the accounts of unincorporated charities. This replaces a similar provision in the current section 43(8) of the 1993 Act. The subsection also gives the Secretary of State the power to amend the list of persons who may act as independent examiners of the accounts of unincorporated charities with a gross income in the relevant financial year of more than £250,000. The new section 43(3A) lists those who may perform this task, but it is thought that it may be appropriate in due course to amend the list, by adding or deleting bodies. The thresholds determine the nature of the annual audit or, as the case may be, annual examination of the accounts of the charity that is required to be carried out. It seems to us sensible and appropriate (a) to provide for the flexibility of changing the financial threshold by delegated legislation, and (b) to allow for the list of approved independent examiners to be updated from time to time by this means. Given the limited nature of the powers in question, we also consider that the negative resolution procedure will provide the appropriate level of parliamentary scrutiny.

Chapter 8

Clause 26 and Schedule 6—new sections 69C(4), 69F(2)(b), 69M and 69P, and paragraph 13 of new Schedule 5A: Power to make detailed provision about charitable incorporated organisations, in particular in relation to their constitution, administration, winding up, dissolution and insolvency.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

22. Schedule 6, introduced by clause 26, makes provision for a new kind of legal entity, the charitable incorporated organisation (“CIO”). Many of the provisions governing CIOs are set out in the legislation. Other aspects we consider can appropriately be dealt with in subordinate legislation, taking into account the level of detail involved and also the desirability of maintaining some flexibility as regards those details so that adjustments can be made when it is seen how CIOs are developing and the types of charities that are making use of this new form of organisation.

23. The Bill includes the following enabling powers in relation to CIOs:

- New section 69C(4)—power to prescribe contents of the constitution of a CIO in addition to the three matters which are provided for in section 69C(2), namely who may be a member, the means of appointment of the Trustees and the application of the property of the CIO upon its dissolution.
- New section 69F(2)(b)—power to prescribe documents or information that must be supplied to the Charity Commission on an application for registration of a CIO, in addition to the proposed constitution and such other documents or information as the Commission may require.
- New section 69M—power to make provision about the winding up, insolvency and dissolution of CIOs and their restoration to the register following dissolution. Subsection (2) goes into some detail as to the matters that may be covered in the regulations and subsection (3) enables the regulations to apply any enactment that would not otherwise be applied, with or without modifications, and also to disapply or modify the application of any enactment that would otherwise apply.
- New section 69P—power to make provision about the administration of CIOs and in particular about the execution of deeds and documents and the maintenance of registers of members and of charity trustees.
- Paragraph 13 of new Schedule 5A—power to make provision about the procedure of CIOs. The Bill provides that, subject to any such regulations, any other statutory requirement and the CIO’s constitution, the CIO may regulate its own procedure.

24. Regulations made pursuant to the enabling powers referred to above will contain technical details relating to the administration etc of CIOs. Since the parameters for these regulations are set out in the Bill it seems to us appropriate that the detailed provisions should be subject to the negative resolution procedure.

Clause 30—new section 74(13): Power to amend the gross income threshold below which an unincorporated charity may resolve to transfer all its property to one or more other charities.

Power conferred on: *The Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

25. Section 30 of the Bill substitutes a new section 74 which gives an unincorporated charity the power to resolve to transfer all its property to another charity or to divide all its property between two or more other charities. This power can only be exercised by an unincorporated charity that does not hold any designated land (as defined in the section) and whose gross income in its last financial year did not exceed £10,000. Subsection (13) gives the Secretary of State the power by order to amend the figure of £10,000. The purpose of this power is to enable the Secretary of State to increase the amount to take account of inflation or to vary the amount if in due course it seems appropriate to adjust the extent of the charities that may benefit from this provision. Since the order-making power only relates to the financial threshold and not to matters of principle, we consider that the negative resolution procedure permits the appropriate level of parliamentary scrutiny.

Chapter 11

Clause 33—new section 75(8): Power to vary the financial threshold which determines whether a charity may resolve to spend its capital in accordance with section 75.

Power conferred on: *The Secretary of State*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

26. Clause 33 of the Bill inserts a new section 75 which gives smaller charities a power to spend capital where the charity trustees are satisfied that the purposes of the charity could be carried out more effectively if they were able to do so. Section 75(3) sets out the financial limits on the exercise of this power. It may be exercised by a charity whose relevant gross income (as defined) in its last financial year did not exceed £1,000 or where the market value of the endowment fund in question does not exceed £10,000. Section 75(8) gives the Secretary of State the power to vary either of these figures. This might be used to raise the amounts in the light of monetary inflation or to adjust the amounts either up or down, and accordingly either broaden

or narrow the scope of this provision, as may seem appropriate in due course. The negative resolution procedure appears to us to provide the appropriate level of parliamentary scrutiny, given that the delegated legislation will not determine matters of policy, but only the financial limits involved.

