

Draft Charities Consolidation Bill: Consultation on the draft Bill and pre-consolidation amendments order: Annex E

NOTES ON THE DRAFT CHARITIES (PRE-CONSOLIDATION AMENDMENTS) ORDER

These notes are intended to explain the reasons for which it is proposed to make amendments to existing legislation prior to the Charities Consolidation Bill coming into force.

These notes should be read alongside the draft Charities (Pre-Consolidation Amendments) Order 2009 provided in Annex D.

(1) Abbreviations used in the notes

In these notes:

(a) references to “the Consolidation Act” are to the Act which the Charities Consolidation Bill will become if passed by Parliament;

(b) references to “the 1993 Act” are to the Charities Act 1993;

(c) references to “the 2006 Act” are to the Charities Act 2006;

(d) references to “the Schedule” are to the Schedule to the draft Charities (Pre-Consolidation Amendments) Order 2009.

(2) Amendments of the Recreational Charities Act 1958

Paragraph 1 of the Schedule

1. Section 1 of the Recreational Charities Act 1958 (“the 1958 Act”) provides that the provision of certain facilities for recreation or other leisure-time occupation is a charitable purpose. This provision does not, however, derogate from “*the principle that a trust or institution to be charitable must be for the public benefit*” (section 1(1) of the 1958 Act).

2. The “principle” referred to in section 1(1) of the 1958 Act was originally a principle established by case law. It has now been codified in sections 2(1)(b) and 3 of the 2006 Act, as part of the statutory definition of “charitable purpose”.

3. The proposed amendment to section 1 ensures that it reflects the codification of the case law principle in the 2006 Act.

Paragraph 2 of the Schedule

4. Section 3(1) of the 1958 Act provides: “*Nothing in this Act shall be taken to restrict the purposes which are to be regarded as charitable independently of this Act*”

5. Part 1 of the Consolidation Act will incorporate not only the surviving provisions of the 1958 Act but also Part 1 of the 2006 Act (which includes section 2 of that Act). Section 2 of the 2006 Act provides a statutory definition of “charitable purposes”. Under this definition, a purpose will be charitable if it falls within one or more the descriptions, or heads, of charity in section 2(2) of the 2006 Act and it is for the public benefit.

6. As a result it is unnecessary to reproduce section 3(1) of the 1958 Act on consolidation. For this reason, paragraph 2 of the Schedule repeals section 3(1).

Paragraph 3 of the Schedule

7. Section 5 of the 1958 Act provides: “*This Act, and (except in so far as any contrary intention appears) any enactment of the Parliament of Northern Ireland passed for purposes similar to section one of this Act, shall bind the Crown.*”

8. The 1958 Act was passed following the decision of the House of Lords in the case of *IRC v Baddeley* ([1955] A.C. 572, HL) which called into question the status of a large number of trusts which had previously been considered charitable. Section 5 was included to ensure that the 1958 Act extinguished any claims that the Crown would have had (if the Act had not been passed) to bona vacantia in respect of failed charitable trusts.

9. It is unnecessary for the provisions in the Consolidation Act deriving from the 1958 Act to be expressed to bind the Crown. This is because, as a result of section 16(1)(a) of the Interpretation Act 1978, the repeal of the 1958 Act by the Consolidation Act will not revive anything extinguished in 1958. Section 16(1)(a) of the 1978 Act provides: “[...] *where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,- (a) revive anything not in force or existing at the time at which the repeal takes effect.*”

10. It is also not necessary for the Consolidation Act to reproduce section 5 of the 1958 Act in so far as it relates to whether an enactment of the Parliament of Northern Ireland passed for purposes similar to section 1 of the 1958 Act would bind the Crown. The Recreational Charities Act (Northern Ireland) 1958 (c.16) was passed on 25 November 1958 and section 3 of that Act provided expressly for that Act to bind the Crown. Section 4 of the 1958 Act passed by the Westminster Parliament, which provided that nothing in the Government of Ireland Act 1920 would preclude the Parliament of Northern Ireland from making, in relation to Northern Ireland, laws for purposes similar to the purposes of section 1, was repealed by the Northern Ireland Constitution Act 1973.

(3) Amendments of the Charities Act 1993

Paragraph 4 of the Schedule

11. Section 1A(4) of the 1993 Act provides “*In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or other government department*”. The proposed amendment changes the words underlined to “or of another government department.”

