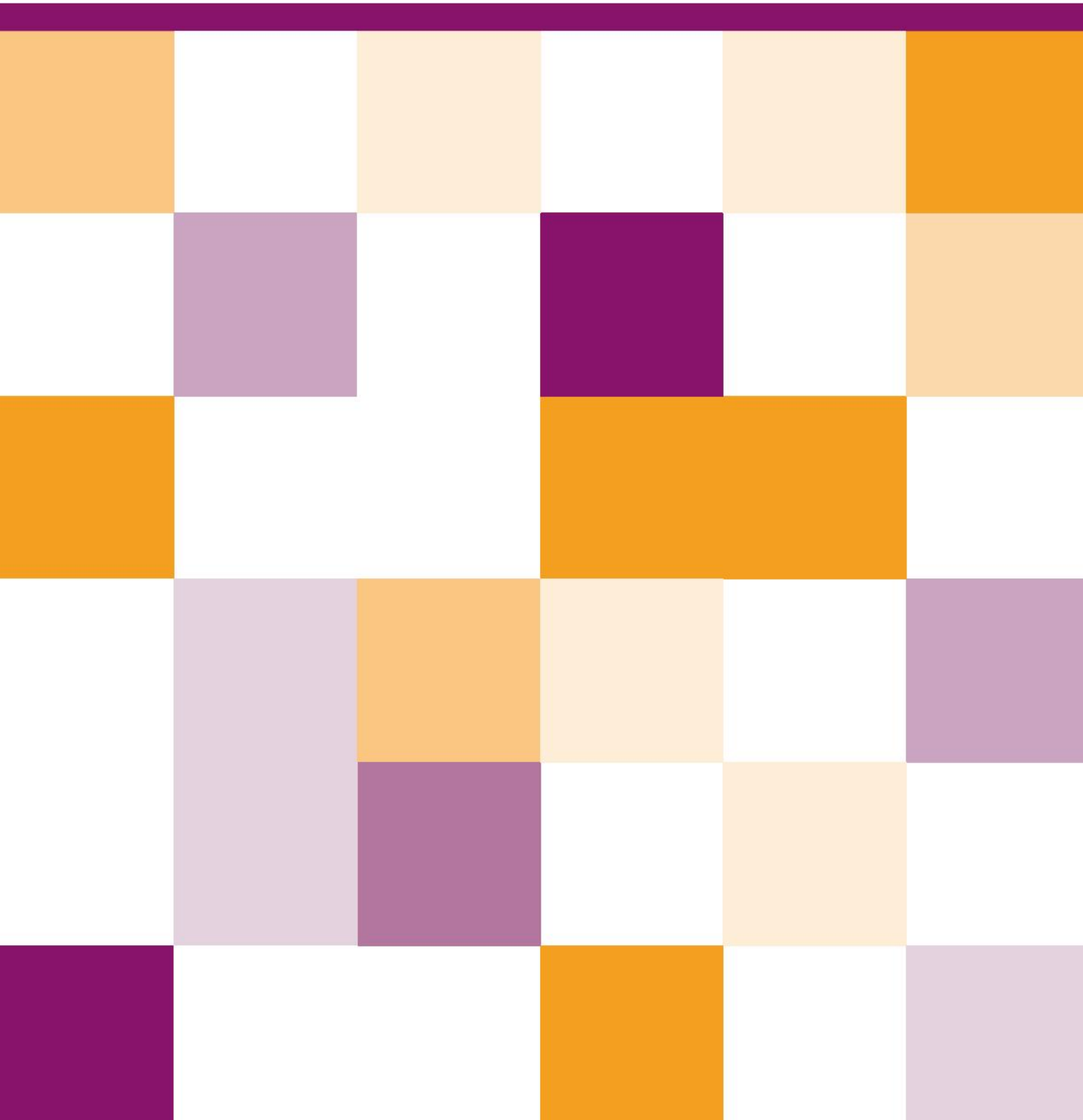




## Charitable Incorporated Organisation

# Summary of Consultation Responses and Next Steps

September 2009



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## Introduction

This document is a summary of responses received to the consultation “The Charitable Incorporated Organisation (CIO): Consultation on the new corporate form for charities” which was undertaken jointly by the Office of the Third Sector and the Charity Commission in the last quarter of 2008.