Clause 33—new section 75B(7): Power to vary financial thresholds applying to the power to spend capital subject to special trusts.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

27. The new section 75B, inserted by clause 33 of the Bill, enables an institution established for special purposes (which as a result of a direction under section 96(5) of the 1993 Act is to be treated as a separate charity) to spend capital, subject to the following restrictions. Where the market value of the fund is more than £10,000, and where the fund was given by means of a will or by a grant, the consent of the Charity Commission must be obtained before the capital is spent. Section 75B(7) gives the Secretary of State the power by order to vary the amount of £10,000. This power might be exercised in order to take account of inflation or where for some other reason it is considered appropriate to either raise or reduce the level at which consent must be obtained. Since the power may only be used to adjust the monetary threshold it seems to us that the negative resolution procedure permits the appropriate level of parliamentary scrutiny.

PART 3

Clause 36—new section 64A: Reserve power to control fund-raising by charitable institutions.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

28. Clause 36 introduces a new section 64A to the Charities Act 1992 (“the 1992 Act”), which enables the Secretary of State to make such regulations as he may think necessary or desirable to regulate charity fund-raising. Subsection (3) provides that regulations may in particular impose a good practice requirement on persons managing charitable institutions. Subsections (4) and (5) describe in some detail what constitutes a good practice requirement. Subsection (6) provides for the regulations to make it an offence to persistently fail without reasonable excuse to comply with any requirement of the regulations. Clause 36(2) imposes a consultation requirement before making any regulations. It is hoped that it will not be necessary for the Secretary of State to exercise this power, and that self-regulation by the sector will prove satisfactory. This is the reason why the matter is dealt with by means of an enabling power, rather than the substantive provisions being set out in the Bill. Regulations under this provision would be subject to the negative resolution procedure, which appears to us to provide the appropriate level of parliamentary scrutiny, given that the contents of the regulations are set out in some detail in the Bill.

Clause 42—new section 73(1) of the 1992 Act: Power to specify matters in relation to the notice to be given of door to door collections, exempt collections, applications for certificates of fitness, applications for permits to conduct a collection in a public place and a general power to regulate the conduct of public charitable collections.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

29. Clauses 37 to 41 amend Part 3 of the 1992 Act which deals with the regulation of public charitable collections. Clause 42 gives the Secretary of State the power to make regulations in relation to a number of matters arising from the regulation of these collections. In particular:

- Specifying matters to be notified to a local authority when giving notification of a proposed door to door collection; section 66A(3) sets out various matters which must be included in the notification and also refers to such other matters as may be prescribed.
- Specifying matters to be notified to a local authority when notifying the authority of a proposed local short-term collection; section 66B(2) sets out matters that are to be included in the notification and also refers to such other matters as may be prescribed.
- Specifying matters to be notified to a local authority when notifying the authority of a proposed door to door collection of goods; section 66C(2) sets out various matters that are to be notified and also refers to such other matters as may be prescribed.

- Specifying the period of time within which a local collection must take place in order to qualify as an exempt collection under section 66B(1)(b).
- Specifying the information that must be included in an application for a certificate of fitness in addition to the matters set out in section 66D(3).
- Specifying the matters that must be included in an application for a permit to conduct a collection in a public place under section 67.
- Specifying the matters to be included in a certificate of fitness issued by a local authority under section 66E.
- Specifying the conditions which may be imposed by a local authority when issuing a permit under section 68.
- Generally regulating the conduct of public charitable collections, and dealing in particular with the matters specified in section 73(2) of the 1992 Act.

30. The amendments to the 1992 Act set out in Part 3 of the Bill make detailed provision for the regulation of public charitable collections. The matters set out above which may be dealt with by delegated legislation are minor matters of detail which we consider it is more appropriate to deal with in this way. This also offers the advantage of flexibility so that, for example, time limits may be changed or requirements as to the types of information that must be provided when applying for a permit or certificate may be varied. This flexibility is likely to be particularly useful given that the Bill is introducing a new system of regulation and when this has been put into operation it may become apparent that some minor changes to the administration of the system will be of benefit. We have provided for the negative resolution procedure to apply since the regulations will deal with detailed points of procedure and in the circumstances this procedure appears to provide the appropriate level of parliamentary scrutiny.

PART 4

Clause 45: Power to make incidental, consequential, transitional or supplementary provision.

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>

31. Clause 45 gives the Secretary of State the power to make such incidental, consequential, transitional or supplementary provision as he considers necessary or expedient:

- (a) for the general purposes, or any particular purposes, of the Act, or
- (b) in consequence of any of its provisions or for giving full effect to it.

Subsection (4) provides that an order under the section may amend or repeal any enactment.

32. This so-called Henry VIII clause gives the Secretary of State the power to amend or repeal any enactment within the limitations set out above. The Bill makes a number of important changes to the law in relation to charities, some of which are likely to have an impact on a fairly substantial number of pieces of legislation. An example of this is the definitions of “charity” and “charitable purpose”, which apply generally for the purposes of the law of England and Wales, and the establishment of the Charity Commission as a body corporate to whom the functions and property, rights and liabilities of the charity Commissioners for England and Wales are transferred. Clause 1(3) provides that a reference in any enactment to a charity within the meaning of the Charitable Uses Act 1601 or the preamble to it shall be construed as a reference to a charity as defined by section 1. Clause 1(2) provides that the new definition of charity will not apply in any enactment if the term is defined by that enactment. We have carried out a trawl of references to charity or charitable purposes in legislation to try to identify any instances where the provisions of clause 1 do not result in appropriate definitions of those terms. However it is possible that other instances may come to light after the Bill has obtained Royal Assent and so we consider that the power in clause 45 is important.