12. The use of the words “or other” in the original text of section 1A suggests that a Minister of the Crown is a government department. However, whilst the typical Minister of the Crown is in charge of a government department, the Minister himself or herself is not a government department.

13. In our view the words “or other” were probably intended to allude to the fact that the Charity Commission is itself a government department. The proposed amendment aims to preserve this nuance whilst avoiding any suggestion that a Minister is a government department.

Paragraph 5 of the Schedule

14. The proposed amendment brings section 2(1) of the 1993 Act into line with the modern form of statutory provisions relating to corporations.

15. Section 2(1) currently provides for the official custodian to be a corporation sole having perpetual succession and using an official seal. The amendment removes the reference to perpetual succession and the use of the official seal.

16. Modern statutory provisions do not refer to perpetual succession (because this is an automatic incident of status as a corporation) or the use of a seal (because corporations are assumed to be capable of having and using an official seal but as a result of changes in the law relating to the execution of documents may not need to use the seal as much as corporations used to in the past).

Paragraph 6 of the Schedule

17. Section 3A(11) of the 1993 Act enables section 3A(2)(b) and (c) of that Act and certain provisions which are dependent on section 3A(2)(b) and (c) to be repealed by subordinate legislation at a future date. However, there are other provisions of section 3A of the 1993 which are dependent section 3A(2)(b) and (c) which currently fall outside the scope of this power. The proposed amendment will enable these additional provisions to be repealed using the power in section 3A(11).

Paragraph 7 of the Schedule

18. This paragraph contains a number of amendments which modernise the language of the 1993 Act by changing references to the furnishing of documents into references to the provision of documents. We do not consider that these amendments will change the substance of the provisions to be amended.

19. This paragraph also addresses the same point in relation to existing subordinate legislation which refers to the furnishing of documents.

Paragraph 8 of the Schedule

20. These amendments clarify the meaning of references to “any such claim” in section 14(5)(c) of the 1993 Act and to “any such claims” in section 14(6)(a) and (b).

21. Section 14 deals with a situation where gifts from unidentified donors or donors who cannot be found are to be applied to slightly different purposes from those for which the gift may originally have been made. It enables such donors, in certain circumstances, to make a claim to recover their gift within a specified 6 month period (section 14(5)(b)). Section 14(5)(c) enables the scheme for applying the gifts of such donors to different purposes to include directions as to the provision to be made for meeting “any such claim”.

22. Section 14(6) provides for the amount of the donor’s entitlement where (a) any sum is, in accordance with any directions made under section 14(5)(c), set aside for meeting “any such claims” and (b) the aggregate amount of “any such claims actually made” exceeds the relevant amount (relevant amount has a specific meaning for the purposes of section 14(6)).

23. It seems likely that the reference in section 14(5)(c) to “any such claim” was meant to be to claims made in accordance with section 14(5)(b) with the references to “any such claims” in section 14(6)(a) following on accordingly. However, section 14(5)(b) concludes by referring to “claims relating to his gift” and so “any such claim” in section 14(5)(c) could be read as referring back to those claims.

24. These amendments are meant to make the legislative intention clearer.

Paragraph 9 of the Schedule

25. This amendment inserts a missing provision in section 14B of the 1993 Act.

26. Section 14B makes provision concerning the power of the court or the Commission to make schemes for the application of property *cy-près*. In making such a scheme, the court or the Commission must have regard to specific matters including the “original purposes” for which a gift was given. No specific provision is currently made regarding the interpretation of “original purposes” in section 14B.

27. The phrase “original purposes” is also used in section 13 of the 1993 Act and in that section its meaning is modified for certain situations. Where the application of the property given has already been altered or regulated by a scheme or otherwise, section 13(3) requires references to the “original purposes” of the gift to be read as referring to the purposes for which the property is for the time being applicable. Section 13(3) does not apply for the purposes of section 14B(3)(b) and (4). However it is possible that the original purposes of the relevant gift will already have been altered or regulated. This amendment fills this gap.

Paragraph 10 of the Schedule

28. These amendments of section 17 of the 1993 Act remove a form of negative SI procedure that was disapproved by a parliamentary committee in 1972.

