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The *Charities Bill [HL]*

Bill 83 of 2005-06

This paper discusses the provisions of the *Charities Bill [HL]* which had its first reading in the House of Commons on 9 November 2005.

The Bill would reform charity law and the regulation of charities and would include for the first time a general statutory definition of 'charity' and 'charitable purpose'. All charities, including independent schools and private hospitals, would have to demonstrate public benefit in order to have charitable status. The Bill would also reform the Charity Commission and its regulation of charities, create a new Charity Tribunal and a new corporate legal form for charities, the Charitable Incorporated Organisation and introduce a new unified licensing scheme for public charitable collections.

Catherine Fairbairn

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Summary of main points

The *Charities Bill [HL]* represents the culmination of a long process of policy development and consultation, proposing reform of charity law. The *Charities Bill [HL]* was introduced in the House of Lords on 18 May 2005 as Bill 1 of 2005-06 and completed its passage through the House of Lords on 8 November 2005. It follows a draft *Charities Bill,* published on 27 May 2004, which was subject to pre-legislative scrutiny by a Joint Committee of the two Houses of Parliament, and a *Charities Bill* which was introduced in the House of Lords in the last Parliament. That Bill was lost on dissolution of Parliament but by then many of the issues had been debated extensively. The present Bill, when introduced, incorporated not only amendments already agreed in Grand Committee debates on the previous Bill, but also amendments tabled or intended to be tabled by the Government for Report stage of the previous Bill (which in the event, was not reached).

At second reading in the House of Lords, Baroness Scotland of Asthal, Minister of State at the Home Office, set out the Government's three aims for the Bill:

- to provide a legal and regulatory environment which will enable all charities, to realise their potential as a force for good in society
- to encourage a vibrant and diverse sector independent of government
- to sustain high levels of public confidence in charities through effective regulation

Key elements in the Bill include:

- a statutory definition of 'charity' and 'charitable purpose'
- the abolition of the presumption that charities established for the relief of poverty, the advancement of education or the advancement of religion are for the public benefit; all charities, including independent schools and private hospitals, would have to demonstrate public benefit in order to have charitable status
- reform of the Charity Commission and its regulation of charities
- the creation of a Charity Tribunal
- the creation of a new corporate legal form for charities, the Charitable Incorporated Organisation
- a new unified licensing scheme for public charitable collections
- a review of the operation of the Act within five years of the Act being passed.

In the House of Lords, the Bill received general all-party support although peers raised points about specific provisions. Issues included the charitable status of organisations which charge high fees, such as independent schools and private hospitals, and the independence of the Charity Commission. The Bill has also been welcomed by the Charity Commission, by key organisations in the charity sector including the National Council for Voluntary Organisations, and by other organisations including the Law Society and the Independent Schools Council, although in some cases concerns were expressed about individual provisions.

The Bill would apply only to England and Wales (apart from minor provisions which affect Scotland and Northern Ireland). *The Charities and Trustee Investment (Scotland) Act 2005* received Royal Assent on 14 July 2005. Consultation on the reform of charity law has recently been conducted in Northern Ireland.

CONTENTS

I Introduction and background

A. Current law

To be charitable, an organisation must have purposes which are exclusively charitable and it must be established for public benefit. There is no structure or legal form which is reserved solely for charities. In practice, the great majority of charities take one of three common forms: company limited by guarantee, trust, or unincorporated association.

A charity's purposes are its objects or aims which are usually set out in its governing document. At present there is no statutory definition of charity and the legal concept has been developed by the courts over several centuries. The current law is based on the preamble to the *Charitable Uses Act 1601.* This Act did not contain a definition of charity but instead a list of the purposes considered charitable at that time. New purposes are considered to be charitable if they are analogous to one of the purposes listed in the preamble or to a purpose already considered charitable by analogy with it.

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 public.[1]

Public benefit involves two elements. First, the purpose must be beneficial and not detrimental to the public. The first three heads of charitable purpose are presumed to be beneficial, but purposes within the fourth head must be proved to be beneficial. The second element concerns the size of the group intended to benefit. It has been established in case law that the section of the public receiving the benefit must be sufficient.

There is also some legislation relating to charities. Some sporting organisations and some organisations promoting recreation are charitable under the *Recreational Charities Act 1958.* In addition, the *Charities Act 1992,* which was largely consolidated into the *Charities Act 1993*, tightened up the regulation of charities.

However, the current position is that a body of charity law, much of it very ancient in origin and honed in case law rather than contained in modern statutes, is used to establish whether an organisation is legally charitable. If an organisation meets that test, then it can take advantage of tax concessions. At the same time, as a charity it will normally also become subject to the regulatory jurisdiction of the Charity Commission, which requires that annual returns and accounts be submitted to the Commission. The Charity Commission can advise charities on their legal obligations and it has powers of intervention.

Charity law allows charities to exercise a trade in the course of the actual carrying out of a primary purpose of the charity. This is called 'primary purpose trading' and includes, for example, the holding of an art exhibition by a charitable art gallery or museum in return

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1 *Income Tax Special Purpose Commissioners* v *Pemsel* [1891] AC 531

for admission fees. The profits of a primary purpose trade are exempt from tax (but not necessarily exempt from VAT), provided that the profits are applied solely to the purposes of the charity. A charity may also exercise a trade which is ancillary to the carrying out of a primary purpose of the charity, for example the sale of food and drink in a restaurant or bar by a theatre charity to members of an audience. This is treated as primary purpose trading for both charity law and tax purposes.

Non-primary purpose trading is trading with the sole or main aim of raising funds, for example some charity shops. Charity law does not permit charities to carry out non-primary purpose trading, on a substantial basis, in order to raise additional funds. A charity may carry out non-primary purpose trading, and is exempt from income tax on trading profits, only if the income from this type of trading is small or incidental - £5000 or less than 25% of the charity's total income, up to a maximum of £50,000. If the income is above this threshold, a charity may set up a separate trading company which can then transfer its profits back to the charity, tax-free under the Gift Aid scheme.

Further information about trading by charities, and potential problems which might be encountered with the establishment of a subsidiary trading company, is set out in a Charity Commission publication, *CC35 - Charities and Trading.*[2]

B. Public trust in charities

One of the Government's stated aims in bringing forward legislation to reform charity law is to boost public confidence in charities.[3]

On 4 November 2005, the Charity Commission published research into what makes people trust charity. In a press release announcing the publication of *Public trust and confidence in charities,* the Charity Commission said that "the over-riding trust factor isn't fact-based - it's actually 'inherent belief'." The research findings included:

- 88% of people surveyed said the main factor in their trust of charities was an inherent belief that they were well managed and spending their money well
- 84% said they were more likely to trust a charity if they'd heard of them - so a charity's profile affects their trust rating
- While 97% thought Oxfam was a charity, only 15% believed Tate Modern was - people's view of charity is still fairly narrow
- 44% of people trust big charities more than smaller ones
- 90% of people said they, and their close family and friends had not received money, support or help from charities, although 75% actually had.

Andrew Hind, Chief Executive of the Charity Commission said,

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2 July 2001, http://www.charity-commission.gov.uk/publications/cc35.asp

3 Home Office Press Release, *Streamlining Charity Law, Building Trust, Empowering Citizens,* 27 May 2004, http://www.homeoffice.gov.uk/docs3/charitiesbill_pressnote040527.pdf

> "It's good news for charities that so many people inherently believe that charities are well managed. But this basic level of trust seems to be based on a more limited understanding of the issues than we'd previously expected. This adds up to another challenge to charities, and the Commission, to better explain the role of the sector."[4]

The report of the quantitative survey findings is available online.[5]

The consultants nfp Synergy publish the *Charity Awareness Monitor* which provides research into public confidence and the public's concerns about charities. The results from the November 2005 survey are summarised below:

- 42% of people surveyed felt that charities were more trustworthy than Government, down from 58% in the October 2001 survey.
- 45% of respondents felt that charities were more trustworthy than companies, down from 55% in October 2001.
- People were asked to name the three kinds of organisations they felt were the most trustworthy. 52% of all people mentioned 'Churches', with 48% citing 'Charities' and 24% 'Small businesses'.
- At the other end of the scale 6% of respondents placed National Government in their three most trustworthy organisations, 5% newspapers, 3% multinational companies and less than 1% mentioned political parties.
- Almost two-thirds of people trusted charities 'a great deal' or 'a fair amount' to spend donations wisely. Only 8% of respondents would not trust UK charities to make good use of a donation.[6]

C. *Private Action Public Benefit*

In July 2001 the Prime Minister commissioned his Strategy Unit to carry out a review of the law and regulation of charities and other not-for-profit organisations. The Review, entitled *Private Action, Public Benefit,* was published in September 2002.[7] It made a series of recommendations intended to modernise charity law and status to provide greater clarity and a stronger emphasis on the delivery of public benefit; improve the range of available legal forms enabling organisations to be more effective and entrepreneurial; develop greater accountability and transparency to build public trust and confidence; and ensure independent, fair and proportionate regulation. The main recommendations included:

- Updating and expanding the list of charitable purposes
- Requiring a clearer focus on public benefit
- Allowing charities to trade directly

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4 Charity Commission, *The truth about charity- research shows trust in charities is high but not based on knowledge*, 4 November 2005, http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=176480&NewsAreaID=2

5 http://www.charity-commission.gov.uk/Library/spr/pdfs/surveytrustrpt.pdf

6 Contributed by Gavin Berman, Social and General Statistics Section, reproduced with the kind permission of nfp Synergy

7 http://www.number-10.gov.uk/su/voluntary/report/index.htm

- Enabling charities to campaign
- Cutting bureaucracy through a package of deregulatory measures
- Improving the range of legal forms available to charities and social enterprises
- Developing greater accountability and transparency by improving information available to the public and regulating fundraising more effectively
- Reinforcing the Charity Commission's role as the regulator for charities
- Establishing a new independent tribunal to enable trustees to challenge Charity Commission decisions at reasonable cost
- Updating the rules on registration with higher thresholds for registration with the Charity Commission and some large charities currently not required to register with the Charity Commission to be monitored for compliance with charity law.

D. Charity Commission response

The Charity Commission response to *Private Action, Public Benefit*, which was published on 20 November 2002, welcomed the Review and confirmed the Charity Commission's support for the great majority of its proposals.[8] The Charity Commission expressed support for the proposal to allow charities to trade directly, although it did express arguments both for and against this proposal. The Commission also argued that an independent ombudsman, with powers to make recommendations to charities that are failing service users, would make the voluntary sector more accountable. It said that a charity ombudsman could provide redress if a charity's own customer care and complaints arrangements failed to resolve alleged maladministration.

E. The Government's response

Following consultation, the Government published its response to the Strategy Unit's proposals in July 2003.[9] The Government accepted all but one of the main recommendations. It also added a further three purposes to the list of charitable purposes proposed by the Strategy Unit. However, the Government rejected the recommendation that charities should be allowed to trade directly without the need to set up a separate trading company as at present. It said that this would offend the principle of a level playing field with private sector businesses.

The Government specifically accepted the Review's recommendation for a new definition of charity based on the principle of public benefit and agreed with the conclusion of the Review that there should not be a statutory definition of public benefit.

The Government accepted that self-regulation to promote good practice in fundraising should be tried first but proposed to reserve power in the draft Bill to introduce statutory regulation should self-regulation fail.

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8 The Charity Commission, "*The Charity Commission's response to the Strategy Unit review*", 20 November 2002, http://www.charity-commission.gov.uk/spr/corresp.asp

9 *Charities and Not-for-Profits: A Modern Legal Framework* http://www.homeoffice.gov.uk/docs3/charitiesnotforprofit.eng.pdf

F. Consultation Paper on proposals for a new local authority licensing scheme

In its response to *Private Action, Public Benefit*, the Government accepted the need for a new unified statutory licensing scheme for public collections, and indicated that this would be included in the draft Bill. However, it said that further detailed consultation would be conducted to ensure that the new scheme would be practicable. The Government published a consultation paper, *Public Collections for Charitable, Philanthropic and Benevolent Purposes,* in September 2003.[10] It proposed a new scheme under which local authorities would be required to license all public charitable collections apart from the very small and local, which would be exempt. The licensing requirement would extend to direct debit solicitation, sometimes called face to face fundraising (by so-called chuggers).[11]

G. The draft Bill and scrutiny by Committees

1. The draft Bill

The draft *Charities Bill*, consisting of 48 sections and 8 schedules and divided into 4 parts, was published on 27 May 2004 together with Explanatory Notes and a draft Regulatory Impact Assessment.[12] Many of the clauses, as in the Bill now before Parliament, were to amend the *Charities Act 1992* and the *Charities Act 1993.* A Home Office press release, issued when the draft Bill was published, outlined the purpose of the draft Bill:

> Developed in consultation with the voluntary and community sector, the draft Charities Bill contains 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 is a key 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.[13]

2. Scrutiny by the Joint Committee on the draft Charities Bill

The draft bill was subject to pre-legislative scrutiny by a Joint Committee of the two Houses of Parliament. The Joint Committee's report, *The Draft Charities Bill* was published on 30 September 2004 and included over 50 recommendations.[14]

Announcing the publication of its Report, the Committee welcomed the Government's proposals for reform and modernisation of charity law which it said it believed to be "long overdue". The Committee also said of its Report:

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10 http://www.homeoffice.gov.uk/docs2/fundraising.pdf

11 The proposed licensing scheme has now been amended. See Section II C of this paper below

12 Cm 6199, http://www.homeoffice.gov.uk/docs3/charitiesbill_foreward040527.pdf

13 Home Office Press Release, *Streamlining Charity Law, Building Trust, Empowering Citizens,* 27 May 2004, http://www.homeoffice.gov.uk/docs3/charitiesbill_pressnote040527.pdf

14 Joint Committee on the Draft Charities Bill, *The Draft Charities Bill,* 30 September 2004, HL 167, HC 660, 2003-04, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167.pdf

> It is particularly keen to ensure that smaller charities are not over-burdened by regulation, and would like to see charities given greater freedom to trade. Further key recommendations concern the role and remit of the Charity Commission and the Charity Appeal Tribunal, the accountability of professional fundraisers, the definition of public benefit and the clarification of charitable purposes, especially those relating to religion and the promotion of religious and racial harmony.[15]

The Committee paid tribute to the vital work performed by charities and confirmed that its assessment of the draft bill and the recommendations it made were based on a desire to see charities grow and not diminish.

The Committee pointed to the difficulty in understanding the draft Bill on its own because many of the clauses would amend the existing *Charities Acts* of 1992 and 1993. It recommended either that the real Bill should combine the provisions of the draft Bill with the surviving sections of the 1992 and 1993 *Charities Acts* to enact a single Charities Act or that a further consolidation bill should be brought forward subsequently to draw together all statute law on charities into a single Act.[16] (The Government has since indicated that the Law Commission would be able to begin work on a consolidation Bill very soon after Royal Assent.[17])

The Committee also noted that, although the draft *Charities and Trustee Investment (Scotland) Bill* being considered in Scotland at that time was similar in many respects to the draft Bill, there were a number of differences which could cause problems for charities operating across Britain.[18] The Government accepted the Committee's recommendation that it should 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.

The Government's response to the Joint Committee's report was published in December 2004.[19]

The Joint Committee recommended that the trading turnover threshold above which charities are obliged to set up a trading company in order to trade should be raised to allow more charities to trade within the charity itself.[20]

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15 Joint Committee on the draft Charities Bill Press Notice, *Publication of Report,*29 September 2004, http://www.parliament.uk/parliamentary_committees/jcdchb/chb_6.cfm

16 Paragraphs 383 and 384, Joint Committee on the Draft Charities Bill, *The Draft Charities Bill,* 30 September 2004, HL 167, HC 660, 2003-04, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167.pdf

17 HL Deb 21 March 2005 c53GC

18 Paragraph 41, Joint Committee on the Draft Charities Bill, *The Draft Charities Bill,* 30 September 2004, HL 167, HC 660, 2003-04, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167.pdf

19 The Government Reply to the Report from the Joint Committee on the Draft Charities Bill Session 2003-04 HL Paper167/HC 660, *The draft Charities Bill,* December 2004, Cm6440, http://www.official-documents.co.uk/document/cm64/6440/6440.pdf

20 Para 354, Joint Committee on the Draft Charities Bill, *The Draft Charities Bill,* 30 September 2004, HL 167, HC 660, 2003-04, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167.pdf

The Government rejected that recommendation on the basis that this would give charities an unfair competitive advantage over small businesses, which are taxed on their profit.

Reference to particular recommendations made by the Joint Committee, and to the Government's response, is made, in context, in the following sections of this paper.