33. A further example is to be found in clause 4 which establishes the Charity Commissioner and provides for the functions and property, rights and liabilities of the Charity Commissioners for England and Wales to be transferred to it. Subsection (5) provides that any enactment passed before the coming into force of the section has effect so far as necessary as if any reference to the Charity Commissioners were a reference to the Charity Commission. Although we have tried to identify all references to the Charity Commissioners to see if specific amendments are needed, it is possible that there may be others which are not adequately dealt with by the general provisions of clause 4.

34. We have provided for the affirmative resolution procedure to apply to any order under clause 45. This seems appropriate, and indeed is the usual practice, where the enabling power allows for the amendment of primary legislation.

Clause 48: Commencement.

Power conferred on: *The Secretary of State*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *None*

35. Clause 48(1) provides that the provisions that do not come into force on Royal Assent, namely all the provisions in the Bill except clause 11(4) to (6), clause 45(3) to (5) and clause 48, will come into force on such day or days as the Secretary of State may appoint by order. Such an order may contain transitory, transitional or saving provisions in connection with the provisions that are being commenced. As is normal in the case of commencement orders, no parliamentary procedure is considered necessary.

August 2004

Supplementary memorandum from the Home Office (DCH 352)

THE REGULATORY IMPACT ASSESSMENT (RIA)¹

COSTS TO THE LOCAL AUTHORITIES

In terms of costs to the local authorities the potential impact of the draft Charities Bill is limited to the introduction of a new unified scheme for public collections.

A copy of the consultation on public collections was sent to all the local authorities in England and Wales as well as the London Boroughs. A Partial Regulatory Impact Assessment accompanied the consultation and asked for information in terms of costing.

Using information provided by 37 local authorities (including the City of London) the Government was able to provide an estimate as to the cost of administering the current licensing regime. The RIA suggests that the average figure should be treated with caution and goes on to explain that the costs varied considerably from one local authority to the next.

The Government has assessed the cost impact of the new scheme on local authorities as neutral. It has reached that conclusion by comparing the requirements of the current licensing regimes with the requirements of the proposed scheme. In some respects the scope of the licensing regime has been extended, for example, the extension of the definition of public place and the inclusion of direct debit solicitation but in other respects it has been reduced, for example, by the removal of the collection of goods house to house from the scope of the scheme and the implementation of the lead authority proposal.

The Government recognises that under the proposals there would be particular cost implications for the London Boroughs and has agreed that funding would be provided for that.

The Government is confident in the assessment of the cost impact on local authorities provided in the RIA. It is the best estimate of costs given the information available. Notwithstanding that, the Home Office would welcome representations/evidence from the Local Government Associations about costs and will continue to meet with them to discuss their concerns.

PUBLIC BENEFIT CHECKS

The RIA does not consider the costs to the Charity Commission of undertaking public benefit checks, as this measure is not included in the legislation. The RIA considers only the costs of implementing the provisions of the draft Bill. The public benefit check would be an administrative mechanism for the Charity Commission to check on the public character of charities.

Given that the Charity Commission is currently refining the nature and scope of these checks, any figures produced at this stage would be highly speculative.

TAX RELIEFS FOR NEW CHARITIES

It is unlikely that the Charities Bill would lead to any significant increase in the number of charities entitled to tax reliefs. The proposed definition of charity, that is the extension of the list of charitable purposes, reflects what is currently considered to be charitable today and would not result in automatic increase in the number of organisations having charitable status.

Both exempt and excepted charities, while not registered with the Charity Commission, are currently entitled to claim tax relief from the Inland Revenue and domestic rate relief.

¹ A note on this was sought from the Home Office following the evidence given by Fiona Mactaggart and Richard Corden on 21 July 2004. The Committee specifically requested details on the RIA with regards to local authorities' costs, the costs to the Charity Commission of carrying out public benefit checks, the costs of additional tax reliefs to new charities, and the costs of enforcing and monitoring the Bill.

ENFORCEMENT/MONITORING COSTS

The majority of the provisions in the Bill are permissive rather than restrictive.

Those measures that do require enforcement, such as ensuring the registration of exempt and excepted charities, have been included within the RIA and are based on figures provided by the Charity Commission.

The one area where the policy remains within the enforcement remit of the Home Office is the possible implementation of regulatory mechanisms should the self-regulation of fund-raising fail. The criteria to decide whether self-regulation is working would be applied via secondary legislation so would not form part of the current RIA.

Monitoring and evaluating the legislation will be the responsibility of the Home Office and Charity Commission. Costs associated with this work would be from within existing resources.