29. Currently, an order of the Minister for the Cabinet Office to give effect to a scheme under section 17 is subject to the negative procedure under section 6 of the Statutory Instruments Act 1946 (unless the scheme is one to which section 17(3) applies). The procedure in section 6 of the 1946 Act requires such an order to be laid in draft before both Houses of Parliament for a period of 40 days and prevents the order being made if, during that period, it is disapproved by either House.

30. The Second Report of the Joint Committee on Delegated Legislation (the “Brooke Committee”) for the Session 1972-73 (HL 204, HC 468) recommended that the procedure provided by section 6 of the 1946 Act should be avoided in the future (paras.27, 28 and 75). The Brooke Committee also recommended that consideration should be given to amending the terms of reference of the Joint Committee on Consolidation Bills to enable statutory instrument procedure to be rationalised in the way that the Committee proposed as part of the process of consolidation (para.16).

31. The terms of reference of the Joint Committee were not amended as proposed by the Committee. However, it is considered desirable to act on the Committee’s recommendation for standardising negative instrument procedure now as part of the consolidation process by using the current power to make pre-consolidation amendments.

32. The proposed amendment will mean that in future orders which are not subject to section 17(3) can be made by the Minister without having first been laid before Parliament. Such orders will still be required to be laid before Parliament but this will be done after they are made.

Paragraph 11 of the Schedule

33. These amendments facilitate the splitting of section 18 of the 1993 Act into a number of separate sections in the Consolidation Act. Section 18 is very long and splitting it up should make the legislative text easier to follow. But if section 18 is split up in this way, appropriate changes have to be made to the cross-references to section 18. These amendments clarify the general legislative intention in the existing cross-references to section 18.

34. Section 18(12) requires the Commission to give notice before exercising its jurisdiction “*under this section otherwise than by virtue of subsection (1)*”. Apart from section 18(1), the following provisions of section 18 are considered to confer jurisdiction on the Commission: subsections (2), (4) and (5). It is thought that the expression “under this section otherwise than by virtue of subsection (1)” may have been used because it required fewer cross-references than “by virtue of subsection (2), (4) or (5)”. Paragraph 11(1) changes the words “under this section otherwise than by virtue of subsection (1)” to “by virtue of subsection (2), (4) or (5)”. The amendment is not intended to make a change of substance.

35. Section 22(3) of the 1993 Act refers to a case where land is vested in the official custodian in trust for a charity by virtue of an order under “section 18”. The provision of section 18 which expressly enables an order to be made vesting land in the official custodian is section 18(1)(iii). Paragraph 11(2) substitutes the more specific cross reference.

Paragraph 12 of the Schedule

36. Paragraph 12 contains two proposed amendments which are designed to deal with two gaps in the 1993 Act as regards communities in Wales that have no community council. These amendments (or any revisions to them necessitated by responses to the consultation) are subject to agreement by Welsh Ministers.

37. Sections 20 and 79(2) of the 1993 Act derive from provisions of the Charities Act 1960 which catered for communities in Wales having a community council, but not for communities without a community council. This was in stark contrast to the provisions from which section 79(3), (4) and (5) of the 1993 Act derived, where communities not having a community council were catered for (see section 79(7)(b) and (c)). There was no power to make pre-consolidation amendments at the time of the consolidation in 1993 and so this apparent anomaly was not removed at that time. Since the 1993 Act was enacted, section 20 has been replaced by a new section 20 which followed the previous version of section 20 as regards communities in Wales.

38. These amendments would correct the apparent anomaly in sections 20 and 79(2). It is suggested that the most appropriate approach is to make provision having the same effect as section 79(7)(b) and (c).

Paragraph 13 of the Schedule

39. This amendment supplies some additional words which will make the sense of section 22(1) of the 1993 Act flow better, particularly when the subsection is paragraphed in the Consolidation Act.

Paragraph 14 of the Schedule

40. The first part of section 26(3) of the 1993 Act provides “*An order under this section may give directions as to the manner in which any expenditure is to be borne and as to other matters connected with or arising out of the action **thereby authorised**; and where anything is done in pursuance of an authority given by any such order, any directions given **in connection therewith** shall be binding on the charity trustees for the time being as if contained in the trusts of the charity;*” (emphasis added). It is desirable to modernise the language of section 26(3) by avoiding the use of “thereby” and “therewith” and also to clarify the intended effect of those words.