H. The *Charities Bill [HL]* in the last Parliament

1. The Bill

After consultation and scrutiny of the draft Bill by the Joint Committee on the draft Charities Bill, the *Charities Bill [HL]* was introduced in the House of Lords on 20 December 2004 as Bill 15 of 2004-05. The Bill had 72 clauses and 9 schedules and so was considerably longer than the draft bill. Recommendations by the Joint Committee which were reflected in the Bill included:

- the addition to the list of descriptions of charitable purposes of the advancement of 'the saving of lives'; the advancement of 'culture', (to bring the Bill into line with the wording of the draft *Charities Bill and Trustee Investment (Scotland) Bill);* and 'the promotion of religious or racial harmony or equality and diversity'

- clause 2 (4) (b) and (c) was to include within the general 'any other purposes' category of charity, a reference to purposes 'within the spirit of' already recognised charitable purposes, in addition to purposes considered to be analogous

- clause 4 was to require the Charity Commission to issue guidance on public benefit following consultation

- the new Clause 1B to be inserted into the 1993 Act by Clause 7 of the Bill was to give the Commission a "charitable resources objective" which was to promote the effective use of charitable resources; the 'social and economic impact objective' included in the draft bill which attracted criticism in evidence to the Joint Committee had been removed

- the new Clause 1D to be inserted into the 1993 Act by Clause 7 of the Bill was to require the Commission, in carrying out any of its functions, so far as reasonably practicable, to act in a way that encouraged charitable giving and voluntary action

- the remit of the Charity Appeal Tribunal was to be extended (these provisions have now been amended further) and the Tribunal was to be able to award costs

- the Commission was to be required to consult the principal regulator of an exempt charity before exercising any of its enforcement powers in relation to the exempt charity

- if the Charity Commission removed a trustee, officer, agent or employee from office after an inquiry, it was also to have discretion to remove that person from membership

- the Commission was to have power to determine membership of a charity
- the automatic lifetime disqualification from trusteeship was to be amended in some circumstances
- the criminal penalty for a trustee who takes part in a decision about his own remuneration was to be replaced with a civil penalty
- organisations conducting house-to house collections would require a public collections certificate
- the licensing scheme for public charitable collections had been considerably amended (Part 3 Chapter 1)

Peers considered the Bill at second reading and then in Grand Committee on eight separate occasions. The Bill was lost when the general election was called but, by then, many of the issues had been debated extensively.

2. Scrutiny by the Joint Committee on Human Rights

The Joint Committee on Human Rights considered the *Charities Bill [HL]* which was introduced in the last Parliament, in its Sixth Report of Session 2004-05.[21] The Committee reported that the majority of the Bill's provisions did not raise any significant human rights issues.[22] The Committee made the following points:

- The presumption of public benefit: it was likely that any interference with property rights involved in an organisation's loss of charitable status would be found to be justified in the general interest[23]
- Private schools:

> We concluded in our report on the draft Bill that the provisions of the Bill were unlikely to significantly constrain the operation of private schools so as to breach education rights under Article 2 of Protocol 1, provided that the provision is not applied in a discriminatory way. We further concluded that, in order to ensure Article 2, Protocol 1 compliance, guidance should provide for "public benefit" to be interpreted as including the provision of education in accordance with religious or philosophical convictions which it can be demonstrated are not adequately provided for within the state educational system. The Home Office in reply agreed that it would be desirable to clarify the matter in guidance. We note that provision is made in clause 4 of the Bill for the Charity Commission to issue guidance on the meaning of "public benefit" under the Bill.[24]

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21 Joint Committee on Human Rights, *Scrutiny: Second Progress Report,* 8 February 2005, HL 41 HC 305, 2004-05, http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/41/41.pdf

22 *Ibid* para 3.2

23 *Ibid* para 3.6

24 The issues relating to public benefit and the charitable status of private schools are covered in part II A 2 of this paper below

- Organisations advancing religion or belief:

> ...we remain of the view that protection of Article 9 rights on an equal basis could most effectively and clearly be ensured by provision on the face of the Bill, expressly extending clause 2(2)(c) to cover all religious and non-religious organisations which promote systems of belief. As we stated in our report on the draft Bill, at a minimum, guidelines under the Bill must clarify that organisations advancing all forms of both religious and non-religious beliefs protected by Article 9 would be accorded recognition under either clause 2(2)(c) or clause 2(2)(l) on an equal basis. **We reiterate those conclusions here, and draw this matter to the attention of both Houses.**[25]

These issues are also considered in Part II of this paper below.

II The Bill: clauses, issues and debate

The *Charities Bill [HL]* was introduced in the House of Lords on 18 May 2005 as Bill 1 of 2005-06 with 76 sections and 9 schedules. The Bill incorporated not only amendments already agreed in Grand Committee debates on the previous Bill, but also amendments tabled or intended to be tabled by the Government for Report stage of the previous Bill (the previous Bill did not reach Report stage because of the dissolution of Parliament but the Government had intended to table some 160 amendments).[26] Further amendments have since been made in the House of Lords. The present Bill was considered in Committee rather than in Grand Committee. The Bill completed its passage through the House of Lords on 8 November 2005 and had its first reading in the House of Commons on 9 November 2005 as Bill 83 of 2005-06.

Many issues were raised by the Committees which considered the draft bill and the previous bill, and in debates both on the previous bill and the present bill in the House of Lords. Before the previous Bill was lost on dissolution of Parliament, peers had already debated its terms for over 31 hours and by the time the present Bill was passed at third reading, they had debated the previous bill and the present Bill for a total of more that 60 hours.

In the House of Lords, the Bill received general all-party support although peers raised points about specific provisions and issues. Several peers spoke of the value of the contribution made by charities to society and confirmed that the Bill was being welcomed in the charitable sector.

This part of this paper sets out a summary of the main areas covered by the Bill and includes, where appropriate, references to the Report of the Joint Committee on the draft Charities Bill, to the Government's response to that Report and to debate both on the previous Bill and the present Bill. A very large number of proposed amendments were debated, sometimes on several occasions, and not all (and not all stages) are included in

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25 *Ibid* para 3.15

26 HL Deb 7 June 2005 c832

this paper. The Explanatory Notes published by the Government with the Bill give a more detailed explanation of the clauses in the Bill.[27]

A. Part 1: Meaning of 'charity' and 'charitable purpose'

Part 1 covers the meaning of 'charity' and 'charitable purpose' and also the public benefit requirement.

1. Statutory definition of charity

a. The Bill

Clause 1 would set out a general statutory definition of 'charity' for the first time, as an institution which is established for charitable purposes only and is subject to the jurisdiction of the High Court.

Clause 2 would set out a statutory meaning of 'charitable purpose' as a purpose which meets two criteria: it falls within any of the listed descriptions of purposes **and** is for the public benefit. The listed descriptions of charitable purposes are:

- the prevention or relief of poverty
- the advancement of education
- the advancement of religion
- the advancement of health or the saving of lives
- the advancement of citizenship or community development
- the advancement of the arts, culture, heritage or science
- the advancement of amateur sport
- the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity
- the advancement of environmental protection or improvement;
- the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage
- the advancement of animal welfare
- the promotion of the efficiency of the armed forces of the Crown
- other purposes recognised as charitable under existing charity law or analogous to any such purposes or to any of the purposes listed above.

These categories would include all the present areas of charity, widened in some cases, for example, the prevention as well as the relief of poverty. The final purpose ensures that the definition of charitable purpose would still rely on the existing body of case law. The final purpose differs from that proposed in the Strategy Unit's Review, *Private Action, Public Benefit,*[28] which was "other purposes beneficial to the community". However, the Government's Explanatory Notes state that the total effect of Clause 2

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27 Bill 83-EN, http://www.publications.parliament.uk/pa/cm200506/cmbills/083/en/06083x--.htm

28 http://www.number-10.gov.uk/su/voluntary/report/index.htm

would enable the meaning of 'charitable purpose' to be expanded in the future by allowing the possibility of new charitable purposes to be recognised.[29]

The Bill now includes a definition of religion which may include non-deity and multi-deity groups. In the previous Bill there had been no such definition, despite a recommendation by the Joint Committee and calls in debate for this point to be clarified.

The Charity Commission has published a commentary on the descriptions of charitable purposes in the Charities Bill, which it states is designed to give a broad overview of each of the descriptions of purposes.[30]

b. Issues and debate

The House of Lords debated, at some length, items on the list of charitable purposes and also further items which some peers felt should be specifically mentioned, including:

Religious charities

At second reading of the previous Bill, the Liberal Democrat peer, Lord Lester of Herne Hill, argued that the absence of a definition of religion in the Bill raised the potential for discrimination as between theistic and non-theistic religions and as between religious and other belief organisations. He argued that this risked breaching the *Human Rights Act* and Articles 9 and 14 of the European Convention on Human Rights.[31]

When the Bill was reintroduced, it included a new Clause 2(3)(a) which sets out that 'religion includes (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god'. At second reading, the Labour peer, Lord Borrie expressed concern about this definition:

> I understand that that is wider than the Charity Commission's current opinion of what is meant by "the advancement of religion", but the repetition, several times over, of the word "religion" in the new clause seems to me to emphasise that organisations promoting non-religious belief, or promoting a lack of faith, or promoting agnosticism are not within the phrase "the advancement of religion" or indeed within the spirit of that purpose. I suppose one could see Clause 2(4) as a broadening provision.[32]

In Committee, the Labour peer, Lord Wedderburn of Charlton, supported by Lord Borrie, moved an amendment, which was subsequently withdrawn, which would have extended the charitable purpose relating to the advancement of religion to include the advancement of a belief.[33] He said that a purpose for the promotion of non-religious belief would be at risk of being found not to be analogous to any express description in the list and consequently of not being a charitable purpose, a risk that religious purposes

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29 Bill 83-EN, para 23, http://www.publications.parliament.uk/pa/cm200506/cmbills/083/en/06083x--.htm
30 Charity Commission, *Descriptions of Charitable Purposes in the Charities Bill,* December 2005, http://www.charity-commission.gov.uk/spr/corcom1.asp
31 HL Deb 20 January 2005 c918
32 HL Deb 7 June 2005 c807
33 HL Deb 28 June 2005 c137

would not run.[34] Lord Bassam of Brighton, the Government Spokesperson for the Home Office, said that this amendment was not necessary because non-religious belief systems which promote moral and spiritual welfare have been charitable for some time, and would continue to be charitable under the Bill as a result of the final general description in the list. He also argued that the Bill would not discriminate between charities promoting religious or non-religious belief because, as a result of the removal of the presumption of public benefit from religious charities, religious beliefs and non-religious beliefs would be in exactly the same position of having to demonstrate public benefit in order to qualify for charitable status.[35]

The Labour peer, Baroness Whitaker returned to this issue on Report and moved a similar amendment, which again was withdrawn. She also was concerned about the different treatment given under the Bill to religious belief and non-religious ethical belief:

> But putting non-religious belief under the catch-all heading is not only technically discriminatory, but implies that non-religious ethical belief is not equivalent in value to religious belief. It will inevitably lead to the development of different tests for religious and non-religious charities doing similar work and will reinforce the prevalent view that, for instance, humanism ... is not an ethical system on a par with religion but a set of opinions on a par with a political policy. All those are inconsistent with the Human Rights Act.[36]

Lord Bassam disputed this claim:

> It has been argued that the Bill leaves non-religious belief at a disadvantage because it is encompassed by the catch-all provision of Clause 2(2)(l) rather than being expressly mentioned. That argument is based on the perception that the purposes within Clause 2(2)(l) are somehow lesser purposes. I do not share that view. They are not. More importantly, there will, once the public benefit presumption is removed, be no respect in which those purposes are treated in law or in practice any differently from any other charitable purpose.... we cannot give everything that is charitable its own specific heading without making the list unmanageably long... We do not agree that it is safe to allow all belief systems or philosophies into the list of charitable purposes on the grounds that the public benefit test would act as a backstop to exclude those that had no place in the domain of charity. We disagree with that argument because it is ultimately an argument for a definition of charity which does not have a list of headings of charitable purposes, but simply says that anything for the public benefit is charitable. That is not the route that we, or any commentators on the Bill, favour at all.[37]

Animal welfare

In a debate on a probing amendment to the previous Bill moved by Lord Hodgson of Astley Abbotts, Opposition Spokesperson for the Home Office, Lord Bassam of Brighton

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34 HL Deb 28 June 2005 c139

35 HL Deb 28 June 2005 c144-5. Information about the public benefit requirement is included in section II A 2 of this paper below

36 HL Deb 12 October 2005 c292

37 HL Deb 12 October 2005 cc294-5

confirmed that the inclusion of the advancement of animal welfare as a charitable purpose would not have the effect of granting charitable status to anti-vivisectionist groups, who would at present be denied that status. He further confirmed that the inclusion of this purpose was not inconsistent with accepting medical research charities.[38]

Heritage houses

Lord Bassam of Brighton confirmed that historic houses would continue to be charitable under the Bill on the same basis as they are charitable now.[39]

Sport

In Grand Committee debate on the previous Bill, Lord Hodgson of Astley Abbotts moved an amendment, which was subsequently withdrawn, which would have included in the definition of sport activities involving mental exertion such as chess or bridge. The Government did not accept this and insisted that sport should be defined as encompassing activities involving an element of physical skill, which promote and maintain health. Lord Bassam also confirmed that other charitable purposes might be furthered by the promotion of sport, such as the advancement of education for children and young people, or the relief of disability.[40]

Armed forces charities

Peers debated the position of armed forces charities including Service Non-Public Funds (SNPFs). In Grand Committee debate on the previous Bill, Lord Craig of Radley, Lord Marshal of the Royal Air Force, described SNPFs as:

> essentially funds used to support unit and other formations' social, sporting and adventure training activities. Their income derives largely from worldwide NAAFI rebates—to be replaced at home from a pay-as-you-dine arrangement levy—and, in some cases, by servicemen and servicewomen gift-aiding their pay for one or two days a year. There is no fund-raising effort devoted to bringing additional funds into these accounts.[41]

Peers debated whether armed forces charities should be listed among the specific charitable purposes. In the previous Bill and in the present Bill when introduced in the House of Lords, there was no such specific purpose. Lord Craig of Radley, with support from several peers, moved amendments designed to achieve specific listing for armed forces charities in relation to both the previous Bill and the present Bill. The Government's original stated position was that promoting the efficiency of the armed forces, which had been a charitable purpose for a very long time, would continue to be a charitable purpose by virtue of the last general description of charitable purposes and without the necessity for a specific listing.

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38 HL Deb 3 February 2005 c53GC
39 HL Deb 9 February 2005 c84GC
40 HL Deb 9 February 2005 c90GC
41 HL Deb 3 February 2005 c24-25GC

However, a Government amendment to include in the list of charitable purposes 'the promotion of the efficiency of the armed forces of the Crown' was made on Report.[42]

Peers also debated whether the inclusion of "conflict resolution" as a charitable purpose might prejudice the position of Armed Forces charitable funds.[43] Lord Bassam confirmed that he did not see any inconsistency in accepting as charitable purposes the promotion of conflict resolution and reconciliation and the promotion of military efficiency.[44]

2. Public benefit

a. The Bill

Part 1 also introduces the public benefit test. Under existing law, there is a presumption that charities established for the relief of poverty, the advancement of education or the advancement of religion are for the public benefit. Charities established for all other purposes do not benefit from this presumption. **Clause 3** would abolish the presumption so that, in future, all charities would have to show that they are for the public benefit, irrespective of the purpose for which they are established. The term "public benefit" would not have a statutory definition and would continue to be interpreted in accordance with existing common law (case law).

Clause 4 would require the Charity Commission to issue guidance on public benefit following consultation. This provision was included in response to a recommendation by the Joint Committee that the basic principles of public benefit should be set out either in the Bill or in guidance issued by the Secretary of State.

b. Issues and debate – including the charitable status of independent schools

Guidance

In Grand Committee debate on the previous Bill, Baroness Scotland of Asthal explained what the Charity Commission would have to do in issuing guidance:

> First, it will have to explain ... the nature and meaning of the public benefit requirement. ... Secondly, it would have to explain how it proposes to operate or apply the requirement in practice to charities of various types and characteristics. ... Thirdly, it will have to carry out the public and other consultation mentioned in Clause 4. Fourthly, it will have to disseminate the guidance in a way that is calculated to raise awareness and understanding of what is written in the guidance.[45]

Baroness Scotland also confirmed that the Charity Commission would revise its guidance as the need arose.[46]

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42 HL Deb 12 October 2005 cc296-8
43 HL Deb 3 February 2005 c24-38GC
44 HL Deb 3 February 2005 c37GC
45 HL Deb 9 February 2005 c103GC
46 HL Deb 9 February 2005 c106GC

The Charity Commission has already published a statement on its position on how public benefit is treated in the *Charities Bill,*[47] together with guidance on how it would propose to implement the public benefit test.[48] In the first of these documents, the Charity Commission confirms that it would apply the broad principles established by law in the light of modern conditions, but acknowledges that applying principles drawn from a small number of cases involving particular charities and situations would involve difficult judgements and interpretations of the law which would be open to challenge:

> For this reason we believe that if changes to the Bill are being considered the development of the law would be enhanced if a future Charities Act included non-exclusive, high level criteria, including issues around fee charging charities, which would clarify the general principles established by the existing law to be taken into account in assessing public benefit.

In the second of the Charity Commission's documents, *Public Benefit – the Charity Commission's approach,* the Commission sets out its current proposals relating to the issues which its guidance would cover. The Commission states that, on enactment, it would review the proposals and publish a new version as a draft for consultation. The Commission also confirms that it would carry out public benefit checks on existing charities although it has not yet decided on the best way of carrying out these checks.

