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# Charity Law

## Update

New Charities Bill  
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# New Charities Bill proposes to reduce burden of charity regulation

On 11 May 2021 the Queen announced an important piece of legislation for the charity sector as the Government's plans to roll out the Charities Bill. In 2017 the Law Commission published a report '*Technical Issues in Charity Law*' setting out problems in the legal sphere in which charities operate and making recommendations for improvements. The Report noted that much of charities' time and funds are spent satisfying administrative legal burdens, rather than on their intended charitable causes. Annexed to the report was a draft Bill, designed to give legal effect to the Commission's proposed amendments.

Following delays, caused by Brexit and the pandemic, the Government issued a response to the Law Commission's report in March this year accepting the majority of the recommendations made. The Queen's speech confirmed that subject to Parliamentary approval, the Charities Bill will be implemented with the purpose of addressing "a range of issues in charity law which hamper charities' day to day activities," as identified in the Commission's 2017 report.



## What is the Charities Bill intended to achieve?

The aim of the Bill is to:

- Remove the unnecessary administrative and financial burdens that charities currently face because of the 'inefficient and unduly complex' laws that they are governed by;
- Make the regulation surrounding charities more effective, and make the legal framework easier to navigate, enabling charities to use their resources effectively to promote their charitable causes;
- Help charities consolidate and restructure by simplifying legal processes which will reduce costs and save time; and
- Rebalance the regulations by enabling trustees to run charities effectively, whilst ensuring that there is proper oversight which safeguards the public interest; and
- Ensure that the law works better for the entire sector.

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## New Charities Bill proposes to reduce burden of charity regulation (continued)

# What changes will the Bill implement to charity law if it is passed through Parliament?



## 1. Governing documents

Changes will be introduced to make it easier for charities to change their governing documents, including streamlining the process by which charities with Royal Charters can get Privy Council approval.

Confusion is currently created by differences in how unincorporated charities (e.g. trusts and unincorporated associations) and incorporated charities (e.g. companies and Charitable Incorporated Organisations) may amend their governing documents and in particular, seek consent of The Charity Commission to regulated alterations. The Bill aims to put unincorporated charities and incorporated charities on a similar footing to reduce disparity and to clarify the legal procedures.

If the Bill is enacted, The Charity Commission will consider the same three-part test when considering giving consent to regulated changes to charities' governing documents. Regulated changes are:

- Changes which would alter the charity's purposes;
- Changes to the charity's dissolution provisions; and
- Changes which would authorise benefits to be obtained by the charity's trustees or members or people connected with them.

The three-part test to be considered by The Charity Commission in considering whether to consent to regulated alterations are that the Commission must have regard to:

- The charity's purposes when it was established;
- Whether it is desirable to keep the purposes similar to those being altered; and
- The need for the charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

Unincorporated charities would still be required to seek The Charity Commission's consent to:

- any changes relating to the manner in which the charity uses or deals with its permanent endowment assets; or
- changes to the rights of third parties (e.g. to nominate and appoint trustees) if such third parties are still in existence at the time the charity is looking to change its governing document.

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## New Charities Bill proposes to reduce burden of charity regulation (continued)

### 2. Charity mergers

There will be a removal of legal barriers to charities merging, when a merger is in their best interests.

The Bill proposes to amend the provisions in the Charities Act 2011 in relation to The Charity Commission's Register of Mergers. The Register of Mergers is intended to protect legacy income to charities that have merged with another charity and have since been dissolved or incorporated and have been removed from The Charity Commission's Register. The Register of Mergers was introduced to stop legacy income "falling through the net" if the beneficiary charity has dissolved when the merger takes effect and has transferred its assets and operations to another charity (whether as the result of a merger or incorporation).

As currently drafted the provisions are not completely fool proof and some legacy income may still fail to take effect to the merged charity if it is unclear whether the testator intended their gift to support that charity specifically or its charitable purposes in general. Confusion over whether the Register of Mergers would be sufficient to protect legacy income post-merger or incorporation, and dissolution of the transferring charity often leads charities to retain the transferring charity as a dormant charity on the Register to ensure that future legacy income does not fall through the net. However, this can be an administrative burden and it can cause confusion.

Amendments to the Register of Merger provisions are designed to address this and to make the operation of the Register of Mergers more effective in the circumstances, and to eliminate the need to maintain dormant charities.

### 3. Ex gratia payments

If the Bill is enacted in its current form, charity trustees will be allowed to make small ex gratia payments without the prior authorisation of The Charity Commission. Occasionally charity trustees need to consider making ex gratia payments. Ex gratia payments are payments which the charity is not under any legal obligation to make and which are not necessarily in the best interests of the charity, but where the charity's trustees believe there is a moral obligation or imperative to make a payment.

Examples of ex gratia payments could include the charity waiving rights to money or property to which it is legally entitled but has not yet received, circumstances where legacies have been left to charities under someone's Will, but there is clear evidence that the testator may have wished to change this, but it was not possible before their death or if there are doubts about the testator's ownership of the assets gifted to charities.

Provided they are in the charity's interests, occasional small gifts that are not of significant value (e.g. token gifts for retiring trustees) are not considered ex gratia payments. Ex gratia payments go above and beyond small gifts for volunteers or retiring trustees that are not of significant value.



The Bill would alter the existing legislation so that charities have the authority to make ex gratia payments without the authority of The Charity Commission provided the value of such payments does not exceed the relevant thresholds set down in the Bill which are based upon the charity's gross annual income.

For example; if a charity's gross income in its last financial year did not exceed £25,000, the relevant threshold would be £1,000. At the other end of the scale, if the charity's gross income in its last financial year exceeded £1 million, the relevant threshold would be £20,000.