CONFIDENCE IN THE RIA

Every effort has been made to ensure that the RIA is as accurate as possible. A reasonable degree of variance has been built in to the costs given within the RIA and a range of possible costs has been given on most areas. We are confident that the figures within the RIA represent the most accurate representation of the costs involved and remain intrinsically sound.

August 2004

Supplementary memorandum from the Home Office (DCH 353)

MEASURING THE EFFECT OF THE LEGISLATION²

This note follows the Home Office's June submission to the Joint Committee on possible indicators of success (DCH20). It provides additional detail on how the Home Office and the Charity Commission will assess the impact of the legislation.

The legislation is founded on recommendations made by the Strategy Unit, in its report "Private Action; Public Benefit", published in September 2002. The impact of the legislation will be assessed against the aims identified in that report, which are to:

- modernise charity law and status to provide greater clarity and stronger emphasis on the delivery of public benefit;
- improve the range of legal forms enabling organisations to become more effective and entrepreneurial;
- develop greater accountability and transparency to build public trust and confidence;
- ensure independent, fair and proportionate regulation.

The Home Office will monitor the impact of the legislation, and proposes to conduct a review of the legislation after a period of five years following enactment. The review will assess the impact of the legislation, and will be published. It will include an evaluation of the measures outlined below.

1. Whilst public benefit checks are not included in the legislation, the Charity Commission intends to carry out an ongoing programme of such checks to ensure that charities are established and operate for the benefit of the public. The Commission's intention is to commence with research exercises on how fee-charging charities meet the public benefit requirement, which the Strategy Unit identified as giving rise to particular concerns. The Commission will publish the results of these exercises in a series of regulatory reports.

2. The Charity Commission has commissioned initial research into public confidence in charities, to advance understanding of its meaning, and the factors that drive it. This research will be used to develop a baseline against which further progress will be measured and the Commission's objective of maintaining or increasing public confidence in charities reported.

3. The new corporate legal form of Charitable Incorporated Organisation (CIO) is designed specifically for charities. The Charity Commission will report on its take-up and impact on individual charities and the sector. Both the Company Law Review and the Strategy Unit recognised that in the longer term consideration should be given to whether the CIO should replace the current forms of charitable company and Industrial and Provident Society, both for new charities forming, and for existing charities in those forms.

4. The draft Bill contains measures to facilitate charity mergers. The Charity Commission will report the number of charity mergers, recorded on the proposed register of charity mergers, and assess the benefits of mergers to the charities involved, and the impact on the sector.

² A note on this was sought from the Home Office at Q981 in the transcript of evidence given by Fiona Mactaggart and Richard Corden on 21 July 2004.

5. Other proposed enabling measures, such as the power to spend capital, the updating of powers of unincorporated charities, and the remuneration of trustees, will also be assessed, both in terms of their impact on individual charities and on the sector as a whole.

6. The draft Bill proposes new enforcement powers for the Charity Commission; the power to give specific directions for the protection of a charity, the power to direct application of charity property, and the power to enter premises. The use and impact of these powers will be evaluated.

7. The Charity Commission has undertaken surveys into public perception of its role of regulator of charities. It is expected that the Commission will undertake similar surveys after the implementation of the legislation.

8. The draft Bill provides the Home Secretary with a reserve power to make regulations controlling charitable fund-raising. The self-regulation of fundraising is being progressed by the sector, but there is not yet enough detail to specify the criteria against which its success would be determined. The Home Office, following consultation with key stakeholders, will publish the criteria against which the success of the self-regulation of fundraising will be assessed.

9. The Charity Commission will review and update its key performance indicators in light of the legislation, and will continue to report against them in its annual report. The Commission's key performance indicators are agreed with HM Treasury, and reported against twice yearly.

10. The Charity Commission, with advice from the Cabinet Office's Regulatory Impact Unit, will quantify the impact of regulation on charities and other not-for-profit organisations, monitor it over time, publish the results, and highlight areas where regulation appears excessive. This analysis is wider than the proposed regulatory measures of the draft Bill, but any assessment of the impact of the legislation would benefit from parts of this study. The Commission will design and pilot these reviews in 2004.

11. The Home Office and Charity Commission will review the impact of the new £100,000 thresholds for exempt and excepted charities, and the introduction of "main regulators" for exempt charities. This review would be informed not only by the Commission's experience, but also by consultation with classes of charities subject to the £100,000 threshold, those subject to regulation by main regulators, and the main regulators themselves. It would include consideration of whether it would be appropriate to lower the initial registration threshold of £100,000 (after a period of five years following enactment).

12. The aim of the Charity Appeal Tribunal is to provide charities and trustees with a simpler, more accessible and less expensive opportunity to challenge the decisions of the Charity Commission through an authoritative and legally binding process. The Home Office will review the impact of the Charity Appeal Tribunal, to determine whether it has achieved that.

13. The Home Office will assess the charitable sector's attitudes to the impact of the legislation. This might be undertaken as part of the Home Office "State of the Sector" survey—which currently involves a panel of over 3,500 not-for-profit organisations. In addition the Home Office will explore the potential for a question on the public trust of charities to be included in the Home Office Citizenship Survey, a survey of 10,000 respondents which takes place every two years.