41. It is our view that “thereby authorised” probably means “authorised by an order made under section 26” and that “in connection therewith” probably means “in connection with the

authority given by an order made under section 26". The amendments change the wording to reflect this interpretation.

Paragraph 15 of the Schedule

42. This amendment omits a reference in section 36(4)(a) of the 1993 Act to the Incorporated Society of Valuers and Auctioneers because the Society merged with the Royal Institution of Chartered Surveyors on 1 January 2000.

Paragraph 16 of the Schedule

43. This paragraph amends the definition of the accounts threshold in section 43(1) of the 1993 Act. The relevant part of section 43(1) provides that "*The accounts threshold means £100,000 or such other sum as is for the time being specified in section 42(3)*". As a result of an amendment, the sum referred to in section 42(3) is now £250,000 (before that amendment it was £100,000). The underlying intention was that the accounts threshold should be whatever sum was specified in section 42(3) and so the reference to an alternative meaning of £100,000 is at best unhelpful. The proposed amendment will amend section 43(1) so that the accounts threshold is defined solely by reference to the sum specified in section 43(2).

Paragraph 17 of the Schedule

44. This amendment amends section 43A(5) of the 1993 Act so that it refers to "the Charity Commission" specifically rather than to "the Commission".

45. Before its amendment by the 2006 Act, section 43A(5) referred to "the Commissioners". This made clear that it was the Charity Commissioners, not the Audit Commission, who could exercise the power in that subsection.

46. The 2006 Act made provision for the incorporation of the Charity Commission to replace the Commissioners and appropriate consequential amendments were made to the 1993 Act. These amendments included an amendment of section 43A(5) so that the reference to "the Commissioners" became a reference to "the Commission". Section 43(A) contains references both to "the Commission" and the Audit Commission. Section 1A(1) of the 1993 Act provides that in that Act the Charity Commission is referred to as "the Commission" and section 43A(7) defines "the Audit Commission" as the Audit Commission for Local Authorities and the National Health Service in England. It can be inferred from this that, if the intention had been to amend section 43A so as to confer the direction making power on the Audit Commission, the expression "Audit Commission" would have been used.

47. This amendment is designed to save the ordinary reader from having to work this out and avoids any potential confusion as to which body may exercise the direction making power in section 43A(5).

Paragraph 18 of the Schedule

48. These amendments of section 57 of the 1993 Act are linked with the amendments of section 84 (which make clear that the Commission's ability to provide (on request) copies or extracts of documents open to inspection extends to documents preserved under section 57(1) (see the notes relating to paragraph 25 of the Schedule).

49. The amendment of section 57(1) follows the wording in section 45(6) of the 1993 Act in allowing the Commission to dispose of documents which no longer need to be retained. The amendment of section 57(2) aligns the wording of the right to inspect with the

terminology of other provisions in the 1993 Act (by removing the reference to the documents being inspected “under the direction of the Commission”).

Paragraph 19 of the Schedule

50. The proposed amendment of section 69I(3) changes the reference to the register of friendly societies in that provision to a reference to the mutual societies register.

51. Section 69(1)(3) needs to refer to the register in which industrial and provident societies are registered. Before the coming into force of the Financial Services and Markets Act 2000, industrial and provident societies were registered in a register maintained by the Chief and Assistant Registrars of Friendly Societies. However, as a result of changes made by and under the 2000 Act, the reference in section 69I(3) to the register of friendly societies is inappropriate. Section 335 of the 2000 Act enabled the Treasury to provide by order for any functions of the Chief Registrar of Friendly Societies, or of an Assistant Registrar of Friendly Societies for the central registration area, to be transferred to the Financial Services Authority. Responsibility was transferred to the Authority by the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001 (S.I. 2001/2617). Industrial and provident societies are now registered in a register known as the mutual societies register.

Paragraph 20 of the Schedule

52. This amendment makes clear that section 69M(5) of the 1993 Act is about when the resolution of the transferor CIO takes effect (rather than when the resolution of the transferee CIO takes effect).

Paragraph 21 of the Schedule

53. Section 74B(11) of the 1993 Act currently provides that for the purposes of sections 74 and 74A of that Act, any reference to any obligation imposed on the charity trustees by or under section 74 includes a reference to any obligation imposed on them by virtue of any of subsections (6) to (8) of section 74B. In fact the only references to any obligation imposed on the charity trustees by or under section 74 that appear to exist are in sections 74(8) and 74A(2). The proposed amendment, therefore clarifies the effect of the provision by substituting explicit references to sections 74(8) and 74A(2).