Independent schools and private hospitals

The charitable status of organisations which charge high fees, particularly schools and hospitals, has proved controversial both in the Joint Committee's deliberations and in House of Lords debates. Under the Bill, in common with all other charities, independent schools and private hospitals would have to show that they provide a public benefit. The main problem identified was how such organisations could demonstrate adequate public benefit when access to their services is limited to those who can afford to pay the fees charged. The Government rejected a suggestion from the Joint Committee that charitable status should perhaps be removed from independent schools and hospitals in return for favourable tax treatment if quantified public benefit could be demonstrated.

There was also some disagreement about how valuable the tax incentives of being a charity actually are to independent schools in relation to the benefits given back (such as in fee reductions and grants). For example, at third reading, the Labour peer, Lord Campbell-Savours said that 'fee-paying schools desperately cling on to [charitable] status for the tax benefits' whereas the Conservative peer, Lord MacGregor of Pulham Market said the 'tax benefits amount to something like £100 million a year ... if one takes into account all the other aspects, broadly speaking, the independent schools contribute twenty times that to education as a whole and to the public good'.[49]

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47 *Public Benefit – The Charity Commission's position on how public benefit is treated in the Charities Bill,* July 2005, http://www.charity-commission.gov.uk/spr/publicbenefit.asp

48 *Public Benefit – the Charity Commission's approach,* January 2005, http://www.charity-commission.gov.uk/spr/pbcca.asp

49 HL Deb 8 November 2005 cc599-561

The Joint Committee noted that they had received conflicting evidence on how much difference the removal of the presumption of public benefit would make to existing charities and in particular that there was disagreement on this point between the Home Office and the Charity Commission. A joint position has now been agreed between the Home Office and the Charity Commission. An extract from a joint letter (the concordat) from Fiona Mactaggart, a junior Home Office Minister and Geraldine Peacock, the Chief Charity Commissioner, is included in the Joint Committee's report.[50] This sets out the principles to be used, in any case where an organisation charges fees for its facilities and services, to judge the impact of the organisation's fee-charging on its ability to satisfy the public benefit test for charitable status. It confirms that the Charity Commission would continue to follow the case-by–case approach followed by the courts in determining public benefit, and also that the Commission would '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'. The concordat also acknowledges that the law on public benefit would evolve and develop over time.

The Prime Minister's Strategy Unit recommended that the Charity Commission carry out a review of the public benefit provided by high fee-charging charities once the Bill is enacted, and the Commission has agreed to carry out such a review. This would include not only schools but all other fee-charging charities, including private hospitals, arts organisations, and others.

The Joint Committee concluded that, although a detailed statutory definition of public benefit would be too inflexible, there was still a need for a more explicit definition. The Committee recommended that the basic principles for a definition of public benefit should be those set out in the concordat 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.[51]

The Government replied that the concordat letter was not meant to be a full exposition of the public benefit principles applying to charities generally and would therefore form only a partial and not a complete basis for an explanation of public benefit. Furthermore, the Government did not favour a list of non-exclusive criteria because of the danger that over time, the list would come to be seen as representing not some but all of the factors to be taken into account by the Charity Commission and the court when considering an organisation's public benefit. The Government said that it favoured the option of having the public benefit principles stated in explanatory guidance as this would provide maximum flexibility for the law to develop in response to changes in society and because it would allow for all, rather than just some, of the public benefit principles to be set out and explained. In order to avoid the risk of there being any perception of Government control in the definition of what is charitable, the Government stated that the Charity Commission would be responsible for issuing the guidance after carrying out appropriate consultation.

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[50] pp24-25
[51] Para 102

The Charity Commission has now published draft guidance on how it would propose to implement the public benefit test.[52] In *Public Benefit – the Charity Commission's approach*, the Commission states that public benefit might be affected by charges made by a charity if they are so high that they effectively exclude the less well off, and sets out the broad principles which it would apply in considering the extent to which charging by a charity might affect its ability to demonstrate benefit to the public:

- 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 is set up and operates for the benefit of the public;

- 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 organisation is not set up for and does not operate for the benefit of the public;

- However, an organisation which wholly excluded less well off people from any benefits, direct or indirect, would not be set up and operate for the benefit of the public and therefore would not be a charity.

35. Applying this approach in cases where high fees are charged for services or facilities provided, the following issues will be considered:-

1. Does the level at which fees are set have the effect of preventing or deterring the less well off from accessing the services or facilities?

2. If this is the case, is it possible to show that the less well off are not wholly excluded from any possible benefits, direct or indirect?

36. The following general factors may be relevant:-

- Whether and how the less well off may otherwise access those services. This is likely to vary from charity to charity and for different charitable purposes but may include considering:

    - The provision of concessions, subsidised or free places (for example, in the case of schools by offering scholarships, bursaries or assisted places, or in the case of theatres by offering concessionary tickets);

    - The existence of accessible insurance or other benefit schemes (for example, medical insurance schemes);

    - The provision of wider access to charitable facilities or services. For example some charities may provide additional facilities or services for the less well off people who would otherwise be excluded. Some charities may lend equipment or staff out to other charities or groups which provide the same facilities or

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[52] *Public Benefit – the Charity Commission's approach,* January 2005, http://www.charity-commission.gov.uk/spr/pbcca.asp

services to the less well off. For example, a charitable independent school allowing a state maintained school to use its educational facilities.

- What is the nature and extent of the benefit provided? This may include considering how far the type of service or facility provided is one for which there is a public need, and how far the service or facility provided in the particular case contributes towards meeting that need. For example, a hospital not run by the NHS may provide specialised scanning equipment which is not available in the local NHS hospital, or an elderly person in a home might be provided with care for longer than he or she would have received it from the public service provider.

- The nature and extent of any indirect public benefit. This may take various forms. For example, a care home not run by the state working alongside state run homes may be able to meet local needs for the provision of care which the state run homes alone would be unable to do.

When introducing the previous Bill in the second reading debate in the House of Lords, Baroness Scotland of Asthal, Minister of State at the Home Office, specifically referred to the issue of charities which charge high fees. She said that the Bill had been criticised 'both for failing to remove the charitable status of independent schools and for failing to protect the charitable status of independent schools'.[53] However, Baroness Scotland confirmed that independent schools would be treated by the Bill in the same way as any other charity and would have to show that they provide a public benefit.

Several peers spoke of the requirement for demonstrating public benefit in the context of the activities of independent schools, private hospitals and other fee charging institutions.

Lord Phillips of Sudbury claimed that it had long seemed anomalous that independent schools should retain charitable status although they devote by far the greater part of their benefits to the rich as others cannot afford the fees they charge.[54]

The Crossbencher, Baroness Howe of Idlicote, pointed to three distinct ways in which independent schools contribute to the quality of the educational system:

- They save the state huge sums by educating a large number of pupils at the expense of their taxpaying parents.
- By virtue of their charitable status, they continue to attract a substantial inflow of additional charitable giving
- The schools make available a range of scholarships.[55]

The Labour peer, Lord Campbell-Savours, a member of the Joint Committee, described the issue of whether independent schools should be charitable institutions as the most

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[53] HL Deb 20 January 2005 c885
[54] HL Deb 20 January 2005 c907
[55] HL Deb 20 January 2005 c912

controversial issue considered by the Committee and gave a warning: "this is rebellion material in the House of Commons, and this is the opportunity to deal with such material because the Bill is starting in the House of Lords".[56]

In Grand Committee debate on the previous Bill, the Labour peer, Lord Wedderburn of Charlton, moved an amendment, which was subsequently withdrawn, which would have removed charitable status from 'elite institutions'.[57] He wished to ensure that tax advantages were reserved for those schools which take a serious step towards increasing the number for whom fees are not paid.

Baroness Scotland of Asthal reiterated that if an institution could demonstrate to the Charity Commission that it is established for charitable purposes and for the public benefit in a way that would satisfy the public benefit requirement, then the Government's view is that it would meet the criteria for charitable status and should be allowed to take its place within the domain of charity.[58]

Lord Phillips of Sudbury moved an amendment on several occasions which would have required the Charity Commission, in applying the public benefit test, to look at the effect upon access of charging by charities. He argued that this would ensure that an organisation would not be able to argue, based on existing case law, that it satisfied the public benefit test because it provided superior facilities and that, in taking patients and pupils out of the state sector, it was relieving state funds.[59] He also referred to the problem of the existing common law in this area as being 'confused and sparse' (principally a 1967 Privy Council decision in *Re Resch)*.[60] A number of peers supported the amendment and Lord Phillips said that the Charity Commission would like the amendment.[61]

In debate on the previous Bill, Lord Hodgson of Astley Abbots did not agree that charities which charge for their services should have to pass further additional tests or be treated differently from those that do not charge fees.[62] Baroness Scotland of Asthal confirmed that the charging of fees could, in some circumstances, affect the level of public benefit that an organisation delivers, and thus affect its charitable status. She said that documents produced by the Charity Commission explained how the charging of fees could affect public benefit and how, in practice, the Commission would go about checking the public benefit of organisations which charge fees.[63] Baroness Scotland went on to say that the Government would not be surprised if "the Commission identified some charities whose fee-charging restricted access to the benefits of those charities' services and facilities to such an extent that they could not demonstrate sufficient public benefit".[64]

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56 HL Deb 9 February 2005 c69GC
57 HL Deb 9 February 2005 c63GC
58 HL Deb 9 February 2005 c77GC
59 HL Deb 9 February 2005 c114GC
60 HL Deb 12 October 2005 c310
61 HL Deb 12 October 2005 c316
62 HL Deb 9 February 2005 c114GC
63 HL Deb 9 February 2005 c116GC
64 HL Deb 9 February 2005 c117GC

In the course of debate, the Cross Bench peer, Lord Dahrendorf, expressed concern that public benefit should not be considered solely in the context of those who are poor or disadvantaged: 'In my view, that would be too narrow a notion of public benefit... there could be public benefit in supporting, for example, the highly gifted in certain areas, or those with special talents'.[65]

On Report, Lord Bassam referred peers to the Charity Commission's proposals for judging public benefit as set out in its publication, *Public Benefit – the Charity Commission's approach*. He said that the amendment was unnecessary because:

> in setting out the legal principles by which it will apply the public benefit requirement, the Charity Commission says that it can already, and without the need for the amendment, take into account the effect of fee-charging on an organisation's ability to meet the public benefit requirement.[66]

Lord Phillips withdrew his amendments at the Committee stages but pressed for a division on Report. The amendment was defeated by 139 votes to 60.

In Committee debate on the present Bill, Lord Borrie moved an amendment (later withdrawn) which was supported by Lord Wedderburn of Charlton and the Labour peer, Lady Turner of Camden, the purpose of which was to ensure that a fee-paying school wishing to continue to enjoy charitable status would have to establish that it gives something back to the community on a continuous basis.[67] Lord Bassam said that the amendment would single out organisations with an educational purpose from all other types of charity and that if the purpose of doing this was to ensure that the Charity Commission should take a different view of what 'public benefit' means for education purposes as opposed to other purposes, this was unnecessary because the law was already capable of doing that.[68]

At third reading, Lord Campbell-Savours, who stated that 'the charitable status of public schools brings charity law into disrepute', moved an amendment which would have required the Charity Commission, when determining whether an independent school meets the public benefit test, to have regard to any directions or guidance issued by the Secretary of State.[69] Lord Phillips of Sudbury disagreed that the Secretary of State should have any role in this area:

> I find the notion that a Secretary of State can simply weigh in and give directions on management and other matters very unsatisfactory, more unsatisfactory than leaving the matter to the Charity Commission in whom I have more faith than the noble Lord.[70]

Lord Bassam also said that the amendment would go against the concept of the independence of the Charity Commission: 'It would undermine the notion of a credible

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65 HL Deb 28 June 2005 cc166-7
66 HL Deb 12 October 2005 c318
67 HL Deb 28 June 2005 c151
68 HL Deb 28 June 2005 c156
69 HL Deb 8 November 2005 c559

independent commission and undermine the principle that charitable status is decided objectively under the law'.[71] The amendment was withdrawn.

Religious charities

At second reading and in Grand Committee debate on the previous Bill, the Bishop of Southwell expressed concern about the effect of the removal of the presumption of public benefit in relation to purposes for the advancement of religion.[72] In Grand Committee, Lord Bassam of Brighton confirmed that the Government did not intend that the removal of the presumption that the advancement of religion provides public benefit would lead to a narrowing-down of the range of religious activities that are currently considered charitable.[73]

At second reading of the present Bill, the Bishop of Southwell confirmed that representatives of the churches had received some reassurance about the guidance on the public benefit requirement:

> representatives of the churches have had the benefit of a constructive and helpful meeting with representatives of the Charity Commission, which has gone some way to reassuring us that the guidance on the public benefit requirement that the commission will have to produce will properly reflect not only the wide range of religious activity that is currently accepted as charitable, but the full breadth of the benefit to the public—both direct and indirect—that is derived from that activity. Following that encouraging start, we look forward, together with other faith communities, to working with the commission on the development of the statutory guidance.[74]

Armed forces charities

In Committee debate on the present Bill, Lord Bassam of Brighton resisted a probing amendment moved by Lord Craig of Radley which would have ensured that charities promoting the effectiveness and welfare of the Armed Forces passed the public benefit test. Lord Bassam said that this went against the general purpose of the Bill which was to remove the presumption of public benefit from any charities.[75]

The consequences of the removal of charitable status

In *Public Benefit – the Charity Commission's approach*, the Commission sets out what might happen to an existing registered charity which cannot demonstrate public benefit:

> 22. Where charities are not delivering public benefit but are able to, our action might include helping the charity change its stated purposes or its activities so that it is benefiting enough of the public to show public benefit. We might also use our regulatory powers to enforce change if the trustees are not co-operating with us, although we anticipate we would need to do this in only in a few cases.

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70 HL Deb 8 November 2005 c564
71 HL Deb 8 November 2005 c565
72 HL Deb 20 January 2005 c896, HL Deb 3 February 2005 c13GC
73 HL Deb 3 February 2005 c19GC
74 HL Deb 7 June 2005 c796
75 HL Deb 28 June 2005 c135

> 23. However, in extreme cases, where the trustees are co-operating with us but the organisation simply cannot in all the circumstances provide public benefit, our action might include removing the charity from the register and making a legal scheme where necessary to ensure that any charitable assets of the organisation will in the future be applied for other charitable purposes close to any purposes that have ceased to be charitable. This would only happen where it was not possible for an organisation to meet the public benefit requirement.

The Government rejected a Joint Committee recommendation that it should consider allowing trustees of organisations which had failed the public benefit test to retain their assets and continue to run the organisation, as a not-for-profit organisation without charitable status, for the original purposes.

In Grand Committee debate on the previous Bill, several peers, including Lord Goodhart, Liberal Democrat Shadow Lord Chancellor and Spokesperson for Constitutional Affairs, unsuccessfully moved amendments to set out what would be the consequences for an organisation which might lose charitable status if the Bill were enacted.[76] This followed a recommendation by the Joint Committee that the effect of the loss of charitable status should be clarified.

Lord Bassam of Brighton confirmed that in the future, as now, assets which have entered the domain of charity would remain there.[77] Consequently, if an organisation were to lose charitable status, its assets would be applied to charitable purposes similar to the original purposes under the cy-près rule.[78]

On the same subject, a probing amendment was moved on Report by the Conservative peer, Lord MacGregor of Pulham Market, which would have allowed a charity which failed the public benefit test (he specifically mentioned small schools in remote areas) to continue to pursue its original charitable purpose and become a community interest company.[79] Lord Bassam pointed out that although every charity would have to satisfy the public benefit test, there would be flexibility about how this would be assessed for different charitable purposes but also repeated that charitable assets would have to remain within the realm of charity.[80]

B. Part 2: Regulation of Charities

This part is divided into 11 chapters:

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76 HL Deb 3 February 2005 c7GC
77 HL Deb 3 February 2005 c18GC
78 The cy-pres rule, which is discussed in section II B 4 of this paper below, provides that if a charitable gift or trust has failed, the property is to be applied for charitable purposes as near as possible to those originally contemplated
79 HL Deb 12 October 2005 cc301-4
80 HL Deb 12 October 2005 cc307

1. Chapter 1: The Charity Commission

a. The Bill

Clauses 6 and **7** and **Schedules 1** and **2** would abolish the office of Charity Commissioner for England and Wales and create, instead, a body corporate, to be known as the Charity Commission for England and Wales, as the regulatory body for charities; and would set out in statute the Commission's objectives, general functions and duties. The Commission would be a non-ministerial department. The Bill now provides that in the exercise of its functions 'the Commission shall not be subject to the direction or control of any Minister of the Crown or other Government department' (Clause 6(4)). This provision was not included in the previous Bill and is the Government's response to concerns raised in debate about the independence of the Charity Commission.

The Commission would have five statutory objectives:

- to increase public trust and confidence in charities
- to promote awareness and understanding of the public benefit requirement
- to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities
- to promote the effective use of charitable resources
- to enhance the accountability of charities to donors, beneficiaries and the general public.

The Commission would also have six general functions:

- determining whether institutions are or are not charities
- encouraging and facilitating the better administration of charities
- identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with any such misconduct or mismanagement
- determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections
- obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives, including maintaining an accurate and up-to-date register of charities
- 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 objectives.