August 2004

Supplementary memorandum from the Churches Main Committee (DCH 355)

**RESPONSE FROM MR ANDREW BRITTON TO QUESTIONS FROM THE JOINT
COMMITTEE ON THE DRAFT CHARITIES BILL**

QUESTION (1)

The case for widening the definition of religion is not a strong one. If there is an argument for broadening it on grounds of alleged discrimination, belief systems which are not in law "religions" and do not qualify for charitable status under clause 2(2)(c) of the draft Bill, would nonetheless be eligible to do so under clauses 2(2)(l) and 2(4) provided that they could demonstrate public benefit from their activities. It is hard to see how any discrimination would arise just because a body was entitled to charitable status under one provision rather than the other.

However, if it were desired to extend the concept of the advancement of religion to include as wide a range of religions as possible, or even to embrace non-religious belief systems, there would not seem to be any reason to object to that in principle. The provision would only apply where the body advancing the religion or belief system in question could demonstrate public benefit from its activities. The only issue that would seem to arise is whether an extension to non-religious belief systems could be expressed in such a way as to avoid giving charitable status to bodies that most people would not recognise as promoting a "belief system" in any meaningful sense.

QUESTION (2)

The Churches' concerns arise from what appears to be a rather narrow understanding of the types of body currently entitled to charitable status under the head of the advancement of religion, the breadth of activities those bodies undertake and the nature of the public benefit which may accrue from those activities. Thus in "Private Action, Public Benefit" it was stated (in paragraph 4.33) that "*Religious practice tends generally to contribute to the social and moral welfare of adherents. It is not proposed to change the principle that celebration of a religious rite which is open to the public should be regarded as providing public benefit*". And the Government's response stated (in paragraph 3.19) that "*Removing the presumption of public benefit will not affect the continuing charitable status of religious organisations that carry out missionary and evangelistic work*".

These statements might be thought to imply a belief that all or most charities concerned with the advancement of religion are involved in providing opportunities for public worship or evangelistic/missionary activity. In fact, currently accepted religious purposes are much broader than that and include within the Church of England alone:

- the provision and maintenance of places of public worship (including their contents);
- the promotion of worship;
- the promotion of ministry (including the endowment of bishoprics, the augmentation of clergy stipends, the encouragement of candidates for ordination and patronage trusts);
- evangelism and missionary work (eg the Church Missionary Society and Alpha International);
- the promotion or co-ordination of the work of a particular denomination (through bodies such as parochial church councils, diocesan boards of finance and the Archbishops' Council);
- the promotion of the work of charitable ecclesiastical offices (such as those of an incumbent and churchwardens);
- (in some circumstances) the promotion of the work of religious communities;
- the encouragement of the spiritual life (eg the Bible Reading Fellowship and the Society of Retreat Conductors);
- the nurture of young people in the Christian Faith (eg the Boys' Brigade);
- the promotion of particular aspects of the Christian Faith (eg the Anglican Society for the Welfare of Animals);
- the promotion of particular doctrinal positions within a Church (eg the Church of England Evangelical Council); and
- the promotion of ecumenism.

Moreover, the statements also appear to assume that the benefit derived from religious belief and practice will be confined to adherents alone, when those with religious affiliation would wish to argue that such belief and practice confer significant benefits on society as a whole, in a number of ways. These include the articulation and propagation of fundamental ethical values beneficial to society, and the significant contribution made to its "social capital" by the substantial commitment to voluntary service on the part of members of faith communities (whether through volunteering or charitable giving). The existence of benefits of this kind has of course been recognised by the Prime Minister and other senior ministers in the support they have given to the role of the faith communities in society.

In the light of this, the Churches' concern is to establish that, if the existing presumption of public benefit is removed, decisions about the public benefit of religious activities should preserve the breadth of religious purposes currently accepted as charitable. One way of achieving this would be to write such a breadth of definition into the legislation itself. It would, however, in practice be difficult to specify (in ways that reflect the current position) the precise nature of the public benefit requirement to be met by bodies for the advancement of religion.

The Churches were pleased that, during discussions on 10 June between the Churches Main Committee, the Charities Unit at the Home Office and the Charity Commission, it was explained that the rules governing charitable status would be exactly the same as they are now. The advancement of religion would continue to be a charitable purpose and there would be no change in the definition of public benefit. The provision that would impact on that was the removal of the presumption of public benefit. However, the Churches were told that in practice that would have little impact as the Charity Commission had been asking the same questions of new charities regardless of the charitable purpose they pursued. Decisions about public benefit would be based on previous judgements on public benefit and we were assured that there was nothing in the Bill that would alter the way in which those considerations were undertaken.

The alternative, given the diversity of types of religious body and of activity undertaken by them, and in the light of the assurances that the Churches have been given, would be to rely on the Charity Commission taking, in deciding the public benefit issue in particular cases, a properly informed and objective approach which recognises the many possible manifestations of religious belief and observance and the full range of public benefit than can accrue from them.