Paragraph 22 of the Schedule

54. This amendment removes a reference to ratepayers from section 79(2) of the 1993 Act. The reference is considered to no longer serve its original purpose as a result of changes in local government taxation.

55. Section 79(2) enables parish councils or parish meetings, in certain circumstances, to appoint trustees for a parochial charity where the trustees do not include persons “*elected by the local government electors, **ratepayers** or inhabitants of the parish or appointed by the parish council or parish meeting*” (emphasis added). (Section 79(2) applies with modifications in relation to the Wales.)

56. Section 79(2) derives from section 37(2) of the Charities Act 1960, which in turn was based on section 14(3) of the Local Government Act 1894. In 1894 the meaning of “ratepayers” was different from the current meaning. Domestic rates were abolished in 1988 (by the Local Government Finance Act 1988) and replaced by the community charge; subsequently, the community charge was replaced by council tax. Rates now survive only in connection with non-domestic rates. In theory a charity could have been established which conferred power to appoint trustees on business rate payers, but this was not the object of

the provision in 1894 or 1960 (which was to give a power to parishes to appoint trustees for local charities which lacked adequate local representation). It was not possible to address this point in the 1993 consolidation, as that was a pure consolidation. However, it is considered appropriate to address it now.

57. The reference to ratepayers will be repealed but a reference to council tax payers will not be substituted in its place. There would appear to be little value in amending section 79(2) to refer to council tax payers. Section 79(2) applies to parochial charities only if they are more than 40 years old and so whether trustees have been elected by council tax payers could not be relevant until 2050. Liability for council tax currently turns mainly on residence. Assuming that this remains the case in 2050 and that provisions corresponding to section 79 are still needed at that time, substituting a reference to council tax payers for the reference to ratepayers would be unlikely to add much to the existing reference to inhabitants of the parish.

Paragraph 23 of the Schedule

58. This amendment ensures that where the Commission has seized any document or device from a body entered in the Scottish Charity Register which is managed or controlled wholly or mainly in or from England or Wales and concludes that it is no longer necessary to retain it, the Commission has the option of returning the document or device to the persons having the general control and management of the administration of the body. At the moment this option appears not to be available, because such persons are not “charity trustees” for the purposes of the 1993 Act.

Paragraph 24 of the Schedule

59. This amendment removes a discrepancy between the wording in section 60(4) to (6) of the 1993 Act and the wording in section 82 of the 1993 Act.

60. Section 60(4) to (6) ensures that where charity trustees have been incorporated, they may confer authority on two or more of their number to execute “documents” for giving effect to transactions to which the incorporated body of trustees is a party. Section 82 enables charity trustees who have not been incorporated to confer authority on two or more of their number to execute “assurances or other deeds or instruments” for giving effect to transactions to which the charity trustees are a party. It is considered that there is no longer any reason to maintain this difference between sections 60 and 82. Section 82 is therefore to be amended so that it refers to “documents”, rather than “assurances or other deeds or instruments”.

61. The meaning of “document” is wider than “assurances or other deeds or instruments”. In particular, the definition of “document” in section 97(2) of the 1993 Act is capable of bringing in electronic documents. However, any widening of the scope of section 82 is considered to be minor and consistent with the modern approach to the fact that documents are now created and stored electronically.

Paragraph 25 of the Schedule

62. The proposed amendment simplifies section 84 of the 1993 Act, which imposes a duty on the Commission to supply (on request) copies of or extracts of certain documents open to inspection.

63. The current duty applies in relation to documents open to inspection under Parts 2 to 6 and section 75D of the 1993 Act. In our view this catches documents open to inspection

under section 3(8) and (10) (in Part 2) and section 47(1) and paragraph 13 of Schedule 5A (in Part 6) and documents available for inspection under section 20(6) (in Part 4).

64. The effect of the amendment will be to apply the duty in relation to any document open to or available for inspection under the 1993 Act. The practical effect of this amendment (which needs to be read with the amendment of section 57(2)) is to extend the duty to documents which can be inspected under section 57(2) (in Part 7) and to entries in the register required to be available for inspection under section 72(7) (in Part 9) and to put beyond doubt that it extends to documents which are required by section 20(6) to be available for inspection.