Finally, the Commission would have six general duties:

- So far as is reasonably practicable it must, in performing its functions, act in a way—
  - (a) which is compatible with its objectives, and
  - (b) which it considers most appropriate for the purpose of meeting those objectives
- So far as is reasonably practicable it must, in performing its functions, act in a way which is compatible with the encouragement of—
  - (a) all forms of charitable giving, and

(b) voluntary participation in charity work

- In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way
- In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed). This is a new general duty which was not included in the previous Bill and is the Government's response to concerns raised in the House of Lords
- In performing its functions the Commission must, in appropriate cases, have regard to the desirability of facilitating innovation by or on behalf of charities. This is another new duty inserted as a result of debate
- 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.

In debate on the previous Bill, the Government resisted amendments moved in Grand Committee which would have increased the minimum number of Commissioners and would have required one (and not two as in the Bill) member to be a lawyer, one member to be an accountant and one member to be a representative of small charities, on the basis that such provisions would be too prescriptive.[81] However, although the Bill would still provide that at least two members of the Commission must be lawyers, the present Bill would also provide that between them, the members of the Commission must have knowledge of the law relating to charities, charity accounts and the financing of charities, and the operation and regulation of charities of different sizes and descriptions (**Schedule 1 paragraph 1**). Furthermore, the Government has also responded to concerns raised about the length of the term of appointment of members of the Commission which is now three years, renewable to a maximum of ten years in total, and not a renewable term of five years as previously provided.

b. Issues and debate

The regulatory balance

Peers debated a number of related issues including:

- The Joint Committee recommended that the Charity Commission should be required to use its powers proportionately, fairly and reasonably.[82] Lord Phillips of Sudbury referred to this as "probably the most important recommendation which the Government declined to accept."[83] Even though there is now a provision in the present Bill requiring the Commission to have regard to the best principles of regulatory practice, at second reading the Conservative peer, Lord Swinfen and the Crossbencher, Baroness Howe of Idlicote, both queried why the provision does not

[81] HL Deb 10 February 2005 cc144-154GC
[82] Paragraph 169
[83] HL Deb 23 February 2005 c298GC

include the words 'fairly and reasonably'.[84] In Committee, Lord Swinfen moved an amendment, with considerable support, to remove the words 'so far as relevant' from the Commission's duty to have regard to the principles of best regulatory practice and to require the Commission to act fairly and reasonably.[85] Baroness Scotland resisted the amendment saying that it was necessary to have the qualifying words because the Commission's functions would go wider than its regulatory functions and it would not be appropriate to apply the principles of best regulatory practice in, for example, the preparation of an annual report. She also rejected the inclusion of the words 'fair and reasonable':

> We are in no doubt that the commission, like other public bodies, already has a duty in administrative law to use its powers reasonably. They are as affected by that wide body of jurisprudence as any other public body. We do not think that there is any need to include a statutory provision to give the commission that duty.
>
> If Parliament felt it necessary to give the commission that duty through the Charities Bill, the implication would be that Parliament did not see the commission as being under that duty at present. It is not a question of feelings; the duty exists now. The commission must behave reasonably. We do not think that adding the words "fair and reasonable" to the words, "proportionate, accountable, consistent, transparent and targeted", which are already in the Bill would add anything helpful.[86]

Lord Swinfen returned to this subject on Report and again received support from a number of peers. Lord Bassam defended the words 'so far as relevant':

> We are clear that this qualifier means that the commission must have regard to these principles when performing regulatory functions and must not have regard to these principles when performing non-regulatory functions.[87]

He also assured Lord Phillips that the words 'fairly and reasonably' 'add nothing to the legal duties which the commission is already under. We have no doubt that the commission is under a duty in administrative law to use its powers reasonably.' He said that the words already included 'adequately express the concept of fairness and demonstrate clearly to trustees and others the way in which they can expect the commission to act.'[88] The amendment to remove the words 'so far as relevant' was defeated on a division and the further amendment was not then moved.

- Hopes were expressed in debate that a balance would be struck between having sufficient regulation to maintain public confidence in the charitable sector on the one hand, and ensuring that small charities would not suffer from over-regulation and excessive bureaucratic interference which could act as a major disincentive, on the other hand. At second reading of the previous Bill, Lord Phillips of Sudbury said that

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84 HL Deb 7 June 2005 cc809 and 814
85 HL Deb 28 June 2005 c186
86 HL Deb 28 June 2005 cc189-90
87 HL Deb 12 October 2005 cc334-5
88 HL Deb 12 October 2005 c335

the legislation must not add to the bureaucracy of voluntary bodies, especially the small ones.[89] Baroness Secombe considered that a degree of flexibility should be maintained in order that growth of the sector should not be prevented.[90]

- In the light of the difference between private charities, large multinational charities and local community charities, Lord Hodgson of Astley Abbotts questioned whether the Charity Commission would not have a 'one size fits all' approach to charity regulation.[91]

- Baroness Howe of Idlicote hoped that the Charity Commission would be seen as transparently accountable for its actions.[92]

- In Committee, Lord Bassam said that, in the light of the Joint Committee's recommendation for a review of the burden of regulation, the Government was developing proposals for such a review to be carried out by the Better Regulation Task Force.[93]

The independence of the Charity Commission

In debates on the previous Bill, concerns were raised about the independence of the Charity Commission. Under that Bill the Commission was to have remained a non-ministerial Government department and its functions were to be performed "on behalf of the Crown". The Joint Committee was unclear about what this phrase meant and was concerned that it might be used to infringe the Commission's and charities' independence. It recommended the removal of this phrase and its replacement with a clear statement that the Commission would be a body independent of Government.

At the time the Government did not accept this recommendation and said that the wording was necessary to preserve the Charity Commission's status as a Government Department, a long held status which would not be changed by the Bill. The Government confirmed that the Commission would remain an independent regulator, completely free from any Ministerial direction or control over the exercise of its statutory powers to regulate charities.

Lord Sainsbury of Preston Candover regretted that the Government had not accepted the Joint Committee's recommendation that the phrase 'on behalf of the Crown' should be removed from Clause 6 and was insisting that the Charity Commission should continue to be a non-ministerial Government department. He considered that the Charity Commission should report to Parliament and be totally independent of the Government, perhaps on the model of the National Audit Office.[94] Lord Hunt of Wirral considered it to be crucial that the Charity Commission should be insulated and be seen to be insulated

89 HL Deb 20 January 2005 c906
90 HL Deb 20 January 2005 c955
91 HL Deb 20 January 2005 c892
92 HL Deb 20 January 2005 c911
93 HL Deb 28 June 2005 c179
94 HL Deb 20 January 2005 c901

from political pressure.[95] Replying for the Government, Lord Bassam of Brighton said that the Commission's independence would not be compromised by the fact that its staff are civil servants and that the Commission would continue to have full operational independence in making decisions and exercising its powers in relation to charities.[96]

At second reading of the previous Bill, Baroness Scotland confirmed that the Government believed that the independence of the Charity Commission is of paramount importance for the proper regulation of charities and for the public's confidence in charities.[97]

In Grand Committee, Lord Phillips of Sudbury moved an amendment which would have specified that the Commission would be an independent public body free of Government direction and control.[98] He said that he considered this to be one of the more important aspects of potential reform of the Bill. He continued:

> The Charity Commission is a quasi-judicial body and, just as the judges in the courts have to be seen to be independent as well as being independent, so the greater constitutional distance one can create between the commission and the Government, the better for the commission and for the Government.[99]

Lord Hodgson of Astley Abbotts agreed that this was an important issue, probably the most important to be debated on the Bill.[100] He proposed amendments based on the National Audit Office example and said that the Commission should be independent of the Government 'clearly, legally and visibly on the face of the Bill.'[101] His view was that:

> Non-ministerial department status, although giving the commission responsibility for the use it makes of its power, is not of itself sufficient guarantee of independence, nor are ministerial undertakings given during the passage of the Bill. Governments and Ministers come and go and we need an amendment such as this to provide a proper guarantee of commission independence in the future.[102]

Lord Borrie disagreed that there was a general perceived lack of independence of non-ministerial Government departments on the part of the general public.[103]

In reply, Lord Bassam resisted the amendments and said that he did not consider that anyone disagreed about the importance of the independence of the Charity Commission.[104] He set out how the Commission would operate in practice. The Home Secretary would have power only to appoint the Commissioners after fair and open

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95 HL Deb 20 January 2005 c927
96 HL Deb 20 January 2005 c961
97 HL Deb 20 January 2005 c886
98 HL Deb 10 February 2005 c124GC
99 HL Deb 10 February 2005 c125GC
100 HL Deb 10 February 2005 c126GC
101 HL Deb 10 February 2005 c127GC
102 HL Deb 10 February 2005 c129GC
103 HL Deb 10 February 2005 c132GC
104 HL Deb 10 February 2005 c136GC

competition. The Commission would send an annual report to the Home Secretary which the Commission would lay before Parliament and:

> The commission is not in any sense accountable to my right honourable friend, who has no powers whatever over the commission in the discharge of its statutory functions in relation to charities. The commission is thus entirely free from political control or direction and would remain so under the Bill.[105]

Lord Bassam said that it was necessary to specify that the Commission would perform its functions 'on behalf of the Crown' for technical reasons to ensure the Commission's continued status as a non-ministerial department and confirmed that these words would not create any change in the relationship between Ministers and the Commission.[106]

When the Bill was reintroduced, the relevant provision had been amended. Although Clause 6 still provides that the functions of the Commission would be performed 'on behalf of the Crown' it also now provides that 'in the exercise of its functions the Commission shall not be subject to the direction or control of any Minister of the Crown or other Government department.'

Peers generally welcomed this addition although Lord Sainsbury of Preston Candover considered that this would still not make the Commission truly independent:

> As long as the commission is a non-ministerial government department, it cannot be responsible for the number of its staff or their pay and conditions. If the Government really wish that the commission should be fully independent of ministerial direction and control, why not make it a non-departmental public body, reporting to Parliament?[107]

Lord Swinfen also expressed concerns:

> The existing non-ministerial basis of the commission leaves it vulnerable to back-door interference while making its actions unquestionable in Parliament. Only by putting the Charity Commission on a truly independent basis, free of the government of the day, will the reputation of charities, the Charity Commission and the Government be protected.[108]

In Committee, Lord Hodgson of Astley Abbotts moved an amendment intended to remove the requirement for any appointments by the Commission to be approved by the Minister for the Civil Service, and to give the Commission the ability to appoint members with complete independence.[109] Lord Bassam replied that, except for a small number of its most senior staff, the Charity Commission already had effective control over the terms and conditions of service of staff within it.[110] He also set out further reasons why he could not accept the amendment, whilst promising a review of the position:

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[105] HL Deb 10 February 2005 c137GC
[106] HL Deb 10 February 2005 c139GC
[107] HL Deb 7 June 2005 c801
[108] HL Deb 7 June 2005 c813
[109] HL Deb 28 June 2005 cc172-4
[110] HL Deb 28 June 2005 c174

> The amendment would affect the commission's status as a non-ministerial department. We thought long and hard about the commission's status, and decided that the most appropriate status for it remained that of a non-ministerial department—not least because no suitable alternative had been identified and described to us. The commission fully supports the continuation of that status.
>
> However, we listened to the points made by noble Lords on the matter in the previous Session, so have made provision in Clause 70 for the commission's status to be considered as part of the review of the impact of this legislation. A person must be appointed to carry out the review within five years of the Bill receiving Royal Assent, and a copy of the report produced as a result of the review must be laid before Parliament. As a result of that review, some alternative status and perhaps an alternative strategy for the Charity Commission may well be identified outside the Civil Service. For as long as it remains a non-ministerial department staffed by civil servants, it is in our view essential that government should retain some control of staff terms and conditions.[111]

The amendment was withdrawn.

Lord Hodgson returned with a further proposed amendment on Report saying:

> It does not take a genius to work out that a future government of whatever political colour could use this measure to shape the staffing of the commission, and thus influence the commission's attitude and approach on key charitable and perhaps political issues.[112]

Lord Bassam again set out the Government's position:

> The commission, along with other non-ministerial government departments, has already delegated authority to determine the terms and conditions of its staff without referral to the Minister. That means that the commission is required only to agree the overall pay remit with the Treasury and to employ the right mix of staff to deliver its objectives. As with other departments, the commission would require approval of the broad framework within which it can take detailed decisions on terms and conditions of service. It is a broad approval. That has worked extremely well, and the commission has made good use of that significant flexibility and independence to recruit and retain good-quality staff.
>
> (...)
>
> The amendment would require the staff of the commission to be reclassified outside the Home Civil Service. That is the effect of the amendments in this group. I ask noble Lords opposite to think about that extremely carefully. That would create problems with such staff transferring to and from other departments, and it could affect their career options. It could also seriously affect the pension position of staff. The Government have decided that the most appropriate status for the commission remains that of a non-ministerial department—not least because no suitable alternative had been identified from other quarters.[113]

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[111] HL Deb 28 June 2005 c175
[112] HL Deb 12 October 2005 c323
[113] HL Deb 12 October 2005 c325

Lord Hodgson withdrew his amendment and Lord Phillips of Sudbury then moved a different amendment on the same subject stating that 'the appointment, and retention of other staff must as regards remuneration be within the total remuneration budget agreed annually with the Treasury'.[114] On a division, this amendment was carried by 166 votes to 134. However, at third reading, Lord Bassam made a statement about this amendment:

> Your Lordships will recall that the House voted into the Bill an amendment moved by the noble Lord, Lord Phillips, which removed the control of the Minister for the Civil Service over the terms and conditions of the staff of the new Charity Commission, substituting a provision that would allow the commission to determine the remuneration of its staff subject to an overall remuneration budget agreed with the Treasury. The amended provision is now paragraph 5(3) to a new Schedule 1A to the Charities Act 1993, which appears at line 41 on page 80 of the Bill.
>
> The Government have since had time to reflect and explore the effects and implications of that amendment. My understanding is that a significant effect of it may well be to remove from the Home Civil Service the staff of the new commission, with the exception of the chief executive, over whose terms and conditions ministerial control survives. That must in turn call into question the status of the commission under the amended Bill as a non-ministerial department. It was and remains the Government's intention that the staff of the new commission should be in the Home Civil Service, as the staff of the present charity commissioners are. I do not believe that the noble Lord, Lord Phillips, intended by his amendment to remove the staff of the new Charity Commission from the Home Civil Service. Accordingly, the Government will consider what steps they can take in another place to ensure that the commission staff will continue to be in the Home Civil Service from the moment when the provisions converting the existing commissioners to the new commission take effect.[115]

Accountability of the Charity Commission

The Joint Committee recommended improving the Commission's accountability to Parliament by means of the Home Affairs Select Committee having an annual evidence session with the Charity Commission and a debate on the annual report of the Charity Commission in each House every year.[116] The Government replied that the Home Affairs Select Committee would have to decide on the first part of the recommendation and that the Government would consider any request in the House of Commons for a debate on the annual report of the Charity Commission, subject to time constraints. Members of the House of Lords would decide on matters to be debated by them.

Distinction between advice and regulation issued by the Charity Commission

The Joint Committee noted the problem that advice from the Commission is not clearly differentiated from regulatory directives and recommended that the Charity Commission

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[114] HL Deb 12 October 2005 c326
[115] HL Deb 8 November 2005 c558
[116] Paragraph 186

should make clear in all its communications the distinction between advice and instructions.[117] The Government endorsed this recommendation and said that the Commission had accepted it. However, Lord Bassam resisted an attempt to write this into the Bill.[118]

In Grand Committee debate on the previous Bill, Baroness Howe of Idlicote echoed concerns about the potentially conflicting roles of the Charity Commission:

> We can see a more powerful Charity Commission emerging with considerable extra powers. To have the same body regulating with those very strong powers and advising on what must be done is dangerous.[119]

In Committee, Lord Hodgson of Astley Abbotts moved an amendment to add another general duty for the Commission to differentiate clearly its regulatory from its advisory functions:

> The commission's central task—we agree—is as a regulator. Therefore, its central interaction with charities will be in a regulatory context. Advice from the commission needs to be clearly distinguished from any regulation as it might be wrongly assumed that the latter was intended and, in consequence, a suggestion misinterpreted as a command, hence the term "regulatory creep", which is what this amendment battles against.[120]

Baroness Scotland replied that both the Government and the Charity Commission fully agreed with the principles behind the amendment but believed that it was more appropriate to leave its implementation to management action by the Commission rather than to deal with it in statute.[121] The amendment was withdrawn.

Adequacy of Commission's resources

The Joint Committee noted that the Bill would impose heavy additional responsibilities on the Charity Commission including:

- registering excepted charities with incomes above £100,000
- registering exempt charities
- carrying out the programme of public benefit checks and
- defending appeals to the independent Tribunal.

The Committee also pointed to what it considered to be deficiencies in the Regulatory Impact Assessment published with the draft bill. The Committee found:

> The evidence we have heard has given us reason to question whether the Charity Commission is properly organised and properly resourced to make it

[117] Paragraph 207
[118] HL Deb 23 February 2005 c313GC
[119] HL Deb 10 February 2005 c172GC
[120] HL Deb 28 June 2005 c191
[121] HL Deb 28 June 2005 c192

> 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.[122]

In its response, the Government said that it believed that the evidence of the Charity Commission's performance in recent years showed that it was an effective and a properly resourced organisation.