Supplementary memorandum from the Home Office and the Charity Commission (DCH 356)

We, Fiona Mactaggart MP, Home Office Minister responsible for the draft Charities Bill and Geraldine Peacock, Chair of the Charity Commission, are writing, following closure of the Joint Committee's proceedings, to clarify our departments' unified position regarding the particularly complex legal point, highlighted by the Committee, of the application of the public benefit principles for fee-charging charities to independent schools.

Fiona Mactaggart gave the Joint Committee an undertaking that the Home Office and Charity Commission would continue to work closely to resolve any differences in interpretation.

In the same constructive spirit that has characterised the Departments' collaboration over the preparation of the Bill, Fiona Mactaggart and Geraldine Peacock were confident that the two Departments would find a way forward.

This we have done, and having considered the range of views and evidence presented to the Joint Committee our shared position is set out below:

- The current law on public benefit would be preserved by the draft Charities Bill, except that the presumption of public benefit for charities for the relief of poverty, the advancement of religion and the advancement of education would be removed.
- The law provides that public benefit is determined on a case-by-case basis. Although in every category of charity public benefit must be present, the courts have not adopted the same practical measures of public benefit for different categories of charity. Different standards are required for different charitable purposes.
- The Charity Commission will continue to follow that approach of the court when determining public benefit in any particular case. The Commission will have regard to the social and economic context within which an organisation operates, as well as to the relevant charitable purposes and activities of the organisation.
- As with the law on charitable purposes, the law on public benefit will evolve and develop over time. The removal of the presumption of public benefit will provide a basis for further development of the law.

In considering specifically the impact of fee-charging on public benefit, we further agree that:

- The Commission will apply the broad principles indicated by the court in the case of *Re Resch*.³ These principles are that:
 - Both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an organisation does, or can, operate for the public benefit;
 - The fact that charitable facilities or services will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean the organisation does not operate for the public benefit; and
 - An organisation which wholly excluded poor people from any benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.
- The Commission will apply these principles in judging whether or not a charity is meeting the public benefit requirement. It will apply the general principles in cases of all fee-charging charities, whatever their particular charitable purposes and however long they have been established.
- The "schools cases"⁴ referred to in the Commission's earlier evidence to the Joint Committee⁵ will not prevent the Commission from carrying out public benefit checks on schools and will not prevent the overarching principles above from being applied to schools. As with any other legal case which impacts on public benefit, the schools cases are to be considered as part of the overall framework which also includes:
 - The principles referred to above;
 - The nature of the particular charitable purpose;
 - The particular circumstances of the organisation; and
 - The current social and economic conditions under which the organisation operates.

Finally, we agree that fundamental to all this is the fact that the law on public benefit will evolve and develop over time. This evolution will have regard to both the particular charitable purposes and the social and economic changes in society. It is in this context that the Commission will, in considering the application of the principles which apply to fee-charging charities, including independent schools, be mirroring the court's approach and encouraging the law to develop as appropriate in pace with modern society.

³ *Re Resch's Will Trusts* (1969) 1A AC 514.

⁴ *Attorney General v The Earl of Lonsdale* (1827); *Brighton College v Marriott* (1926); and *Malvern Wells v Ministry of Local Government and Planning* (1951).

⁵ Paragraph 19 of evidence DCH 13.

The Commission will forward a separate composite paper to the Committee setting out the more detailed position including a description of how it will carry out the checks in practice.

In light of these fruitful discussions we are confident that the Home Office and the Commission can, in partnership, move forward with the draft Bill and embrace the opportunity it offers for the development and modernisation of charity law and regulation.

August 2004

Supplementary memorandum from the Charity Commission (DCH 357)

The Commission has considered the evidence presented to the Scrutiny Committee, including from the Home Office, the charitable sector and their legal advisers. The Commission has and continues to liaise closely with the Home Office on this issue.

Set out below, the Commission:

- provides further detail on how it would assess public benefit, particularly how it proposes carrying out public benefit checks; and
- clarifies and explains further how it sees the public benefit principles applying to fee-charging charities, including independent schools, in the future.

OVERVIEW

1. The current law on public benefit would be preserved in the Charities Bill, as presently drafted, with the exception that the presumption of public benefit for charities for the relief of poverty, the advancement of religion and the advancement of education would be removed.

2. The current law provides that public benefit is determined on a case by case basis and although in every category of charity public benefit must be present, the courts have not adopted the same measure with regard to different categories of charity and different standards are required for different charitable purposes. The Commission will follow the court's approach when determining public benefit in any particular case and have regard to the purposes of the institution and the social and economic context within which it operates. As with the law on charitable purposes, the law on public benefit will evolve and develop over time, having regard to the relevant charitable purposes, the charity's activities and the social and economic context within which it operates. The removal of the presumption of public benefit will also provide a basis for further development of the law.