It can take several weeks to obtain The Charity Commission's consent to make ex gratia payments and an advantage if these powers are introduced would be to enable charity trustees to react

quickly to situations where they feel there is a moral obligation for the charity to make an ex gratia payment. However, these powers should be exercised cautiously; particularly in view of the charity's reputation and perception/opinion about whether something is in the charity's interests is subjective. If these powers become available, charity trustees using them should be prepared to explain the rationale for making their decisions and to justify why making an ex gratia payment is in the charity's best interests. Careful decision making and Minutes documenting the decision making process would be required, and managing any conflicts of interest would also be essential.

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## New Charities Bill proposes to reduce burden of charity regulation (continued)

### 4. Disposal of charity land

The Bill proposes to simplify the law around the disposal of charity land and to make it easier for charities to secure the advice required to do so. This change could save charities both time and funds because the current provisions are a common source of aggravation for charity trustees.

A source of frustration for charity trustees are the requirements under the Charities Act 2011 to engage a RICS qualified surveyor to prepare written report advising the trustees when the charity is disposing of charity land. In circumstances when the transaction is relatively low value, but is caught by the land disposal provisions the cost of obtaining such a report can be disproportionate. Where time is of the essence in charity land transactions there may not be time to obtain an Order from The Charity Commission authorising the disposal if the costs of obtaining a surveyor's report are disproportionate either.

The Bill proposes to address this by making changes to the range of professionals that charity trustees can obtain the written report from. This would be expanded to include Fellows of the National Association of Estate Agents and Fellows of the Central Association of Agricultural Valuers. Furthermore, if a charity has a suitably qualified person from amongst the trustees or its employees they can also provide the advice if they are in a position to do so, and provided there would be no conflict of interest.

The Bill also simplifies the contents of the written report, so that this would consider:

- The market value of the land;
- Any improvements that would improve the market value/price;
- Any marketing the adviser would recommend; and
- Any other recommendation relevant to the transaction.

Anyone advising the charity and preparing the report would be required to self-certify that they have the relevant knowledge and expertise and that they do not have a conflict of interest in relation to the transaction.

These changes will be very welcome to charities holding land and should address some of the problems and disproportionate costs and delays that have been experienced by charity trustees in complying with the current procedures.



## 5. Failed fundraising appeals

The Bill, if enacted, would allow charities to keep small donations below £120 when a fundraising appeal fails to reach its target or achieves a surplus without having to contact the donor for their approval. Charities would also be able to spend small donations on similar charitable purposes without needing to contact individual donors for permission or seeking a Scheme from The Charity Commission.

## 6. Use of permanent endowment

The Bill proposes to implement measures to give charities increased flexibility to use their permanent endowment. Permanent endowment is assets or investments where the capital value must be preserved and the income only, and not the capital can be spent. Charity trustees can find the current regime very restrictive and the Bill proposes to give charity trustees power to act more flexibly to react to changing circumstances.

The Bill also includes changes which would allow charity trustees to borrow a sum of up to 25% of the value of their permanent endowment funds, without The Charity Commission's prior approval, and subject to repayment conditions.

## 7. Payment of charity trustees

The Bill, if enacted, would introduce an express power for charity trustees to be paid for goods supplied to the charity by them in certain circumstances, even if not expressly stated in the charity's governing document. This would give charities greater flexibility to source goods from their trustees or connected parties when it is in the best interests of the charity to do so (e.g. if it is more cost-effective), without needing The Charity Commission's permission.

## 8. Trust corporation status for sole corporate trustees of charitable trusts

Some unincorporated charities have incorporated trustees and if an incorporated charity has permanent endowment assets, these assets must be held on separate charitable trust.

Charities with sole corporate trustees require that trustee to have trust corporation status so that it can deal with the charity's assets.

The Bill, if enacted, will bestow trust corporation status automatically on all sole corporate trustees of charitable trusts. This is a technical requirement, but an important one and would remove the administrative burden of having to apply to The Charity Commission for a Scheme to obtain this status or to the Ministry of Justice for a Certificate to act as a trust corporation.

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## New Charities Bill proposes to reduce burden of charity regulation (continued)



## Is there anything the Bill does not currently include?

Not all of the Law Commissions recommendations have been accepted by the Government and some of the measures suggested to further reduce the administrative burden on charities have not made the cut to be included in the Bill. Some examples include:

- Under current legislation if a charity wishes lease or sell land to a trading subsidiary, it needs a court order or an order from The Charity Commission because the trading subsidiary is classed as a “connected person”. The Government has turned down the Law Commission’s recommendation that these transactions should be made possible without an Order from the court or The Charity Commission. This was on the basis that relationship between charities and non-charities should continue to operate on an arms-length basis.
- The Government have also rejected the Law Commission’s suggestion to abolish the requirement for charity trustees to give public notice of sales of charities’ designated land. ‘Designated land’ is land that charities are obliged to use for specific purposes. This was on the basis that designated land is often an important asset to the community and commonly takes the form of community and recreation grounds, halls, schools and church property; therefore the Government deemed that public notice of sale should continue to be given.



## Timetable: when will the Bill become law?

The Government has asked the Law Commission to update the Bill that they drafted to accompany their 2017 report and following the announcement in the Queen's speech it is expected that subject to Parliamentary approval the Bill will be introduced in the current Parliamentary session.

If you have any queries on any issues raised in this newsletter, or any charity matters in general please contact Gerry Morrison on **01482 337339** or email [gerry.morrison@rollits.com](mailto:gerry.morrison@rollits.com)



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## Information

If you have any queries on any issues raised in this newsletter, or any charity matters in general please contact:

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The law is stated as at 16 July 2021.

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