Paragraph 26 of the Schedule

65. The proposed amendment of section 86 of the 1993 Act enables the effect of that section and section 74(2) of the 2006 Act, so far as relating to provisions of the 2006 Act which are being consolidated, to be consolidated into a single provision.

66. Section 74(2) of the 2006 Act enables the Minister to make in orders or regulations made under that Act: (i) different provision for different cases or descriptions of case or different purposes or areas; and (ii) supplemental, incidental, consequential, transitory, transitional or saving provision. However, section 86(3) of the 1993 Act is drafted in different terms. It enables regulations made by the Minister under that Act to make: (i) different provision for different cases; and (ii) supplemental, incidental, consequential, or transitional provisions or savings. The amendment to section 86(3) of the 1993 Act removes this difference.

Paragraph 27 of the Schedule

67. The proposed amendments to section 89 of the 1993 Act make two changes.

68. The amendment in paragraph (a) of paragraph 27 repeals the words “(without prejudice to the requirements of this Act where the order is subject to appeal)”. The words are repealed because they refer to requirements which have been removed from the 1993 Act. Section 20(5) of the 1993 Act contained a requirement to publish an order made under section 18 of that Act which was subject to appeal. Section 20(5) was repealed by the 2006 Act.

69. The other amendments made by paragraph 27 will remove the limited power of the Commission, under section 89(3), to discharge an order it has made and extends the order-making power of the Commission so that the order may include transitional provisions or savings.

70. Before the 2006 Act was passed, the Commission had a limited power to discharge an order it had made. The power was confined to cases where, within 12 months of making an order, the Commission was satisfied that the order had been made by mistake or on misrepresentation or otherwise than in conformity with the 1993 Act. In such a case the order could be discharged (in whole or in part), subject or not to transitional provisions or savings. The 2006 Act gave the Commission an unlimited power to revoke or vary an order, but no power to make transitional provisions or savings when exercising that power.

71. The relationship between the power to discharge an order (in whole or in part) and the newly-inserted power to revoke or vary an order was not explicitly addressed at the time the 2006 Act was passed. It is, however, our view that the limited power of discharge is no longer required provided that the Commission is able, when exercising the power in section 89(5) of the 1993 Act, to make transitional provisions or savings. This latter power could be

needed where an order revokes or varies an earlier order in circumstances where the Commission would previously have availed itself of the power to discharge the order.

Paragraph 28 of the Schedule

72. These amendments change references in paragraphs 1, 2, 3, 3A, 4 and 4A of Schedule 3 to the 1993 Act to certain local areas “comprising” another local area to references to the local areas concerned including the other local areas. The purpose is to avoid using a word which is generally regarded as not being “plain English” and to avoid any doubt about the meaning of the provisions.

73. The amendments of paragraphs 5 and 6 of Schedule 3 make clear that “comprising or adjacent to” qualify “parish or parishes” (in paragraph 5, column 2) and “community or communities” (in paragraph 6, column 2), rather than “any area”.

Paragraph 29 of the Schedule

74. This paragraph makes amendments to Schedule 5A to the 1993 Act.

75. The amendment in sub-paragraph (1) clarifies that the power in section 44(1)(f) of the 1993 Act, as applied by paragraph 8 of Schedule 5A to that Act, can only be exercised so as to disapply the requirement in section 43(3) as it applies by virtue of paragraph 7 of that Schedule. It is our view that this is the intention of paragraph 8(2)(e) and so this amendment will not change the practical effect of that paragraph.

76. The amendment in sub-paragraph (2) repeals the cross-reference to section 44A(7) in paragraph 9(1) of Schedule 5A to the 1993 Act. It is not necessary for paragraph 9(1) to refer to section 44A(7), given what is said in paragraph 9(2) of Schedule 5A.

Paragraph 30

77. This paragraph is intended to clarify the existing legal position in relation to the purported repeal of section 10 of the Universities of Durham and Newcastle-upon-Tyne Act 1963. Schedule 7 to the 1993 Act purports to repeal section 10 of the Universities of Durham and Newcastle-upon-Tyne Act 1963 when it should have repealed section 18.