HOW THE COMMISSION WOULD ASSESS PUBLIC BENEFIT

(a) At Registration

3. As is the case now, the Commission will continue at the registration stage not only to assess whether the purposes are charitable, but also whether the charity is for the public benefit. After the enactment of the Bill, a positive assessment will need to be established in every case, including for those charities which may currently enjoy a presumption of public benefit. Paragraphs 20–25 of the Commission's paper DCH 13 sets out how this would be done in further detail.

(b) Public Benefit Checks on Existing Charities

4. The Commission is committed to developing an on going programme of checks to ensure that registered charities are both established and operate for the benefit of the public. Existing charities with purposes which had previously enjoyed the presumption of public benefit, will come within the scope of the public benefit checks in the same way as other charities.

5. The Commission's current intention is to develop and carry out public benefit checks in the following way:

- 5.1 First, the Commission will develop a clear statement of what public benefit means in high level terms. It intends to revise its publication, RR8 "The Public Character of Charities", and then issue it for public consultation.
- 5.2 It will also consider how public benefit might affect charities within each of the 12 charitable purposes proposed in the draft Bill.
- 5.3 The Commission will begin with a research exercise on how charities under each of the particular charitable purposes consider they meet the public benefit requirement. These scoping exercises should be undertaken in full consultation with all relevant stakeholders and explore a wide range of views.
- 5.4. Because the Strategy Unit identified fee-charging charities as giving rise to particular concerns, the Commission proposes to start with the fee-charging sector. The Commission will begin with research exercises on how fee charging charities consider they meet the public benefit requirement.

This would include their fee-charging policies and practices, and other factors relevant to their public benefit, such as any measures they take to widen access to their services and facilities by people who are deterred or excluded from taking up their services because of the level of fees charged. Again, these exercises will be undertaken in full consultation with all relevant stakeholders.

- 5.5 These exercises would enable the Commission to identify how, and to what extent, fee-charging charities (and their particular subsectors) are currently meeting public benefit requirement, and how the requirement might be met in the future. The Commission proposes to publish the results of these surveys in a series of regulatory reports. The Commission's intention is that generally accepted best practices in the provision of benefits to the public may be developed from these, again in consultation with the charities involved, and published.

(c) *Regulatory Action In cases where the Public Benefit Requirement is not Met*

6 The nature of the steps the Commission will take in any particular case, will vary depending on how the public benefit requirement applies to a charity, bearing in mind the nature of its charitable purposes and activities.

7. Where it is clear that an organisation applying for registration, is not meeting the public benefit requirement, the Commission may provide advice, where possible, about how to alter or restructure the activities so as to satisfy the public benefit requirements. If public benefit could not be demonstrated, the application for registration would be rejected.

8. Where it is clear that an existing charity is not meeting the public benefit requirement, as it applies to their particular circumstances, then the Commission will consider taking further regulatory action. Regulatory action in this context might range from working with the charity to ensure that it organises its activities to benefit a sufficient section of the public and thus meet its charitable purposes, through to, in extreme cases, making a legal scheme to ensure that the assets of the organisation will in future be applied for other charitable purposes close to any purposes that have ceased to be charitable.

9. Appeals against Commission decisions, including decisions to refuse registration and decisions to make schemes, may be made to the Charity Tribunal which is proposed by the draft Bill.

HOW PUBLIC BENEFIT WOULD APPLY TO FEE CHARGING CHARITIES

10. In considering what regulatory action the Commission may take, the Commission will assess how the legal requirement that a charity must be established and operate for the public benefit applies in the particular case. In considering the impact of fee charging on public benefit, the Commission will apply the broad principles and approach indicated by the court in *Re Resch*.⁶

- 10.1 both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an institution does, or can, operate for the public benefit;
- 10.2 the fact that the charitable facilities or services will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean that the institution does not operate for the public benefit; and
- 10.3 an institution which wholly excluded poor people from any possible benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.⁷

The Commission will apply these general principles accordingly in judging whether or not a charity is meeting the public benefit requirement in cases of all fee charging charities, whatever their particular charitable purpose.

11. The "schools cases"⁸ referred to in the Commission's earlier evidence to the Joint Committee⁹ will not prevent the Commission from carrying out public character checks on them and the general principles above being applied in the manner described. As with other legal authorities which impact upon public benefit the cases will need to be considered as part of the overall framework. The overall framework also includes the overarching principles referred to above, the nature of the particular charitable purpose, the charity's particular circumstances and the current social and economic conditions under which it operates.

12. As stated above, the law on public benefit will evolve and develop over time, having regard to the relevant charitable purposes, the charity's activities and the social and economic context within which it operates. The Commission will, in considering the application of the principles which apply to fee charging charities, including independent schools, mirror the court's approach and develop the law where this is appropriate.

⁶ *Re Resch's Will Trusts* (1969) 1 AC 514.

⁷ In the absence of any possible direct benefit to poor persons, in a particular case, it might be arguable that they obtained an indirect benefit eg by way of relief on the public purse.

⁸ *Attorney General v The Earl of Lonsdale* (1827); *Brighton College v Marriott* (1926); and *Malvern Wells v Ministry of Local Government and Planning* (1951).