It covers the following:

- background to the joint consultation exercise
- a summary of responses to the consultation
- Government responses to specific questions in the consultation
- the next steps following this consultation
- an indicative timetable for the development and implementation of the CIO

Further copies of this report and the consultation paper can be obtained by contacting Helen Morgan at the address below:

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This report and the original consultation document are also available on the Office of the Third Sector website [www.cabinetoffice.gov.uk/third\\_sector](http://www.cabinetoffice.gov.uk/third_sector) and the Charity Commission website [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk).

### Who are we?

The Office of the Third Sector in the Cabinet Office leads work across government to support a thriving third sector (voluntary and community groups, social enterprises, charities, co-operatives and mutuals), enabling the sector to campaign for change, deliver public services, promote social enterprise and strengthen communities. This includes policy responsibility for the legal and regulatory framework for charities in England and Wales.

The Charity Commission for England and Wales (“the Commission”) is the regulator and registrar of charities in England and Wales. Its aim is to provide the best possible regulation of those charities in order to increase their effectiveness and public trust and confidence in them. The Commission will be the sole registrar and regulator of CIOs.

## Background

1. The Charitable Incorporated Organisation (CIO) is one of the most widely and eagerly awaited provisions of the Charities Act 2006. The CIO is a new incorporated legal structure designed specifically to meet the needs of charities, and which will only be available to charities. It will add to the current range of forms for people wishing to set up charities, or for existing charities.
2. Most charities are established in an unincorporated form, usually either as an association or trust. Over recent years, charities have been increasingly choosing to adopt a corporate structure, as this can offer several benefits over unincorporated structures – particularly for larger charities. An incorporated structure gives the charity a legal personality of its own, enabling it to conduct business in its own name, rather than in the names of its trustees. The capacity and powers of an incorporated charity are generally clearer than those of an unincorporated charity. It can be easier for people dealing with an incorporated charity to assess the credit risk of doing so. The members and trustees of an incorporated charity are usually personally safeguarded from the financial liabilities it incurs, which is not the case for unincorporated charities.
3. Most charities that currently opt for a corporate structure incorporate as a company limited by guarantee under company law. This means that they are subject both to charity law requirements and company law requirements, and there is a recognition that company law may not be best suited to charities and not-for-profits whose defining feature is that they do not distribute profits to their members.
4. There has long been a desire expressed by many in the charitable sector for a corporate structure designed specifically to meet the needs of charities. This was considered in the Company Law Review in 2000-01, and subsequently in the review of the legal framework for charities and not-for-profits undertaken by the Strategy Unit in 2001-02. One of the Strategy Unit's recommendations was that Government should develop and introduce a new corporate legal form designed specifically and only for charities.
5. The Government accepted the Strategy Unit recommendation, and the Charities Act 2006 (“the 2006 Act”) sets out the broad legal framework for the CIO. The 2006 Act amends the Charities Act 1993 (“the 1993 Act”) so that it includes provisions setting out the basic structure of and arrangements for forming a CIO. These provisions contain powers to make secondary legislation to enable the Minister for the Cabinet Office (“the Minister”) and the Charity Commission (“the Commission”) to complete the detailed legal framework for the operation of CIOs.

6. The Minister is responsible for three draft statutory instruments, which are:
  - (a) The draft **Charitable Incorporated Organisations (General) Regulations** (“the General Regulations”)
  - (b) The draft **Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations** (“the Dissolution Regulations”), and
  - (c) The draft **Charity Tribunal (Amendment) Order**. This order is needed because the General Regulations and the Dissolution Regulations each confer on the Commission new decision-making powers which we feel ought to be subject to scrutiny by the Charity Tribunal.
7. There are two forms of model constitution, prepared by the Commission:
  - (a) The draft **Model Constitution for a Charitable Incorporated Organisation (Foundation Version)** is for use where the charity trustees will be the only formal members of the CIO.
  - (b) The draft **Model constitution for a Charitable Incorporated Organisation (Association Version)** is for use by a CIO which will have a body of voting members who are distinct from the charity trustees.
8. The CIO is not intended to replace the company limited by guarantee form for charities, but will add to the range of legal forms that charities can choose to adopt.