The Charity Commission's objectives, general functions and duties

In Grand Committee, in response to an amendment moved by Lord Hodgson of Astley Abbotts (subsequently withdrawn), Lord Bassam of Brighton confirmed that the Charity Commission would principally be a regulator and that it would not be appropriate for it to have as one of its objectives promoting public awareness of the charity sector.[123]

Lord Bassam of Brighton confirmed the Government's view that the giving of advice and the providing of guidance would be ancillary to the Commission's main function and so should not be a function in itself.[124] He also resisted an amendment moved by Lord Phillips of Sudbury which would have added into the Commission's general functions a duty to give advice and guidance to charity trustees.[125]

In Committee, the Labour peer, Baroness Pitkeathley moved a probing amendment intended to require the Charity Commission to take opportunities to increase charitable resources.[126] She did not feel that the Bill did enough to promote philanthropy and felt that the amendment 'would be an incentive for the Commission to be more supportive of regulation that would encourage philanthropy and facilitate the work of grant-making trusts'.[127] Lord Bassam replied that the Government agreed with the principle and spirit behind the amendment and that charities should be using their resources in the most effective way. However, he continued:

> We do not think the amendment is necessary. The commission is not in control of charitable resources; the trustees command them. It would therefore be inappropriate to require the commission to increase the effective use of charitable resources. I am not quite sure how they would achieve that objective.[128]

In Committee, Lord Hodgson moved an amendment which would have added a further function, namely 'facilitating development and innovation in the charitable sector'. He said that he believed that the role of the Commission should not be limited to regulation:

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[122] Paragraph 59
[123] HL Deb 10 February 2005 c167GC
[124] HL Deb 10 February 2005 c174GC
[125] HL Deb 23 February 2005 cc294-298GC
[126] HL Deb 28 June 2005 c176
[127] HL Deb 28 June 2005 c177
[128] HL Deb 28 June 2005 c179

> Putting that additional function on the face of the Bill, and thereby encouraging the commission to "facilitate"—a word that I argue is very different in meaning from "encourage"—development and innovation is an important safeguard against the commission becoming too risk-averse and thus inhibiting the ability of the voluntary sector to meet the needs of our rapidly changing society.[129]

Lord Bassam replied that he felt the Bill already allowed the Commission to be an innovative regulator:

> I am clear that the objective of promoting the effective use of charitable resources, and the function of encouraging and facilitating the better administration of charities, together give the commission full scope and opportunity to encourage development and innovation in the charitable sector.[130]

Lord Hodgson disagreed and the House divided. The vote was tied at 93 votes for and 93 votes against. Under the Standing Order, because no majority voted in favour of the amendment, it was disagreed to. However, on Report, Lord Bassam moved a Government amendment which was agreed. Instead of giving the Charity Commission a new general function of facilitating innovation, the amendment would give it a new duty to have regard to the desirability of facilitating innovation by or on behalf of charities, which would apply to the Commission in carrying out all its functions.[131] At third reading, a further Government amendment was agreed to impose this duty only 'in appropriate cases'.[132]

On more than one occasion, Lord Swinfen attempted to add a requirement for the Charity Commission to have regard to the interests of the people involved in charities, including its beneficiaries, as well as to a charity's material assets.[133] Baroness Scotland felt the amendment was unnecessary:

> There is no doubt that the commission should take into account the interests of those affected by its actions. Two of the principles of best regulatory practice on the face of the Bill are that regulatory action should be "accountable" and "transparent", and these will involve the commission having regard to the interests of stakeholders.[134]

2. Chapter 2: The Charity Tribunal

a. The Bill

Clause 8 and **Schedules 3** and **4** would create a new tribunal, the Charity Tribunal, which would have three functions:

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[129] HL Deb 28 June 2005 c181
[130] HL Deb 28 June 2005 c183
[131] HL Deb 12 October 2005 c339
[132] HL Deb 8 November 2005 c568
[133] See, for example, HL Deb 28 June 2005 c193
[134] HL Deb 28 June 2005 c193

- considering appeals against specific decisions, directions or orders made by the Commission
- reviewing decisions by the Commission to open statutory inquiries and decisions by the Commission not to do other specified matters
- determining a matter referred to it, before the Commission has made any decision on the matter, by the Attorney-General or the Commission. The Commission's power to refer a matter to the tribunal would be excisable only with the Attorney-General's consent. Both the Attorney-General and the Commission would be able to refer to the tribunal questions involving the operation or the application of charity law. In addition, the commission would be able to refer questions about the exercise of its own functions.

Schedule 4 provides a list of all the Commission's decisions, directions and orders that could be appealed to the tribunal, the persons that could bring each type of appeal and the findings that the tribunal could make in relation to each type of appeal. In Grand Committee debate on the previous Bill, Lord Bassam of Brighton confirmed that the range of cases within the remit of the tribunal proposed in the Bill 'has probably been doubled' since the publication of the draft bill.

The Bill also includes power for the Attorney General to intervene in a case already started whether at the tribunal or in the High Court.

The Government introduced a large number of amendments on Report, in part to give effect to the third function mentioned above which had not been included in the Bill until that stage. This was in response to concerns raised in earlier debates. At the same time, in view of the widened remit of the tribunal, its name was changed from 'Charity Appeal Tribunal' to 'Charity Tribunal'. Lord Bassam explained the effect of the amendments in some detail:

> The attorney or the commission will always be party to proceedings on its own references and will be entitled to join itself as a party to proceedings on references by the other. The tribunal may allow any charity or other person who is likely to be affected by its decision to be party to the proceedings.
>
> As with proceedings under the tribunal's two other functions—appeals and reviews—we propose that each party should generally bear its own costs. The exception to that will, as in the other two cases, be that the tribunal may order a party who has acted vexatiously, frivolously or unreasonably to pay other party's costs. ...
>
> Proceedings on references to the tribunal will generally not be adversarial since the purpose will essentially be to help clarify the law where the commission has not yet made a decision. An affected person or charity wanting to have their own view of the law taken into account by the tribunal may join himself as a party and should pay his own costs if he decides to do that. But he need not join himself as a party, since the attorney or the commission will be able to ensure that his view is put across to the tribunal. By choosing that route the person or charity will not have to be represented, will not incur any costs at the proceedings, but will have their view taken into consideration.
>
> Where the reference is about the application of charity law to any particular state of affairs, the commission will be prevented from taking any action based on its

> own view of the law until the tribunal has made its decision. The exception to that will be that the commission can act before the tribunal has made its decision if all of the parties to the proceedings, and any charities likely to be affected by the commission's action, agree that the commission can act.
>
> After the tribunal has made a decision on a reference about the application of charity law to any particular state of affairs, the commission will have to give effect to the tribunal's decision. There will be no appeal allowed to the tribunal against a commission decision which gives effect to the tribunal's earlier decision.
>
> With that extra function of determining references, the tribunal will become more than an appeal tribunal. The name Charity Appeal Tribunal will no longer, we think, therefore be appropriate. We therefore propose to change it to Charity Tribunal, and to make the same change for the Welsh equivalent of the name.[135]

b. Issues and debate

The Tribunal was generally welcomed. Peers discussed matters of detail about the operation of the tribunal which Lord Bassam confirmed would be included in the proposed rules on which there would be consultation.[136]

The role of the Attorney General

The Joint Committee recommended that the rules should enable 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.[137] The Government agreed that the Attorney General should be able to refer matters to the Tribunal where the legal issues are of clear public interest but are complex enough that only a lawyer could be expected to be able to present them effectively to the Tribunal.

Remit of the tribunal

In Committee and on Report, Lord Hodgson of Astley Abbots moved an amendment which would have removed the long list of the specific matters which might be considered by the tribunal. Instead it would have established a full general right of appeal, including a right to request the tribunal to make a determination in the event of undue delay on the part of the Commission.[138] He felt that an attempt to create an exhaustive list could result in gaps appearing (and gave two examples). Lord Bassam defended the inclusion of the table in Schedule 4 as being simpler and clearer about which Charity Commission decisions would be subject to appeal, who would be able to submit an appeal in each case, and the powers of the tribunal in relation to those decisions. On Report he referred to the power for the Secretary of State to amend the table, subject to the affirmative resolution procedure, which he said would provide the flexibility to add, remove, or amend appeal rights. He did not agree that the tribunal's remit should extend to circumstances where the Commission had not made a decision,

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[135] HL Deb 12 October 2005 cc343-4
[136] HL Deb 23 February 2005 cc315-346GC
[137] Paragraph 241
[138] HL Deb 28 June 2005 c226

direction, or order or had unreasonably delayed making a decision. He said that these were matters of maladministration rather than legal decisions which should be dealt with through the Commission's own complaints procedure, the Independent Complaints Reviewer, and ultimately the Ombudsman.[139] The amendment was withdrawn.

Challenging administrative decisions

In Grand Committee debate on the previous Bill, Lord Bassam of Brighton emphasised that the tribunal would provide charities and trustees with a means of challenging only the legal decisions of the Charity Commission and not a means of challenging the case handling or other administrative decisions of the Commission or for complaints about standards of service.[140] These latter types of decision would remain within the remit of the Independent Complaints Reviewer (appointed by the Charity Commission) and the Parliamentary Ombudsman.

Lord Swinfen considered that it was vital to the integrity of the Commission that the tribunal should have power to award compensation commensurate with financial losses to charities, trustees and others when the Commission was found to have made a mistake.[141]

In Committee, Lord Swinfen moved an amendment designed to set on a statutory footing the position of the existing Independent Complaints Reviewer and to allow the Reviewer to award compensation, and not just a consolatory payment, to a complainant for financial loss arising from any maladministration on the party of the Charity Commission:

> Together those changes will bring about a genuinely independent statutory alternative dispute resolution procedure which will provide, in addition to the tribunal and the High Court, a complementary route to access justice by charities trustees and others.
>
> The reason for the amendment is to create a truly independent mechanism for charities, trustees and others to be able to challenge the Charity Commission when it is apparently guilty of maladministration or is acting unfairly, unreasonably or disproportionately and to obtain financial compensation for maladministration and for financial loss.[142]

Lord Phillips of Sudbury supported the amendment and said that he considered the present arrangements to be 'highly defective, especially with the Parliamentary Ombudsman's inability to intervene unless High Court remedies have been exhausted'.[143]

Lord Bassam considered that there was no need to change the current complaints procedure, which he said worked well. The amendment was withdrawn but the Conservative peer, Lord Swinfen returned with a further amendment on Report. On this

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139 HL Deb 12 October 2005 c386
140 HL Deb 23 February 2005 c316GC
141 HL Deb 20 January 2005 c946
142 HL Deb 28 June 2005 c219
143 HL Deb 28 June 2005 c221

occasion, Lord Phillips corrected his earlier misstatement of the role of the Parliamentary Ombudsman:

> There is no need, in order for the Parliamentary Ombudsman to be engaged, for legal remedies through the courts to be pursued. However, if legal action has been commenced, the Parliamentary Ombudsman will not intervene while they are on foot.[144]

Lord Phillips considered that rather than create a new 'bespoke ombudsman', the sector should be given a greater understanding of the availability of access to the Parliamentary Ombudsman if real compensation is sought.

Lord Swinfen returned yet again with an amendment at third reading:

> At present, the Independent Complaints Reviewer is a creature of the commission, which may be ignored if the commission so chooses. By requiring the ICR not to take cases until they have been through the commission's own complaints procedure, the commission has been able to use the complaints and the ICR process as a mechanism of delay—in one case, I am told, in excess of five years.
>
> The ICR is forbidden to even recommend to the commission the payment of compensation where a charity has suffered real loss as a result of the commission's unfair, unreasonable or disproportionate behaviour. The ombudsman routinely refuses to take up cases where there is still the legal possibility of pursuing the commission through the courts. As we all know, this is a ruinously expensive process for charities and trustees, who have no recourse to legal aid.[145]

Once again the Government resisted the amendment which was withdrawn.

Costs

The Government resisted a Joint Committee recommendation that the tribunal should have power to award compensation but the Bill now includes provision to enable the Tribunal to award costs against any of the parties.

The Joint Committee queried why cases brought before the tribunal should be cheaper than those brought before the High Court as they would probably involve the same number of lawyers, and stated that they were unconvinced by arguments from the Minister and the Charity Commission that charities could or would successfully use the Tribunal without expensive legal representation. The Joint Committee recommended that the Commission should formally state that they would not seek to recover costs from an unsuccessful appellant (except where the Tribunal decided that the appeal amounted to an abuse of process). The Joint Committee also recommended that consideration be given to including in the Bill a residuary power for Ministers to make regulations enabling

[144] HL Deb 12 October 2005 c380
[145] HL Deb 8 November 2005 c575

financial assistance to be given to parties to the Tribunal, if it became apparent in the light of experience that access to the Tribunal was being limited by cost.[146]

The Charity Commission confirmed that it would not routinely ask for costs but the position would depend on individual circumstances on a case by case basis.

On the question of financial assistance the Government replied:

> Unlike courts, most tribunals question the user to find out relevant information rather than relying on the user to present an argument. This means that tribunals' users should be able to present evidence by themselves, and for this reason the Government does not believe it necessary to extend Community Legal Service funding to them for representation.
>
> In some cases users might not be able to represent themselves – for example because of difficulties of language. In other cases the result might have very serious consequences for the appellant, meaning that, in the interests of justice, he or she needs to be supported by legal representation. In these types of cases public funding can be granted exceptionally for representation, if the case merits it, under the Access to Justice Act 1999.
>
> Where the issue is legally complex but the appellant cannot afford legal representation the Attorney General will, at his discretion, be able to decide to become a party to the proceedings.

In Grand Committee, Lord Bassam expanded on the possibility of public funding:

> It is also the case that the Legal Service Commission is able to grant exceptional funding for legal representation before a tribunal in certain cases. While exceptional funding is rare and applications are means and merit-tested, a common reason for granting funding is because a case is in the public interest or is a test case.[147]

In Grand Committee, Lord Bassam of Brighton said that costs should not be awarded by the Tribunal as a matter of course 'as that might deter appellants with legitimate appeals from submitting them'.[148]

A Government amendment was passed on Report to clarify that the Tribunal should have power to award costs against any party (ie including the Commission) to proceedings that the Tribunal believed had acted vexatiously or frivolously or in some way unreasonably.

On Report, Lord Phillips of Sudbury moved an amendment to give the Tribunal, when considering a reference made by the Commission or the Attorney General, the discretion to decide whether, in all the circumstances, it thought it fair and reasonable for part or all of the costs of the party involved to be paid by the commission or the Attorney

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[146] Paragraphs 239-240
[147] HL Deb 23 February 2005 c343GC
[148] HL Deb 23 February 2005 c330GC

General.[149] Lord Bassam confirmed that the Government proposed that, in general, each party should bear its own costs and that the amendment was neither necessary nor desirable.[150] The amendment was withdrawn.

Suitor's fund

In Committee, Lord Phillips of Sudbury moved an amendment to establish a suitors fund to 'widen access to the Tribunal by assisting with payment of applicants' costs'.[151] He described the creation of the tribunal as 'arguably the most important single innovation in this measure' but spoke of the importance of ensuring that it should be accessible:

> It is no accident that the National Council for Voluntary Organisations has made this one of its two most important issues for amendment at this stage of the Bill. It is as much in touch with the voluntary sector in all its parts, particularly the smaller elements, as any organisation in the country. It knows as well as I do from long practice that unless there is some costs provision to enable the smaller charities in particular to have access, the tribunal will be seriously under-used, as against the need to use it and our hopes for it. Without some provision for assistance with legal fees ... the tribunal will not achieve the purpose intended for it.
>
> ... The issues that will go to the tribunal will, in the majority of cases, need lawyers to enable the applicant to have a chance of succeeding against the commission, because that is effectively what it will be. The commission will of course have access to its own legal staff; it can bring in and pay for outside barristerial help when it needs it. We will have unequal combat unless some provision is made for worthy cases where the applicant is unable to foot the bill.[152]

In reply, Lord Bassam of Brighton reiterated that, in the light of the Attorney-General's power to intervene and the ability of the Legal Services Commission to grant exceptional funding, the Government did not believe that the case for a separate suitors' fund had been made.[153]

Lord Phillips returned with a further comparable amendment on Report. He referred to a briefing by the National Council for Voluntary Organisations in which they claimed that the 'very evolution of charity law itself—and particularly the definition of what is charity—has been thwarted over decades because of the cost of getting proceedings before the High Court'.[154] Lord Phillips considered that the costs of going to the Charity Tribunal were not likely to be significantly less than going to the High Court when dealing with an issue such as charity status.

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[149] HL Deb 12 October 2005 c389
[150] HL Deb 12 October 2005 c390
[151] HL Deb 28 June 2005 c212
[152] HL Deb 28 June 2005 cc212-3
[153] HL Deb 28 June 2005 c214
[154] HL Deb 12 Oct 2005 cc350-1

Lord Swinfen supported the amendment and said that he did not believe that 'total reliance on the Attorney-General or the Legal Services Commission helping poor charities is either sensible or adequate'.[155]

Lord Bassam continued to resist the amendment but said that the report on the operation of the legislation which would be made within five years of Royal Assent would provide an opportunity to look at the impact of the tribunal and whether access to it was being frustrated by the costs of bringing a case before it.[156]

Lord Phillips pressed for a division and the amendment was defeated by 102 votes to 54.