⁹ paragraph 19 of evidence DCH 13.

 ENHANCING THE DEVELOPMENT OF THE LAW

13. If the Scrutiny Committee wish to recommend the formulation of statutory, non-exclusive, high level criteria to be taken into account in assessing public benefit, which applied across all charitable purposes, this would need careful drafting and consideration. However, the Commission's view is that this could enhance the future development of the law on public benefit by the Commission, the proposed Tribunal and the court in the context of modern society.

August 2004

Supplementary memorandum from the Home Office (DCH 358)

THE NUMBERS OF EXCEPTED AND EXEMPT CHARITIES¹⁰

Because they are not registered, it is impossible to be precise about the numbers of excepted and exempt charities. The Home Office and the Commission have used the following estimates. These figures have been informed by discussions with representatives of the major classes of both excepted and exempt charities.

EXCEPTED CHARITIES

There are estimated to be over 100,000 excepted charities in total at present. Within this total, the most numerous groups are religious charities connected with particular Christian denominations; scout and guide charities; and charities within the armed forces.

The figure of 5,000 cited¹¹ by Mr Andrew Mitchell MP is our estimate not of the total number of excepted charities but of the number of excepted charities with annual income over £100,000. These are the excepted charities that would have to register with the Commission if the draft Bill proposals were implemented.

A more detailed breakdown of this estimated figure of 5,000 is given in Annex A to the Regulatory Impact Assessment on excepted charities published with the draft Bill (see page 243 of the Bill publication).

EXEMPT CHARITIES

We estimate that there are around 10,000 exempt charities¹² a large majority being governing bodies of Foundation and Voluntary schools.

We estimate that around 7,800 of these would become excepted charities under the Bill. This is based on an estimate that around 9,000 would have an income below £100,000, of which around 1,200 would continue to be exempt as being subject to an alternative main regulator.

Further details of the estimates for exempt charities are given in the Regulatory Impact Assessment on exempt charities in the published draft Bill. Paragraphs 1.4 and 1.5 (page 202) and Annex A (page 218) are of particular relevance.

August 2004

**Letter to Lord Phillips of Sudbury from the Attorney General, The Rt Hon The Lord Goldsmith QC
(DCH 362)**

DRAFT CHARITIES BILL

Further to your letter of 22 July and my response of 3 August, I have now had time, together with the relevant Departments, to give your suggestion the consideration it merits.

Your concern relates to the role of the proposed Charity Appeal Tribunal in relation to the development of a body of charity case law, and your suggestion is that legal costs could be paid out of public funds where I am able to certify that the matter is of public importance. I appreciate the reasons behind this concern, and your letter is persuasive. However, I am unable on behalf of the Government to endorse the policy.

The purpose of the Tribunal is, as you know, to render access to a legal forum in charity cases quicker, easier and cheaper. While you are correct that where cases require significant expert legal input, legal costs will be equivalent to those in the High Court, it is envisaged that the great majority of cases will be able to be presented by a litigant in person. It is understood from the Charity Commission that most cases concern issues relating to registration, orders and schemes, where lay trustees are involved without legal representation.

¹⁰ A note on this was sought from the Home Office at Q1114 in the transcript of evidence given by Fiona Mactaggart and Richard Corden on 21 July 2004.

¹¹ At Q1113 of the same transcript of evidence.

¹² This does not include charities covered by the exemption for connected charities in paragraph (w) of Schedule 2 to the Charities Act 1993. It is not possible to estimate how many charities are covered by this exemption although it is likely that only a small proportion would have income over £100,000.

Nevertheless, I agree with you that there will be a small number of cases where the law is of sufficient complexity to debar a litigant in person. The Home Office estimates that this may affect one or two cases annually. The Commission, in giving evidence before the Committee in answer to a question from you, has indicated that, either at the request of the Tribunal or at my own request, I would be a party to cases demonstrating a clear public interest in the review of the relevant law. I would therefore be in a position to argue the case fully before the Tribunal, thus relieving the applicant of a degree of the burden of the costs of legal representation. I nevertheless appreciate that the basic cost of the application will still need to be met.

In fully exploring your proposal, I have discussed the situation with other stakeholders. I understand from the Department for Constitutional Affairs that public funding for individual cases before the Charity Appeal Tribunal would be anomalous. Public funded legal representation is available in no other tribunal in this country which is not concerned with the liberty and fundamental rights of individuals. The obstacle to implementing your suggestion is, therefore, that to allow public funding for the purpose of developing a body of charity case law would involve a radical overhaul of the Access to Justice Act and the criteria for funding of tribunals generally. Even if the funding itself were to be made available, the concern is that a precedent would be established which would have far-reaching consequences on the tribunal system.

On this basis, I must advise you that I can detect no real prospect of the Government being able to support your suggestion. I am nevertheless grateful to you for making it, and affording the opportunity to discuss the issue. My hope is that the Tribunal will establish a flexible forum for the great majority of cases which will, in itself, promote a more vigorous development of the case law to the general benefit of charities and charity law.

September 2004