## Summary of Consultation

9. There were 95 responses to the consultation in all. A broad range of stakeholders responded, including sector umbrella bodies, representative bodies of professional advisers, charities of various sizes, academics, individual trustees, and members of the public (respondents are listed in Annex A). There was a disappointing low level of response from financial institutions, but this is perhaps understandable given the consultation period coincided with the height of the recent difficulties in the financial markets.
10. Four consultation events were held in October 2008 in London and Leeds. Two events were primarily for charity trustees and managers, the other two events were aimed at professional advisers to charities. The events were well received by the 222 people who attended from a wide range of organisations and the feedback was generally positive in nature with people looking forward to the CIO form becoming available for charities.
11. We are very grateful to all who responded to the consultation. Many respondents had given the consultation and associated documents detailed and thorough consideration, and were able to provide well-reasoned arguments for ways in which the legal framework for CIOs could be improved. The quality of responses we received has really helped us develop the framework, and we believe will result in a CIO model that is better suited to the needs of charities whilst continuing to command external confidence.
12. Almost all respondents were supportive of the development of the CIO, and the potential for it to have a positive impact for the charity sector. Although several respondents felt that the framework needed more work for the CIO to become a fully effective and attractive option for charities. One respondent considered the CIO to be the most important provision of the Charities Act 2006. Another respondent pointed out a voluntary sector governance survey of 600 charities undertaken in 2008 which indicated that 33% of surveyed charities said that they would or might convert to CIO status once it becomes available.
13. Below, we outline the responses to the questions in the consultation document, before going on to set out some of the additional feedback received on other matters that do not specifically relate to the consultation questions.

## Responses to specific questions

### Question 1: Minimum age of CIO Trustees

#### ***Should the minimum age for appointment as a charity trustee of a CIO be set at 16? If not, what age should it be and why?***

14. There were 74 responses to this question. There was an almost even division between those that thought 16 was the right minimum age and those that thought 18 or higher was the right minimum age.
15. 50% of respondents favoured a minimum age for a charity trustee of a CIO being set at 16 (mirroring the minimum age for being a director of a charitable company), although some of these respondents recommended particular safeguards, or the need for Commission guidance on the appointment of young trustees. 49% of respondents suggested that the minimum age should be at least 18 (including four respondents who suggested 21 should be the minimum, and two respondents who felt that 25 should be the minimum). One respondent argued that there should be no minimum age for charity trusteeship under any legal form.
16. Of those who argued for a minimum age of at least 18, many were concerned about the legal capacity of those under 18 years old and the enforceability of transactions against someone under the age of 18. Others were concerned that those under-18 might lack the necessary skills and experience needed to take on the responsibilities of charity trusteeship.
17. Of those in favour of setting 16 as the minimum age, many respondents pointed to the importance of encouraging young people to get more involved in civic activity through charity governance, although several respondents suggested safeguards would be appropriate, such as limiting the number of under-18 trustees to a minority of the trustee board. A number of respondents noted that it is already possible to establish a charity as a company limited by guarantee with directors aged 16 or above (with no restrictions), and if the CIO does not offer the same possibility then it would disadvantage the CIO in comparison with the company model.

#### **Government and Commission Response:**

18. Having considered the range of responses to this question, we believe that 16 is appropriate as the minimum age for the charity trustees of a CIO. We think this strikes the right balance between wanting to encourage young people to become involved running charities, whilst recognising that charities need to be administered by people who are able to understand and manage the responsibilities of charity trusteeship. This does not mean that a CIO will have to have trustees who are under 18 years old. The Commission will produce guidance about the appointment

of CIO trustees who are under 18 years old, and that guidance will recommend that not all the trustees of a CIO should be under 18 years old. The Commission will also add an optional clause for CIO model constitutions that will enable the promoters of a CIO to set a higher minimum age for trustees, or a majority of the trustees, if they wish to do so.

19. A CIO will have its own legal personality. Third parties would conduct business with the CIO itself, rather than the individual trustees (which is the case in unincorporated charities). The charity trustees of a CIO exercise the powers of the CIO so as to manage the CIO and may act so as to bind the CIO. The personal liability of a trustee of a CIO who is under 18 years old would in practice be similar to that of the charity trustees of a charitable company.