Publication of decisions

The Government resisted an amendment moved by Lord Hodgson of Astley Abbotts requiring the tribunal to publish its decisions without unreasonable delay. Lord Bassam considered that there were merits in having some flexibility on the publication on the tribunal's decisions:

> The Government believe that it is right that tribunals should be able to exercise the power to exclude from public pronouncement or publishing particulars of any decision in special circumstances; for example, where publicity would prejudice the interests of justice.[157]

3. Chapter 3: Registration of charities

a. The Bill

Clauses 9 to **14** and **Schedule 5** would deal with registration of charities. There are three main changes:

- Small charities: at present charities with an annual income of more than £1000, or any permanent endowment,[158] or which has the use or occupation of any land are required to register with the Charity Commission. Under the Bill, charities whose gross income does not exceed £5000, would not be required to register, but would be able to register voluntarily.

- Excepted charities: at present excepted charities, for example, some religious charities, scouts and guides and armed forces groups, are not obliged to register with the Charity Commission, but are regulated by it. The original justification for excepting certain charities from the requirement to register was that the existence of those charities was publicly documented elsewhere or that there was not thought to be great public interest in those charities.[159] Under the Bill, excepted charities with an annual income of £100,000 or more would be required to register with the Charity

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155 HL Deb 12 Oct 2005 c352
156 HL Deb 12 Oct 2005 c353
157 HL Deb 28 June 2005 c212
158 Capital which is subject to a restriction preventing its expenditure
159 *Draft Charities Bill,* p227, paragraph 2.3.3

Commission. Smaller excepted charities would still not have to register. The Secretary of State would have power, by order, to reduce the annual income threshold applying to excepted charities above which such charities would be required to register. In Grand Committee debate on the previous Bill, Lord Bassam confirmed that the Government intends to reduce the threshold progressively over a period of years so that eventually the same threshold would apply for currently excepted charities as for all others.[160] However, the Government accepted a Joint Committee recommendation that the Home Office and the Charity Commission should monitor and report on the actual costs and benefits of the registration of those charities with an income above £100,000 before any plans were drawn up to lower the threshold.[161] In Grand Committee debate on the previous Bill, Lord Bassam said that the Government have given an undertaking that no excepted charity will be required to register with the Charity Commission until October 2007, which is when the current regulations relating to some of the excepted charities expire.[162]

- Exempt charities: at present, exempt charities, for example, housing associations, universities and colleges, are neither registered nor regulated by the Charity Commission. These charities are exempt from supervision by the Charity Commission because they are considered to be adequately supervised by, or accountable to, some other body or authority.[163] Under the Bill there would be increased regulation of exempt charities. In the reintroduced Bill there is a new power for the Secretary of State to add to categories of exempt charities in the future, not just to remove them, as originally proposed. The Secretary of State would have power to prescribe a principal regulator for an exempt charity, which would be required to ensure that the exempt charity complies with charity law. Exempt charities without a principal regulator would be required to register with the Charity Commission. The Government intends that the principal regulators would already be familiar with the charities they would be regulating, as the charities would already be monitored by them in other respects. They would be expected to adapt their existing monitoring mechanisms to capture information required for monitoring charity law compliance, therefore imposing the minimum extra bureaucracy.[164] The Charity Commission would be required to consult the charity's principal regulator before exercising any specific power in relation to the charity.

  The Joint Committee recommended that the Home Office should consider designating a principal regulator for foundation and voluntary schools so that they could retain exempt status. The Government rejected this recommendation saying that it had not been possible to identify a principal regulator.

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160 HL Deb 8 March 2005 c 287GC
161 Paragraph 380
162 HL Deb 8 March 2005 c285GC
163 *CC23 - Exempt Charities,* December 2001, http://www.charity-commission.gov.uk/publications/cc23.asp#4
164 HL Deb 14 March 2005 cc411-412GC

b. Issues and debate

Small charities

The Joint Committee concluded that the impact of the Bill on small charities would be marginal. The Committee considered that the Bill should contain some safeguard against over-regulation[165] and that the Government should commission 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.[166]

The Government confirmed that the independent Better Regulation Task Force (BRTF), had decided to carry out a study of the regulatory environment for the charitable sector or parts of it.

The Government resisted an amendment moved on several occasions by Lord Hodgson of Astley Abbotts which would have raised the threshold for registration.[167] Lord Bassam said that this would take a large number of charities outside of the Charity Commission's scrutiny. However he did confirm that all the thresholds would be reviewed:

> We can see that there is some merit in raising the threshold to £10,000. But it is not a step we should take without there being full consultation because the figures in the Bill have been consulted on and there has been a broad measure of agreement on them and it would be wrong of us to break that. The Government plan to do a review of all of the thresholds which charities are subject to a year after Royal Assent. That would be a more appropriate time in which to conduct a further consultation as time will have passed. This figure will certainly be included in that review but I would not want to single out one financial threshold in the Bill for change at this stage.[168]

On Report, Lord Hodgson again moved an amendment to raise the threshold for registration to £10,000 to 'reduce the regulatory burden for both charities and the Charity Commission'.[169] He queried why a charity with an annual income of less that £10,000 should have to register if it did not want to and pressed for a division. The amendment was defeated by 45 votes to 19.

Grant-making charities

The Bill, like previous legislation, does not distinguish between grant-making and other charities. The Joint Committee reported that it had received evidence that there was a risk that increasing the regulatory burden on grant-making charities would discourage philanthropy. The Committee recommended that the Government amend the proposed public confidence objective to read: "The public confidence objective is to increase public trust and confidence in charities and to stimulate philanthropy". The Committee further recommended that the Government should commission an independent review of the

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165 *Ibid* Para 125
166 Para 127
167 HL Deb 8 March 2005 cc278-282GC
168 HL Deb 28 June 2005 c231
169 HL Deb 12 October 2005 c391

burden of regulation that grant-making charities face more generally, to ensure that regulation is fair and proportionate.

In its response to the Joint Committee, the Government disagreed that the Commission should have the objective of stimulating philanthropy but agreed to include in the Bill a new general statutory duty for the Commission. The new duty (new Clause 1D (2) 2 which would be inserted into the 1993 Act by Clause 7 of the Bill) would require the Commission, in carrying out any of its functions, so far as reasonably practicable to act in a way that encourages charitable giving and voluntary action. The Government also accepted in principle the recommendation for an independent review and confirmed that the feasibility of such a review was part of BRTF's discussions with the Government.

At second reading, Lord Sainsbury of Preston Candover expressed his view that it was not appropriate to have the same accounting regulations for all charities, and, that 'if the Charity Commission is to act in ways compatible with the encouragement of all forms of charity, it should have a different SORP [Statement of Recommended Practice] for grant-making charities, for small charities and for others'.[170]

The Conservative peer, Baroness Rawlings, hoped that a distinction could be made between charitable foundations which give away their own money, and charities which raise money from the public.[171]

In Grand Committee, the Government resisted an amendment moved by Lord Sainsbury of Preston Candover which would have allowed a grant-making charity to make anonymous donations saying that there should continue to be a presumption in favour of disclosure in the interests of accountability and transparency.[172] However, the reintroduced Bill contains a new provision at **Schedule 8, paragraph 128** which would provide that the identities of recipients of grants given by a charitable trust need not be disclosed in the trust's accounts during the lifetime of the person who created the trust or his or her spouse or civil partner.

On Report, Lord Hodgson of Astley Abbotts moved an amendment, with considerable support, particularly from Lord Sainsbury of Preston Candover, which would have allowed different accounting regulations to be applied to different sizes and types of charity. Lord Sainsbury said:

> the accounting regulations encompassed by SORP have grown and grown. They have become a serious burden to charities, especially small charities. ...
>
> The amendment should be a real help to charities. Requiring minimum regulations commensurate with giving a true and fair view of the charity's financial position should reduce significantly the number of paragraphs in the SORP. Ending the "one size fits all" regulations should result in appropriate regulations that take account of charities of different size and type, and thus, I suggest, provide a more meaningful account.

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[170] HL Deb 7 June 2005 c800
[171] HL Deb 20 January 2005 c951
[172] HL Deb 8 March 2005 c266GC

> ... the current regime of SORP is a serious disincentive to some potential large benefactors considering establishing a grant-making trust as an alternative to channelling their charity giving via gift aid, which they might do.[173]

In reply, Lord Bassam said that the current legislation already allowed the Home Secretary to make different provision for different cases. He also felt that because there was no statutory definition of 'true and fair view', the amendment would create an unworkable system.[174]

The House divided and the amendment was defeated by 130 votes to 114.

Armed forces charities

The Joint Committee considered that a case had 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 (when the threshold is reduced from £100,000). The Committee recommended that the Home Office and the Ministry of Defence should explore ways of otherwise ensuring that these funds remained properly accounted for.

The Government rejected this recommendation saying that armed forces charities which are excepted charities are – like all other excepted charities – already within the Commission's regulatory jurisdiction. The Government pointed out that it considered there to be a clear public interest in armed forces charities because they benefit from the tax reliefs available to charities.

In Grand Committee debate on the previous Bill, Lord Hodgson of Astley Abbotts moved an amendment which would have moved all existing and any new service non-public funds (SNPFs) into the category of exempt charity.[175]

Lord Bassam resisted this amendment saying:

> The Government do not intend to add any other charities to the list of exempt charities in line with our aim to increase the transparency and accountability of the sector as a whole, which we believe is vital to its success.[176]

Exempt charities

Various aspects were discussed including:

- Higher education institutions: Charitable higher education institutions in England would continue to be exempt charities, subject to regulation by a principal regulator, the Higher Education Funding Council for England (HEFCE).

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[173] HL Deb 18 October 2005 c723
[174] HL Deb 18 October 2005 cc725-63
[175] HL Deb 8 March 2005 c287GC
[176] HL Deb 8 March 2005 c292GC

In Grand Committee, concerns were expressed about the danger of over regulation of the sector. Lord Bassam confirmed that the Government are keen to keep to an absolute minimum any additional burden for universities as a result of the Bill:

> The principal regulator approach has several advantages over registration with the Charity Commission. Principal regulators are in a position of knowing and understanding their sector, and the issues of importance to it. The principal regulator—in this case, HEFCE—would be able to use existing reporting mechanisms and monitoring processes so far as possible, to demonstrate compliance with charity law. Keeping the burden to a minimum could include the use of existing auditors to attest to compliance, or other ways of simplifying or automating the compliance monitoring process.[177]

- Church Commissioners: Lord Hodgson of Astley Abbots moved an amendment which would have reversed the proposal in the Bill to remove the Church Commissioners from the list of exempted institutions arguing that it could be perceived that the requirement for the Charity Commission to regulate the Church Commissioners represented a subtle but nonetheless significant shift of emphasis in the relationship between the two.[178]

  Lord Bassam of Brighton resisted the amendment saying that it had not been possible to identify a principal regulator for the Church Commissioners and the charities that they administer, meaning that they would have to register with and be regulated by the Charity Commission. However, he confirmed that "there is no intention on the part of the Government that this proposition or any ensuing legislation will affect in any way the balance of the establishment of the Church of England in any way, shape or form."[179]

4. Chapter 4: Application of property 'cy-près'[180]

a. The Bill

If a charitable gift or trust has failed, the cy-près doctrine enables the property to be applied for charitable purposes as near as possible to those originally contemplated. The principles underlying the doctrine are first, that once assets are held for charitable purposes, they should remain in perpetuity within the domain of charity; and second, that the wishes of donors should be respected as far as possible. Chapter 4 (**Clauses 15** to **18)** would modify the rules governing the application of the cy-près doctrine.

The Charity Commission, when considering whether it would be appropriate to make a scheme to alter the purposes for which charity property is to be applied, would be required to take into account the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes, in addition to considering, as now, the spirit of the gift.

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[177] HL Deb 8 March 2005 c300GC
[178] HL Deb 14 March 2005 400GC
[179] HL Deb 14 March 2005 c400GC
[180] 'Cy-pres' literally means 'near to'.

The Charity Commission or the Court would be able to direct that property is to be treated as belonging to donors who cannot be identified (at present only the Court may make this direction). There would be a new provision covering the application of property given for specific charitable purposes in response to an appeal containing a certain type of statement.

The cy-près rule would also be changed to require the Court or the Commission, when making a scheme, to have regard not only to the spirit of the original gift and the desirability of choosing new purposes which are close to the original purposes, but also to the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances. This is revised wording following concerns raised in debate in relation to the previous Bill where the requirement was for the relevant charity to be able to make a significant social and economic impact.

b. Issues and debate

Lord Phillips moved amendments to remove the words 'in the light of current social and economic circumstances'. He said that the words were prescriptive:

> They do not cover the circumstances of a cultural or sporting charity, or an archaeological or religious charity. Those words are not appropriate to those sort of charities and many others. On reflection, it seemed to me that those words added nothing at all. All that the Charity Commission or court need to be satisfied about is that the relevant charity has purposes that are suitable and effective.[181]

In reply, Lord Bassam said that the Commission would simply be required to take into account the current social and economic circumstances when considering whether proposed new purposes would be suitable and effective and that that would allow the Commission to be more accommodating to the differences between charities. The amendment was withdrawn.

Lord Phillips moved a similar amendment on Report. Again, Lord Bassam resisted it:

> Our view is that, when using these provisions, the courts and the commission must have a greater focus on what is important; that is, the social and economic circumstances in which charities operate. There may well be circumstances wider than social and economic that could influence a decision, such as the effect of lobbying from particular interest groups in the locality including political groups, which it would not be appropriate to take into account. We believe the circumstances must be clearly defined, and an emphasis on society and on economic needs is the right limitation to adopt.[182]

The amendment was withdrawn.

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[181] HL Deb 28 June 2005 c237
[182] HL Deb 12 October 2005 c395

5. Chapter 5: Assistance and supervision of charities by Court and Commission

a. The Bill

Clauses 19 to **26** would give new powers to the Commission:

- to suspend or remove trustees and employees from membership of their charity
- to give specific directions to charity trustees to take specified actions for the protection of the charity
- to direct the application of charity property
- to determine who are the members of a charity and
- in the course of a statutory investigation, to enter premises and take possession of information and documents.

A Government amendment was made on Report which would preserve the contractual and other rights which arise in connection with anything which has been done under the authority of a direction of the Commission (rights of the charity itself or of a third party).

The Bill, unlike the previous Bill, now provides that anyone executing a warrant to enter and search premises must do so within one month of the date of its issue and must (before leaving the premises unless this is not reasonably practicable) make a written record of:

- the date and time of his entry on the premises
- the names and number of persons (if any) who accompanied him onto the premises
- the period for which he (and any such persons) remained on the premises
- what he (and any such persons) did while on the premises and
- any document or device of which he took possession while there.

If required to do so, the authorised person must give a copy of the record to the occupier of the premises or someone acting on his behalf. The amended clause is the Government's response to concerns raised in debate.

In response to earlier debates, a Government amendment was made at third reading to make it a statutory requirement for the Commission, (subject to certain safeguards) to provide the trustees or the charity with a copy of any order where it exercises certain protective powers. It would also require the Commission to provide a statement of reasons for making the order. The Commission would not need to comply with this requirement if it considered that to do so would prejudice any inquiry or investigation or would not be in the interests of the charity.[183]

The Commission would continue to have power to give a charity trustee who applies in writing, their opinion or advice on any matter affecting the performance of his or her duties. If the trustee acts in accordance with the advice or opinion given by the Commission, he or she is deemed to have acted in accordance with the trusts of the

[183] HL Deb 8 November 2005 c605

charity. This protection is withdrawn, however, in specified circumstances. The Bill would give the Commission, in addition, a more general power to give advice or guidance. This would be part of the Commission's new general function of encouraging and facilitating the better administration of charities. In the draft Bill, the power of the Commission to give advice or guidance was to have been extended to officers, agents and employees but this power has now been restricted to charity trustees.

There would be a relaxation of the publicity requirements relating to schemes and various orders made by the Commission. The Government's Explanatory Notes set out the purpose of these changes:

> The purpose of the changes is to speed up the formal procedure for the making of schemes and orders by the Charity Commission and to reduce the cost to charities, by making advertising of the changes a matter of Commission discretion.[184]

Clause 27 is a new clause since the last Bill, added by Government amendment on Report, and would deal with restrictions on mortgaging. The clause would extend the types of arrangement when a charity does not require the formal authority of the Court or the Commission to allow land belonging to a charity to be used as security.

b. Issues and debate

Inquiries

Section 8 of the 1993 Act gives the Charity Commission the power to open an inquiry into a charity or group of charities and to publish a report or statement following such an inquiry.