78. Section 18 of the 1963 Act (as enacted) provided that "*The University of Newcastle shall be deemed to be included among the universities mentioned in paragraph (b) of the Second Schedule to the Charities Act 1960*". Paragraph (b) of Schedule 2 to the 1993 Act refers expressly to the University of Newcastle and the table of derivations for the 1993 Act gives section 18 of the 1963 Act as one of the derivations for that paragraph. Section 10 of the 1963 Act, however, contains provision concerning the constitution and governance of the University of Durham and in particular, confers a power on the University to make statutes.

79. The inclusion of the reference to section 18 in the table of derivations gives rise to the expectation that that provision, rather than section 10 of the 1963 Act, should have been repealed by Schedule 7 to the 1993 Act. Moreover, the 1993 Act, as a “pure” consolidation (i.e. without any amendments), would have had no business repealing section 10 of the 1963 Act. Given the presumption that a consolidation does not change the law, there is in our view a clear argument that the reference to section 10 of the 1963 Act should be read as a reference to section 18 of that Act and thus the correct legal position is that section 10 was not repealed. The purpose of this amendment is to put the point beyond doubt.

(4) Amendments of the Charities Act 2006

Paragraph 31 of the Schedule

80. This paragraph will amend section 74(4)(a) and (6) of the 2006 Act so as to enable an order under section 11 of that Act to be made under the negative resolution procedure if the only purpose of the order is to remove from Schedule 2 to the 1993 Act a reference to an institution which has ceased to exist. This will mean that such an order could be made by the Minister for the Cabinet Office without prior parliamentary approval. The wording in existing section 74(5) will mean that provision removing a defunct institution from Schedule 2 could still be included in an instrument subject to the affirmative procedure.

81. The amendment of section 74(6) follows from the amendment of section 74(4)(a): the hybrid instrument procedure does not apply to instruments subject to the negative procedure.

(5) Amendments relating to the meaning of charity

Paragraphs 32 to 44 of the Schedule

82. Part 1 of the 2006 Act made general provision about the meaning of charity. The 1993 Act also contains its own, slightly different, provision about the meaning of charity in that Act. The main meaning of “charity” in the 1993 Act is the same as in the 2006 Act. However, the 1993 Act adds a qualification to that meaning in section 96(2).

83. Section 96(2) provides that in the 1993 Act, the expression “charity” is not applicable: (a) to an ecclesiastical corporation in respect of its corporate property (unless it is a corporation aggregate, in which case “charity” can apply to the corporation in respect of any of its property held for non-ecclesiastical purposes); (b) to any Diocesan Board of Finance or any subsidiary of it in respect of diocesan glebe land; or (c) to any trust of property for purposes for which the property has been consecrated. The general underlying purpose of section 96(2) is thought to be to preserve the traditional jurisdiction of the ecclesiastical courts over ecclesiastical matters affecting charities.

84. The general effect of section 96(2) is that an institution is not a charity in certain contexts. Where an institution owns property within section 96(2)(a), (b) or (c), provisions of the 1993 Act which are about property do not apply in relation to that property. But those same provisions could apply to other property of the institution which is not within section 96(2)(a), (b) or (c); and other provisions of the 1993 Act which are not about property may apply without any restriction. For example, there are various Diocesan Boards of Finance which are registered charities. The provisions of the 1993 Act which regulate dealing in land would not apply to their dealings in their glebe land (land within section 96(2)(b)) but would apply to any dealings in other land not within section 96(2). Similarly, there are charities which are subject to the 1993 Act in the sense that they need to produce accounts under the 1993 Act; but the accounting requirements do not apply in respect of property within section 96(2) (e.g., consecrated property, which is excluded by section 96(2)(c)).

85. Various Acts (“outlying Acts”) currently contain provisions referring to the 1993 Act meaning of charity. The Consolidation Act will contain both the 2006 Act’s meaning of charity and the more restricted meaning from the 1993 Act. In many cases, if the Consolidation Act were to amend these outlying Acts to refer to provisions in the Consolidation Act corresponding to the 1993 Act meaning, it would suggest more strongly than at present that the qualifications in section 96(2) are relevant in the context of the outlying Act. If the qualifications in section 96(2) are not in fact relevant, such an amendment would be misleading.

86. The amendments in these final paragraphs of the Schedule are designed to remove references to the 1993 Act meaning of charity in cases where the qualifications in section 96(2) are not regarded as relevant.