## Question 2: The Duty of Care

***Should those setting up CIOs be able to disapply the general duty of care which would apply under the 1993 Act to the charity trustees of CIOs, subject to a minimum alternative duty?***

20. There were 67 responses to this question. The overwhelming majority of respondents (85%) supported the view that the trustees of a CIO should not be able to replace the fixed duty of care in the Charities Act with a lesser duty. Several respondents argued strongly that this is necessary if the CIO is to command confidence as a legal structure; that this is reasonable in view of the benefits of incorporation and it would not put organisations off opting for the CIO in favour of an unincorporated form. Several respondents went further, suggesting that the charity sector should promote the very highest standards of governance and administration in order to promote public confidence and that this should be reflected by a high duty of care.
21. Of those who supported this view, five respondents suggested that it should be possible for a CIO to impose a higher and more demanding duty of care. Several respondents argued that having a fixed, clear, duty of care was much simpler for CIO trustees and other stakeholders. One respondent pointed out that charity trustees are permitted to have indemnity insurance.
22. Three respondents suggested a provision that would allow the duty of care for the trustees of a CIO to be reduced, but only in exceptional circumstances and with the prior authority of the Charity Commission.
23. Just 13% of respondents supported the suggestion in the consultation document that a CIO should be permitted to substitute the statutory duty of care with a lesser duty (subject to minimum requirements), in order to offer greater flexibility, be consistent with the position of unincorporated charities, and make it easier for

smaller charities to recruit trustees.

#### **Government and Commission Response:**

24. The clear majority were in favour of a fixed duty of care, and the strength of arguments about promoting high standards of administration to encourage confidence in the CIO model, and about the need for simplicity, are persuasive. We therefore consider that it should not be possible to replace the duty of care set out in the Charities Act with an alternative lesser duty. The draft general regulations and model constitutions will be amended to reflect this.
25. We have considered whether to retain the flexibility to enable a more demanding duty to be substituted by the trustees of the CIO in certain circumstances, but we have accepted the arguments in favour of simplicity, and propose not to allow any variation of the duty. For the same reason we were not convinced by the arguments about exceptional circumstances that may justify a lesser duty.

#### **Question 3: Trustee Benefits, and Conflicts of interest**

***Should a charity trustee of a CIO automatically be prohibited from participating in any decision from which he or she may benefit personally, unless either authorised to do so by the Charity Commission, or where a conflict of interest is extremely unlikely?***

26. There were 67 responses to this question. 90% of respondents agreed in principle that a charity trustee of a CIO should be automatically prohibited from participating in a decision from which he or she may benefit personally, although a number of them qualified their support. 10% of respondents disagreed.
27. Some respondents suggested that regulation 89 of the General Regulations may not be necessary because of the general rules of charity law. Several respondents suggested that specific provision was needed to deal with potential conflicts where a trustee of a CIO is appointed by another organisation, or at least that guidance was needed to enable CIO trustees to be able to identify and manage such conflicts of loyalty. Some respondents also felt that guidance was needed to clarify the circumstances in which personal benefit might be considered extremely unlikely to give rise to a conflict of interest. One respondent suggested that the Commission's model constitutions should set out a model conflict of interest procedure.

#### **Government and Commission Response:**

28. We are not aware of any generally applicable rule of common law which would automatically prevent a charity trustee of a CIO from taking part in a decision in which they had declared a conflict of interest. We therefore consider that it is

important to have an explicit prohibition for the charity trustees of a CIO preventing them for participating in any decision from which they would personally benefit, unless the nature of the personal benefit is extremely unlikely to give rise to a conflict of interest. As such, we propose to retain regulations 86 and 89 of the general regulations.

29. A charity trustee of a CIO who is appointed by another organisation has exactly the same duties and responsibilities as the other trustees of the CIO, and must act in the best interests of the CIO. This is no different than for other forms of charity where a trustee has been appointed by another organisation.
30. The Commission will provide guidance for CIOs on identifying and managing conflicts of interest, including handling of conflicts of loyalty, and examples of circumstances in which the nature of a personal benefit could be considered extremely unlikely to give rise to a conflict of interest. In addition, the Commission will produce example conflicts of interest provisions for the CIO Model Constitutions.