The Government rejected a recommendation by the Joint Committee, and also proposed amendments, 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.[185] The Government stated that it would expect the Commission to give a charity its reasons for opening an inquiry where it is appropriate in the judgment of the Commission to do so, but considered that it should not be necessary for the Commission to do so if this might prejudice the conduct of the inquiry or any subsequent criminal investigation.[186]

On more than one occasion, Lord Swinfen moved amendments designed to allow charities subject to an inquiry 'a right to reply' in the report published by the Commission. Lord Bassam said the Commission's normal practice was to give persons affected by a Section 8 inquiry the opportunity to make representations to the Commission before it finalised and published its statement on the inquiry and decided on what, if any, further action was to be taken. However, he said that the Commission's statement did not

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[184] Bill 83-EN, para 86, http://www.publications.parliament.uk/pa/cm200506/cmbills/083/en/06083x--.htm
[185] Paragraph 160
[186] HL Deb 12 July 2005 c1035

purport to be a consensual summary of the inquiry. Anyone affected by an inquiry could publish their own account of it.[187]

Receivers/managers

A Government amendment was made in Committee to replace the term 'receiver and manager with the term 'interim manager'. Lord Bassam explained the reasoning behind this amendment:

> There is a common assumption that a charity to which a receiver and manager has been appointed by the commission is in the process of being wound up. That assumption appears to be based on people's perception of what a "receiver" is. In fact, the purpose of appointing a receiver and manager is in many cases to restore the charity to a position where it can be fully operational again. In such cases, the appointment of a receiver and manager for a charity is undertaken as a temporary and protective measure. The assumption that a receiver and manager appointment is designed to wind up the charity can stigmatise it and may lead to donors and creditors withdrawing their support, or almost as importantly, their goodwill.
>
> Our Amendments Nos. 68 to 72 would do away with the word "receiver", by changing the term "receiver and manager" in the 1993 Act to "interim manager". That has the benefit of explaining that it is for an interim period, and the function is primarily about management rather than operating as a receiver with all of the connotations of that term.[188]

The Government rejected attempts by Lord Swinfen to require the Charity Commission, rather than the charity to which the Commission has appointed a receiver/manager, to pay the receiver/manager's remuneration and costs. Lord Bassam said that, in most circumstances, it was appropriate for interim managers to be remunerated from the income of the charities concerned but that there might be some exceptional circumstances where it would be more appropriate for the interim manager to be remunerated out of public funds. The law was already flexible enough to allow this.[189]

6. Chapter 6: Audit or examination of accounts where charity is not a company

Clause 28 would amend the provisions relating to the annual audit or examination of accounts of unincorporated charities, including raising the income level at which unincorporated charities must have their accounts audited, to a gross income of £500,000 or £100,000 if the charity has assets in excess of £2.8m.

Clause 29 would amend and extend the provisions relating to the duty of auditors to report to the Charity Commission abuse or significant breaches of charity law and the statutory protection afforded to them.

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[187] HL Deb 18 October 2005 c684
[188] HL Deb 12 July 2005 c1050
[189] HL Deb 18 October c687-8

Clause 30 and **Schedule 6** are new provisions added by way of Government amendment in Committee and would provide for a parent charity, which has subsidiaries under its control, to prepare annual accounts relating to the whole group. At present, the parent and each of its subsidiaries each prepares accounts relating to itself alone. Lord Dubs had moved an amendment to similar effect in relation to the previous Bill.

7. Chapter 7: Charitable companies

Clause 31 would limit the occasions on which a charitable company would need to seek the prior written consent of the Charity Commission in order to alter its memorandum or articles of association.

Clause 32 would raise the audit thresholds for charitable companies to gross income of £500,000 or assets of £2.8m and would make an associated increase in the audit exemption threshold where a charitable company is a parent company or subsidiary undertaking.

Clause 33 would extend to auditors and reporting accountants of charitable companies the duty to report certain matters to the Commission, and the protection provided for auditors and independent examiners of unincorporated charities.

8. Chapter 8: Charitable Incorporated Organisations

Clause 34 and **Schedule 7** would create a new legal form specifically for charities, the Charitable Incorporated Organisation (CIO). The CIO would be a corporate body with limited liability with one or more members and registered with the Charity Commission. The Home Office has explained this proposal:

> This will avoid dual regulation between charity and company law and provide an alternative to the company limited by guarantee model currently used by many charities.[190]

At second reading, Baroness Scotland of Asthal referred to this provision as 'a significant deregulatory measure'.[191]

Charities which are currently set up as companies or industrial and provident societies would be able to convert into a CIO. However, because charitable unincorporated associations and trusts hold property in a different way, they would need to terminate their present existence and then transfer their undertakings to a newly formed CIO.

The Bill would set out the basic framework for CIOs and further provisions would be contained in secondary legislation. The Home Office has produced dummy regulations.[192]

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[190] Home Office Press Release, *Streamlining Charity Law, Building Trust, Empowering Citizens,* 27 May 2004, http://www.homeoffice.gov.uk/docs3/charitiesbill_pressnote040527.pdf

[191] HL Deb 7 June 2005 c785

[192] http://communities.homeoffice.gov.uk/activecomms/ac-publications/publications/183878/charities_dummy_reg.pdf?view=Binary

The Joint Committee recommended that the provisions establishing the CIO should be redrafted to make them more understandable.[193] The Government did not agree to this but confirmed that the Explanatory Notes on the relevant provisions published with the Bill would be improved.

9. Chapter 9: Charity trustees etc

Chapter 9 contains provisions relating to trustees including:

- The Charity Commission's power to waive a person's disqualification from acting as a charity trustee would be amended (**Clause 35**).[194]

- **Clauses 36** and **37** would enable a trustee body to pay an individual trustee in limited circumstances for certain types of service provided to the charity. In Grand Committee debate on the previous bill, Lord Bassam of Brighton confirmed that the Government were trying to 'preserve the essence of the voluntary principle of trusteeship' and that the conditions for payment to a trustee were designed 'to ensure that it is proportionate, protects against conflicts of interest and is in the best interests of the charity'.[195]

- **Clause 38** would enable trustees, auditors and independent examiners to apply to the Charity Commission for relief from personal liability for breach of trust or duty where they have acted honestly and reasonably and the Commission considers they ought fairly to be excused. At present only the court can grant relief and to a more limited class.

- **Clause 39** is a new clause which did not appear in the previous bill. It would enable charity trustees to purchase trustee indemnity insurance and to pay the premiums with the charity's money, subject to certain limitations and conditions. An amendment to similar effect had previously been moved in Grand Committee debate on the previous Bill by Lord Phillips of Sudbury.

10. Chapter 10: Powers of unincorporated charities

Clauses 40 to **42** would modify the rules which enable a small unincorporated charity to transfer its property to another charity; to replace its charitable purposes with other charitable purposes; and to modify its powers or procedures.

11. Chapter 11: Powers to spend capital and mergers

Clause 43 would modify and extend the regime which allows small unincorporated charities to resolve to spend their permanent endowment (capital which is subject to a restriction preventing its expenditure) where to do so would provide for a more effective

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[193] Paragraph 69

[194] The present law, and the Charity Commission's approach, is set out in Charity Commission Operational Guidance, *Waiver of disqualification for acting as a charity trustee*, http://www.charity-commission.gov.uk/supportingcharities/ogs/index042.asp

[195] HL Deb 16 March 2005 c515GC

means of fulfilling the purposes of the charity. It would also provide new powers for some larger charities to spend certain permanent endowment funds.

The Government resisted an amendment moved by Lord Hodgson of Astley Abbotts on Report designed to ensure that, in future, property would be deemed to be permanent endowment only if, at the time of the gift, there was an express stipulation that only the income from the capital could be spent on the purposes of the charity.[196]

Clause 44 would provide for the Commission to establish and maintain a register of charity mergers. The register would contain only those mergers which are notified to the Commission and in some circumstances charities would be obliged to give this notification. At second reading of the previous Bill in the House of Lords, Baroness Scotland of Asthal said that these provisions would remove technical obstacles to mergers.[197] On Report, Lord Bassam of Brighton explained how this Clause would facilitate charity mergers:

> It does so in two ways: it speeds up the process of transferring property from one charity involved in the merger to another; and it preserves, for the benefit of the transferee charity in the merger, gifts made to the transferor charity after that charity has ceased to exist. A gift made to a charity after it has ceased to exist is currently exposed to the possibility of being ineffective as a charitable gift.[198]

The merger provisions in both the previous Bill and the present Bill were debated at length. Following concerns raised in those debates, the Bill now provides that charities wishing to take advantage of the merger provisions in the Bill must confirm to the Charity Commission, when they notify the Commission of their merger, that they have made proper arrangements to discharge their liabilities. On Report Lord Phillips of Sudbury, with the support of Lord Hodgson of Astley Abbotts, moved an amendment which would have resulted in personal liability for trustees of a corporate charity if the statement of arrangements that they give to the Charity Commission is not appropriate or if the statement is otherwise false.[199] Lord Bassam resisted the amendment:

> We cannot see the justification for giving creditors a potentially additional selection of people to sue, simply because the option to register the merger is exercised, and the "appropriate arrangements" have not been made. Charities can go out of existence for reasons other than merger, and the general law would then simply take its course as regards the enforcement of any liabilities of the charity which are left outstanding. If creditors are given rights which they would not otherwise have had to sue trustees simply because the option to register the merger is exercised, and the "appropriate arrangements" have not been made, registration of charity mergers will be discouraged, and the beneficial purpose of these provisions will be undermined.[200]

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196 HL Deb 18 October 2005 c705
197 HL Deb 20 January 2005 c888
198 HL Deb 18 October 2005 c710
199 HL Deb 18 October 2005 c714
200 HL Deb 18 October 2005 c715

Lord Phillips was not satisfied with this response and pressed for a division. The amendment was defeated by 152 votes to 128.

C. Part 3: Funding for charitable, benevolent or philanthropic institutions

This part is divided into three chapters:

1. Chapter 1: Public charitable collections

a. The Bill

Part 3, **Clauses 45** to **66** would reform the regulation of public charitable, philanthropic and benevolent collections which are of two types: collections in a public place and door to door collections. The current street collections legislation does not cover semi-public places (such as public spaces in railway stations or in airports) and it is unclear whether it covers solicitation for direct debit commitments. The Joint Committee commented on the dissatisfaction with the present system which would be replaced:

> 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.[201]

The Bill proposes a new licensing scheme which has been amended since the publication of the draft bill, partly in response to recommendations made by the Joint Committee. The Government intends that face-to-face collections, where members of the public are asked to sign direct debit forms in the street, (by so-called 'chuggers') would be brought within the statutory licensing scheme.

The new system would deal with three situations:

- Collections in public places (this would include semi-public areas)

  Charities and other bodies proposing to undertake public collections would need a public collections certificate from the Charity Commission and also a permit issued by the local authority in whose area the collection is conducted. The Charity Commission (and not local authorities as in the draft Bill) would be responsible for determining whether to issue a public collections certificate to applicants and could attach any conditions it thinks fit. A certificate would last for up to five years. There would be specified grounds for refusing to issue a certificate and there would also be grounds for the refusal of permits. Anyone refused a certificate or who had conditions attached to their certificate would be able to appeal to the Charity Appeal Tribunal and there would also be further specified rights of appeal.

[201] Paragraph 281

- Door to door (house to house) collections

  An organisation conducting door to door collections would also need a public collections certificate from the Charity Commission but it would not need a local authority permit. Instead it would need to notify the local authority. (Under the draft Bill an organisation carrying out a door-to door collection of goods would not have needed what was then called a "certificate of fitness" and this change has been introduced as a result of a recommendation by the Joint Committee.)

- Local short term collections

  These would be exempt from the public collections certificate requirement and (for collections in a public place) the permit to collect requirement. The promoter need only notify the local authority of the proposed collection. In Grand Committee debate on the previous Bill, Lord Bassam of Brighton referred to these collections as "locally organised, infrequent, small-scale collecting activity".[202] A local authority would be able to serve a notice refusing to allow the collection for specified reasons.

The Bill includes further provisions relating to the licensing scheme, and includes clauses which would deal, for example, with applications for certificates, determination of such applications and the issue of certificates, grounds for refusing to issue a certificate, transfer of certificates, and the withdrawal or variation of certificates. The Bill also includes provisions relating to permits. The clauses are explained in detail in the Government's Explanatory Notes published with the Bill.[203] However, much of the detail of the licensing scheme would be set out in regulations. For example, regulations would supplement the requirements for notification to local authorities.

Contravention of the licensing provisions would be an offence.

A charitable appeal which takes place on land where members of the public have access only by permission of the occupier, or on statutory access land, and where the occupier is the promoter of the appeal, would not be regarded as a public charitable collection and would not be regulated under the Bill.

The Government accepted a Joint Committee recommendation that it should consider both the regulatory burdens and the resource issues carefully:

> Statutory controls on public collections should at the same time:
>
> - minimise the bureaucratic requirements for legitimate fundraising activity by charities, and give the public the opportunity to give money to charities; and
>
> - protect the public from nuisance and make it difficult for bogus fundraisers to operate and to profit from their operations.

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[202] HL Deb 21 March 2005 c10GC
[203] Bill 83-EN, paragraphs 185 to 230,

> The Government believes that the scheme set out in the Bill achieves a good balance in that respect. We will nevertheless continue to review the detail of the scheme in search of improvement. We agree that it is important to ensure that the authorities with licensing and other regulatory functions within the scheme are properly resourced.[204]

b. Issues and debate

Peers debated the detail of the proposed licensing scheme, including matters to be prescribed by regulations, notification requirements, the grounds for refusal of a public collections certificate, the conditions which might be attached to a local authority permit, and the provision for a local authority to refuse a permit on the basis of nuisance or capacity.[205]

2. Chapter 2: Fund-raising

At present, section 60 of the *Charities Act 1992* requires professional fundraisers to state in general terms the method by which their remuneration is determined and requires a commercial organisation entering into a joint promotion with a charity to make a general statement outlining the method of determining the benefit to the charity of the promotional venture. **Clause 67** would require professional fundraisers to make a specific statement about the amount of their remuneration (or an accurate estimate if the amount is not then known) from an appeal. Commercial participators would also be required to make a specific statement (or an accurate estimate if the amount is not then known) about the return that will be made to charitable purposes from promotional ventures.

Clause 68 is a new clause which would require paid fundraisers, who are not professional fundraisers but may be employees, officers or trustees of a charity, to make a statement when making appeals. The statement would have to state that they are paid employees of a charity and also indicate the charity or charities to be benefited. This clause was added following concerns raised in Grand Committee debate on the previous Bill about the provisions relating to statements by professional fundraising organisations.[206] Lower paid collectors would not be covered by this provision.

Clause 69 would reserve power for the Home Secretary to introduce a statutory scheme for the general regulation of fundraising if he deems self-regulation to have failed.

The Joint Committee commented on the link between the statutory regulation of public collections and self-regulation of fundraising generally in the context of direct debit or standing order solicitation:

> Statutory regulation should for example, guard against too many collectors being on the streets at any one time. Self-regulation should ensure that these

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http://www.publications.parliament.uk/pa/cm200506/cmbills/083/en/06083x--.htm

[204] The Government Reply to the Report from the Joint Committee on the Draft Charities Bill Session 2003-04 HL Paper167/HC 660, *The draft Charities Bill,* December 2004, Cm6440, http://www.official-documents.co.uk/document/cm64/6440/6440.pdf

[205] HL Deb 21 March 2005 cc1-43GC

[206] HL Deb 21 March 2005 c48GC

> collections are conducted in an appropriate manner (for example, collectors are not overly aggressive or hectoring).[207]

The Committee also noted that the draft bill did not outline the criteria against which the success of a self-regulatory scheme would be measured, and therefore the circumstances in which the reserve power would be used. A written ministerial statement was made by Baroness Scotland on 14 March 2005 to launch the Government's consultation paper, *Principles for Assessing the Success of Self-Regulation of Fundraising,*[208] on the criteria which would be used to assess the success of self-regulation of voluntary sector fundraising. Responses to the consultation were requested by 3 June 2005.[209]

A further written ministerial statement was made on 6 February 2005 by Paul Goggins, Parliamentary Under-Secretary of State at the Home Office, which set out the principles on which the Government intends to base its assessment of the success of the self-regulation of voluntary sector fundraising:

> The main aim of the self-regulation scheme is to maintain and build on the high levels of public trust and confidence in the voluntary sector's fundraising activities. The scheme will help the sector guard against future threats to these high levels of public confidence. It will promote best practice and enable the sector to respond to criticism.
>
> The Institute of Fundraising has led the development of the proposals for self-regulation, with significant support from the sector. However, the Regulation of Fundraising Scheme (RFS) will be run independently of the Institute. The scheme, which will be voluntary, will be open to all charities and fundraising organisations throughout the UK. It is expected to be up and running and open for membership this summer. The Government support self-regulation of fundraising, and (along with the Scottish Executive) are providing funding to enable the scheme to establish itself. In the longer term, the scheme is expected to become self-funding through membership subscriptions.
>
> We have not set out specific long-term targets for the RFS, as these could be inflexible and restrictive. Instead we have focused on what the Government expect the scheme to deliver, and how that could be measured when the Government are considering the scheme's success. External factors would need to be taken into account, and over time we would also expect the fundraising scheme to develop its own performance monitoring and reporting. Respondents to last year's consultation were broadly supportive of this approach.
>
> The expectations which the Government have for the RFS, and which will be considered in any assessment of its success, are as follows:
>
> > The scheme will need to attract high levels of voluntary participation across the sector, although it is appreciated that it will take time to build

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[207] Paragraph 270
[208] http://www.homeoffice.gov.uk/docs4/Success_criteria_consultation_March_05.pdf
[209] HL Deb 14 March 2005 c52WS

up levels of participation. Participation should reflect the diversity of voluntary sector fundraising;

The scheme and its participants must provide a clear public promise of what should be expected from fundraisers who are participants in the scheme, and from the scheme itself. The codes of practice underpinning the scheme should go beyond requiring compliance with the law, and should set a high standard of good practice;

The scheme and its participants should actively encourage awareness among non-members and the public of the scheme's existence, and good fundraising practice;

The scheme should promote openness, transparency and accountability in fundraising practice;

The control of the scheme must be independent and impartial. Its governing body must include consumer representatives and those with fundraising experience;

Compliance with the scheme must be monitored proportionately. But there should not be complete reliance on self-certification;

There must be fair and effective sanctions for non-compliance which are proportionate to the nature and extent of any non-compliance. The initial focus should be on improving performance;

The scheme must have a clear and effective complaints handling process which is easily accessible to the public and which provides fair redress;

The scheme must be clear about its remit and should work effectively with other regulators, particularly where issues are outside its remit;

The scheme must be accountable through the publication of an annual report which details the scheme's performance. The scheme should also develop its own meaningful performance indicators following consultation with stakeholders;

The scheme should identify emerging trends in fundraising practice, and the public's perception of it, and be sufficiently flexible to quickly adapt and evolve codes of practice where necessary;

Regulation should be proportionate and the scheme should keep to a minimum any regulatory burden to participants.