#### **Question 4: The Register of Trustees and Register of Members**

***Do you agree that the Regulations should follow the Companies Act 2006 on the maintenance by the CIO of a register of members and charity trustees?***

31. This question elicited a large number of comments from respondents. In all there were 71 responses: 37% agreed that the CIO regulations should follow the requirements of the Companies Act 2006; 46% agreed but with qualification(s) or reservation(s); and 17% disagreed. There were a number of different issues raised, but in particular respondents were concerned about public availability of information from the registers, the administrative burden of maintaining and updating registers, and the criminal sanctions for breaching the requirements.
32. Most respondents who disagreed with the proposals, or gave qualified support, were concerned about public availability of information on the registers – in particular the register of members. There was a concern that the company law model in relation to the register of members might not be appropriate for the CIO and might act as a deterrent for many charities from adopting the CIO form. The main concerns revolved around data protection, information privacy and the risk of identity theft, and the administrative burden for the CIO in having to deal with information requests.
33. Several respondents raised concerns about the requirement for the register(s) to be updated within 14 days, arguing that this was unrealistic for smaller volunteer-run charities. One respondent questioned the need for the requirement at all. Some respondents were concerned about the requirement to maintain information on the register for people who had ceased to be members or trustees for a period of 10 years, arguing that this was unnecessarily onerous, and that a shorter time period would be more reasonable (two respondents suggested a six-year time period for

retention, consistent with charity accounting rules; one respondent suggested that two years would be sufficient).

34. Four respondents argued that an application for disclosure by a CIO of information on its register(s), where the CIO refuses access, should be to the Charity Commission, rather than the court. One respondent suggested that the register of trustees should include the date of appointment and retirement of trustees.
35. Two respondents pointed out an inconsistency between the language used in the consultation document and the draft general regulations in relation to a specific requirement. The consultation document (in paragraph 4.5) referred to the requirement that the register of trustees must include the “normal place of residence” of the trustees. This wording was intended to reflect the requirement in regulation 69(1)(c) of the general regulations, “*the country or state (or part of the United Kingdom) in which the individual is normally resident*”. However, it was clearly open to a different interpretation, and we apologise if this ambiguity caused confusion.

#### **Government and Commission Response:**

36. Having carefully considered all the responses and comments about the register of trustees and the register of members, we recognise the comments and concerns that have been raised about the appropriateness or otherwise of following the company law model in relation to these provisions. We therefore plan to make several changes to the draft general regulations in light of the consultation feedback.
37. We continue to believe that it is important for a CIO to be required to keep and maintain a register of trustees and members, and for limited information to be made available publicly where it is appropriate and provided there are safeguards in place to protect individuals' personal information.
38. There is no requirement for an individual trustee to include his home address in the register of trustees. This information is already provided to the Commission (but not published) in the Trustees Annual Return, which will be required from all CIOs under s.48 of the Charities Act 1993. Trustees of a CIO will be required to provide a “service” address in the register of trustees - an address where the trustee can be contacted, but not necessarily the trustee's home address (for example, it could be the principal office of the CIO).
39. We believe that the register of trustees should contain the information set out in regulation 69 of the draft general regulations. However we are still considering whether it might be sensible also to require the dates of appointment and retirement of trustees to be kept in the register. The CIO and its trustees, and the Commission, should have full access to the register of trustees. In relation to public access to the register of trustees, we consider that the only information that should

be made publicly available is the name, former name, and service address of a trustee. We also accept that there will be some limited circumstances where it may be appropriate not to disclose even this information. We therefore propose that a CIO will be able to refuse a request for public extracts from its register of trustees where the Charity Commission has exercised its discretion under the Charities (Accounts and Reports) Regulations 2008 so as to enable information about some or all of a charity's trustees to be omitted from the charity's annual report. The draft general regulations will be amended accordingly. There may be some circumstances in which a third party might legitimately need access to information from the full register of trustees, for example in an insolvency situation, or in relation to a claim against a trustee personally in connection with their conduct as a trustee of the CIO. We have not yet reached a conclusive view on how to provide for these specific circumstances, but may need to make provision in the next draft of the general regulations.