We will review the development of the scheme on an annual basis, and agree specific targets, while the scheme is supported by Government funding. However we want to give the scheme sufficient time to become established and prove its effectiveness, before we judge its success. We therefore propose that a formal review of the success of self-regulation take place as part of the review of the impact of the Charities Bill which is due within five years of enactment and will report to Parliament.

If self-regulation were to fail, any proposals under the reserve power for statutory regulation of fundraising would require consultation and would be subject to the

> affirmative resolution of Parliament. A similar reserve power exists in Scotland, in the Charities and Trustee Investment Act 2005. Charity law and regulation is a devolved matter, and in Scotland it would be for the Scottish Executive to decide whether or not to pursue statutory regulation there. However, we will work closely with the Scottish Executive in monitoring the progress of the self-regulation scheme, and reviewing its success.[210]

3. Chapter 3: Financial assistance

Clause 70 would enable the Secretary of State to give financial assistance (including loans or grants) to charitable, benevolent and philanthropic organisations in respect of any of its activities which benefit the whole of any part of England. **Clause 71** would give a similar power to the National Assembly of Wales in relation to such organisations which benefit the whole or any part of Wales.

D. Part 4: Final provisions

Clause 72 is a new provision which would require the Secretary of State to carry out an independent review of the operation of the Bill five years after Royal Assent. This was recommended by the Joint Committee. The review must address in particular:

- the effect of the Act on excepted charities, public confidence in charities, the level of charitable donations, and the willingness of individuals to volunteer,
- the status of the Charity Commission as a government department, and
- any other matters the Secretary of State considers appropriate.

At second reading, Baroness Scotland also confirmed that the Government intended to carry out a review of all the financial thresholds in the Bill one year after Royal Assent to determine whether those thresholds were fixed at appropriate levels.[211] The thresholds could be changed by secondary legislation.

Clauses 75 is another new provision which would provide the Secretary of State with an order making power to facilitate the consolidation of charities legislation in whole or in part. At second reading, Baroness Scotland indicated that the Law Commission, which is responsible for the consolidation of statutes, hopes to begin work on the consolidation soon after the Bill receives Royal Assent.[212]

III Scotland and Northern Ireland

Charity law and regulation is devolved in Scotland. The *Charities and Trustee Investment (Scotland) Act 2005* received Royal Assent on 14 July 2005. The new Act reforms and modernises charity law in Scotland.

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[210] HC Deb 6 February 2006 cc37-9WS
[211] HL Deb 7 June 2005 c787
[212] HL Deb 7 June 2005 c786

At second reading in the House of Lords, Baroness Scotland of Asthal said that continued co-operation between the Scottish Executive and the UK Government, and the Charity Commission and its Scottish counterpart OSCR, would aim to ensure that the two Bills are compatible.[213]

In Grand Committee, Lord Hodgson of Astley Abbotts queried a similar statement made in relation to the previous bill given that the Scottish *Charities and Trustee Investment (Scotland) Bill* (as it was then) included a definition of public benefit.[214] Lord Bassam of Brighton confirmed that the public benefit provision in Scotland would not affect England and Wales, would be likely to be compatible with the definition in the *Charities Bill* and that the definition in Scotland was intended to be explanatory, not to change the law.[215]

On 20 May 2005, an agreement was signed between the two charity regulators - OSCR, the Office of the Scottish Charity Regulator, and the Charity Commission for England and Wales, designed to help to avoid regulation overlap. A Charity Commission press release explained the agreement:

> The agreement will ensure greater consistency and co-operation between the two UK charity regulators and fits in with the wider agenda to modernise the regulation of charities across Scotland, England and Wales.
>
> Chief Executive of the Charity Commission, Andrew Hind, said: "Duplication of regulation has become a hot topic in the charitable sector over the past year and we're delighted to announce this significant step towards a more modern, joined up regulation across Scotland England and Wales. We have put a very high priority on working in close cooperation with OSCR, since its formation in 2003 and are committed to building on a relationship which encourages and supports Britain's growing charitable sector."
>
> Chief Executive of OSCR, Jane Ryder, said: "This agreement is another step forward in creating a modern transparent and vibrant framework for charities across the UK. Co-operation between our two organisations is vital to create a consistent and seamless regulatory regime that will not impose unnecessary burdens on charities operating in both jurisdictions. This practical co-operation is designed to complement new legislation in both jurisdictions."
>
> The aims of the agreement are to:
> - Minimise the burden of regulation for those charities operating right across England, Scotland and Wales
> - Consult and co-ordinate our interpretation and application of the relevant law and policy
> - Share information and collaborate where a common regulatory approach is required;

[213] HL Deb 7 June 2005 c784
[214] HL Deb 3 February 2005 c2GC
[215] HL Deb 3 February 2005 c5GC

- Pave the way for future co-operation, as charity law develops.[216]

Charity law is also devolved in Northern Ireland, and Baroness Scotland of Asthal said that it is likely that there will be reforms there too, although proposals are at an early stage.[217] In 2005, the Northern Ireland Office conducted a consultation entitled *Review of Charities Administration and Legislation in Northern Ireland*.[218]

IV Comment from interested parties

A. The Charity Commission

When the previous *Charities Bill* was first published on 21 December 2004, the Commission welcomed the Bill in a press release:

> Geraldine Peacock, Chairman of the Charity Commission, said,
>
> "Today is a landmark for charities and for the Commission. The publication of the Bill is a true testament to the work and commitment put in by so many in the sector to ensure it becomes a reality.
>
> We warmly welcome the Government's statement that the Commission's independence is of paramount importance for the proper regulation of charities and for public confidence in charities.
>
> We welcome the increased flexibility for charities to evolve and grow. Charitable endeavour is at the heart of modern society. The Bill provides a legal structure and support framework to enable charities to feel the pulse of the communities they serve and help individuals to achieve their aspirations.
>
> I am also delighted that the Bill will provide a modern framework for us to work in partnership across traditional boundaries to increase effectiveness and grow public trust and confidence. Our new role in registering public collections will help this even further.
>
> This is the beginning of a new era for charitable action, one which releases potential and increases effectiveness."
>
> Andrew Hind, Chief Executive of the Commission added,
>
> "The Bill gives a number of additional responsibilities and tasks to the Commission, which we welcome. I believe we have a vital role to play in assisting charitable endeavour in society. However, it will be essential for the Commission

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[216] Charity Commission, *Joined up regulation for charities-Charity Commission and Office of the Scottish Charity Regulator sign memorandum of understanding*, 20 May 2005, http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=157020&NewsAreaID=2

[217] HL Deb 20 January 2005 c884

[218] http://www.dsdni.gov.uk/charities_consultation.doc

> to be adequately funded in order to effectively carry out this important additional work."[219]

B. The National Council for Voluntary Organisations

The National Council for Voluntary Organisations (NCVO) is the umbrella body for the voluntary sector in England. It has published a set of frequently asked questions about the Bill which include:

> Why do we need a charities bill?
>
> We need a Bill to provide a modern and effective legal framework for charities; to clarify what charity means in law; and to enhance public trust and confidence both in the concept of charity and charities themselves, particularly amongst the young.
>
> ...Research shows that there is a gap between what people think is, or should be charitable and what is charitable in law according to this list. We need to narrow this gap if we are to retain public trust and confidence in charity. The current law is also complex and inconsistent, with different categories of charity being treated differently in law. Again this makes it hard for the public to understand what charity is and why some organisations deserve to have this special status.
>
> (...)
>
> What do we want?
> A universal public benefit test: All organisations that are charities should be required to demonstrate public benefit, both when they register as charities and on an on-going basis. At the moment some categories of charities – those for the relief of poverty; the advancement of religion and the advancement of education - may be presumed to benefit the public, but all others must provide evidence that they provide such benefit. Removing this presumption in favour of some charities would not only make the legal position simpler and clearer and create a level playing field for all, it would also establish in the public's mind a clear relationship between charity and public benefit.
>
> A non-statutory definition of public benefit: The definition of public benefit should be based on existing case law, not defined on the face of the Bill. This will ensure that the new system is flexible enough to accommodate the diversity of the sector and robust enough to safeguard its independence. It will ensure that political interests do not influence the way public benefit is defined.
>
> A modern, independent regulator: The role of the Charity Commission should be clarified, with a clearer distinction between its regulatory role and its wider advice-giving functions.

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[219] Charity Commission, *New role for Charity Commission as it welcomes Bill's publication*, 21 December 2004, http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=140079&NewsAreaID=2&NavigatedFromDepartment=True

> An independent appeals process: There should be a mechanism for keeping the Commission's decisions under review other than through the High Court, which is expensive and time-consuming and beyond the means of most charities. It should enable organisations that are unhappy with decisions of the Charity Commission to appeal against those decisions. And there must be scope for the law to evolve through the review and development of case law, so that it continues to reflect contemporary needs and aspirations. If necessary funding should be made available to allow this to happen.
>
> Does the Bill meet these aims?
>
> Yes, to a large extent it does:
>
> - there is a new, updated list of charitable purposes;
> - there is a clear link between charitable status and public benefit;
> - there will no longer be any presumption of public benefit in favour of certain charities; and
> - there will be an independent Charity Appeal Tribunal
>
> These are all measures that the sector has been calling for and we welcome their inclusion in this draft Bill.
>
> What difference will the Bill make?
> The Bill will simplify and clarify the law, making it easier for charities to negotiate their way through it and easier for the public to understand, creating confidence in charities as organisations that benefit the public. This in turn will encourage private philanthropy and other opportunities for people to get involved in causes they care about and which benefit society as a whole. An independent and diverse charitable sector contributes to a vibrant and active civil society; a modern and effective legal framework will ensure that the sector continues to make a positive contribution in the 21st century and continues to have public support.[220]

The NCVO also published a briefing on the revised *Charities Bill* which sets out issues about which the NCVO continued to have concerns including:

> 2.9 NCVO believes ... the public benefit requirement should be strengthened so that those on low income have a more than reasonable chance of benefiting. We believe this could be achieved by an amendment to the Bill that would require the Charity Commission to consider the extent to which charges or fees restrict access to a charity's services, and what this means in terms of the public benefit test. In our view this amendment is essential if the test is to be meaningful in the twenty-first century and if the Bill is to achieve its aim of updating the law on public benefit. It would also bring this Bill in line with the Charities and Trustee Investment (Scotland) Bill.
> 2.10 Since first publishing our proposals for the reform of charity law in 2001 (NCVO, 2001, For the Public Benefit), NCVO has consistently argued that the legal definition of charity (in terms of both purpose and benefit) should continue to be based on case law. This is because case law allows the law to be updated by

[220] NCVO, *Charity Law Reform: Frequently asked questions,* May 2005, http://www.ncvo-vol.org.uk/asp/search/ncvo/main.aspx?siteID=1&subSID=117&sID=18&documentID=2394

> the High Court without recourse to further legislation. This ensures that the legal definition of charity is able to evolve over time, to better reflect modern conditions and understandings of charity and to take account of changing social and economic needs and circumstances. However, taking cases to Court for review is costly. For this reason we have also called for a Suitors Fund to be established to enable a small number of cases to be reviewed at public expense.[221]

C. The Association for Charities

The Association for Charities (AfC) describes itself as ‘‘a national association for the support and protection of beneficiaries, trustees, volunteers and donors’, in other words, the human resources of charities rather than their material assets. It is the country’s first independent, grassroots, inter-charity organisation, representing the interests and rights under the law of charity people and their beneficiaries, particularly in relation to the regulator, the Charity Commission for England and Wales”. AfC welcomed the publication of the previous Bill but drew attention to remaining areas of concern:

> The Association for Charities warmly welcomes the Charities Bill published yesterday. For this Association the arrival of the Bill represents the culmination of over five years' campaigning for a fairer system of regulation for charities, to prevent the kinds of abuse and damage to charities that have occurred over the past decade as a result of the unbridled statutory powers of the Charity Commission under the Charities Act 1993.
>
> The charity sector which does so much good work in our society and in the world deserves a law which is at last properly just and equitable towards charities and their 'beneficiaries, trustees, volunteers and donors', the human resources of charities whose interests this Association was set up to represent.
>
> Hence the institution of a new appeals mechanism - the Charity Appeal Tribunal - is by far and away the most important and significant element in the Bill. It should be noted in this regard that if anything the Commission's powers have been enhanced rather than modified, which makes it all the more vital to have an equally robust appeals mechanism which really works in practice. Not only will this provide charity appellants with a realistic and viable means of obtaining justice as an alternative to the High Court, but it will also serve as a means of testing out the new statutory definition of charity, public benefit, and establishing firm new parameters of charitable activity as well as regulation.
>
> It is vital to ensure therefore, that this Tribunal stands the best possible chance of being effective according to clear terms of reference and powers laid down in law. At first glance it would appear that more work is needed on this Tribunal section, as on Section 19 of the existing law, Receivers and Managers, which has been left untouched, yet this system is responsible for most of the notorious abuses on our case-file ...
>
> We believe that if charities are damaged by the Charity Commission and donors' money wrongly expended on long-drawn-out and unnecessary Receiverships, or

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[221] NCVO *A briefing on the revised Charities Bill,* May 2005, http://www.ncvo-vol.org.uk/asp/search/ncvo/main.aspx?siteID=1&subSID=88&sID=18&documentID=2540

> on dealing with Commission investigations which subsequently establish innocence, it should be possible under the law to claim reimbursement of charity funds as well as court costs, should an appeal be upheld by the Tribunal.
>
> We continue to be concerned about the vulnerability of trustees under both existing law and the new Bill and wish to see the institution of a Suitors' Fund to assist appeals to be taken to the High Court if necessary.[222]

D. The Law Society

In its commentary on the Queen's Speech 2005, published on 17 May 2005, the Law Society broadly welcomed the Bill:

> The Law Society welcomes the general aim of modernising the legal framework, regulating charities and the voluntary sector. We support the introduction of new heads of charity and in particular the new charitable purpose of advancement of human rights.
>
> While welcoming the establishment of the Charities Appeal Tribunal, which should allow swifter and low cost dispute resolution, we are concerned that the Bill contains insufficient detail to provide certainty as to how the Tribunal will work.
>
> We will seek to ensure that the Charity Commission is charged with the aim of giving advice to the charity sector, in addition to its regulatory responsibilities.
>
> We would also like to see more in the Bill to help charities that wish to merge.[223]

E. The Independent Schools Council

The independent Schools Council (ISC) welcomed the publication of the previous Bill:

> ISC agrees with the Government that Britain's charity law needs updating, and welcomes the publication of the Charities Bill, with its mission to provide clarity and stability for all charitable sectors.
>
> ISC schools which are charitable educate 455,000 children. On the Government's own figures, this saves the public purse almost £2bn each year, and frees this amount for spending elsewhere in the education sector, including maintained schools, pre-school provision, and university and higher education.
>
> The tax benefits of charitable status to individual schools are far outweighed by the amounts given back in fee assistance. Almost a third (31.5%) of pupils in ISC schools are given help with fees. On average, £3 is now given back – almost all

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[222] The Association for Charities, *Publication of Charities Bill,* 22 December 2004 http://association4charities.org.uk/press.htm

[223] The Law Society, *The Queen's Speech 2005 A commentary on the Government's proposals for legislation,* 17 May 2005, http://www.lawsociety.org.uk/influencinglaw/currentbillactivity/view=billarticle.law?BILLID=239239

in assistance with fees – for every £1 of benefit received from charitable status. In addition, schools pay twice as much in VAT on goods and services as they receive in fiscal benefit from charitable status.

ISC schools work in partnership with maintained schools in many different ways, including teaching of minority subjects, co-operation in music and the arts, and providing for special needs. Examples of community co-operation are many and varied, including making sports and other facilities available to local communities.

The ISC has consistently argued against the establishment of a rigid test of public benefit because the circumstances of individual charities differ greatly. It welcomes the fact that the Charity Commission is to be given the regulatory function to inquire into the public benefit provided by charities, to issue guidance and to consult widely on that guidance.

This provides a clear mechanism for monitoring public benefit and, where necessary, for bringing charities back to their charitable purposes[224]

[224] *ISC welcomes Charities Bill,* 21 December 2004, http://www.isc.co.uk/index.php/245