40. We continue to believe that all CIOs should be required to keep and maintain a register of their members. In the case of Foundation CIOs this will be a single combined trustee/member register. In the case of Association CIOs there will be a separate register of members. In this context “members” has a specific meaning as those persons who have certain rights and duties in relation to the CIO, and should not be confused with the supporters of a charity, who may in some cases be colloquially referred to as members but are not members in the legal sense and have no duties or rights as such. The information required for the register of members should remain as described in regulation 54 of the draft general regulations. The Commission will continue to have access to the register, although no specific power is considered necessary for it to do so. The trustees of the CIO will continue to have access to the register in relation to their carrying out duties as charity trustees of the CIO. The members of the CIO should have access to the information in the register to enable them to carry out their duties or exercise their powers as members of the CIO. There should be no general right of public access to the information in the members register. However we will need to make provision for third party access to the information in a CIO's register of members in limited specified circumstances where access is required for a proper purpose (such as by a liquidator in an insolvency situation) and only where the members have given a guarantee.
41. We accept that the criminal sanctions proposed by the draft general regulations for failure to meet various requirements in relation to keeping and maintaining the registers of trustees and members may be disproportionate. We are therefore considering what alternatives might be more suitable. Our preliminary view is that in a number of instances where strict liability offences are proposed relating to the keeping or maintenance of registers it may be more appropriate for the Commission to be given a power to direct that the relevant register be brought up to date. Under s.88 of the Charities Act 1993 the Commission would be able to apply to the High Court to deal with any failure to comply with the Commission's direction by ruling it as a contempt of court. Alternatively there may be some occasions where failure to

comply with the Commission's direction could lead to the opening of a Statutory Inquiry by the Commission under s.8 of the Charities Act 1993.

### **Questions 5 to 7: Charges over CIO property, Debentures, and Access to Information**

***Q5. Do you agree with the suggested approach to the publication of information about charges over property which CIOs own? If not, what regime should apply to CIOs?***

***Q6. Do you agree that the Regulations should follow the public information obligations about debentures in the Companies Act 2006, as outlined in section 4.7 [of the consultation document]?***

***Q7. Are the proposals (outlined in section 4.8 [of the consultation document]) to make public information about CIOs available on request acceptable? If not, in what ways would they not meet your needs?***

42. There were 58 responses to question 5. All bar one respondent (2%) supported the suggested approach (81%), or offered qualified support (17%). Respondents generally considered it appropriate to follow the company law model in relation to the requirement for the maintenance of a register of charges, and notification of charges to the Charity Commission.
43. One correspondent suggested that where a charge is not notified by the CIO itself, the certificate of notification of charges (required by regulation 109 of the draft general regulations) should be sent to the CIO as well as the body that notified the charge. This would give the opportunity to the CIO to object to anyone attempting to fraudulently notify a charge over the CIO's property. Several respondents pointed to the need for clear guidance from the Charity Commission about how the charges provisions and processes will work, and what they mean in practice for CIOs.
44. One respondent argued that the criminal penalties imposed against the trustees of the CIO for failure to notify a charge would not be necessary, if the charge is not enforceable until it is notified to the Charity Commission. One respondent argued that a charge over the CIO's property that the CIO itself failed to notify should remain valid rather than be void against a creditor who themselves could have notified the charge.
45. There were 56 responses to question 6. 50 respondents agreed (82%) with the proposals relating to debentures, or gave it their qualified support (7%). 6 respondents (11%) did not agree with the proposals. Many respondents suggested that it would be rare for a CIO to issue debentures, but that provision should

nevertheless be made in the general regulations. One respondent suggested that the option for CIOs to issue debentures may result in greater use of this method for raising funds. Of those who disagreed with the proposals, some respondents argued that provision was unnecessary as it was used so rarely by charities, whilst others considered that the process for issuing debentures was too complex for small or medium sized charities and that they may lack the necessary expertise.

46. There were 54 responses to question 7. All respondents gave the proposals their support (63%), or qualified support (37%). Of those whose support was qualified, most were concerned about how the Charity Commission would make information available in relation to charges over CIO property. Several respondents argued that an online publicly searchable register of notified charges, similar to that operated by Companies House, would be required. This would allow those proposing to do business with a CIO (e.g. a bank considering a making a loan to a CIO), to access the information quickly. They suggested that if an online, searchable register of notified charges was not available, it would make the CIO a less attractive proposition for some charities (and those that do business with charities). Several respondents suggested that the Charity Commission may not have sufficient resources to provide an online searchable register of notified charges over CIO property, and the suggested that the Commission may need to charge a fee for access to the information.

### **Government and Commission response**

47. The approach outlined in the consultation appears to be generally well supported. However, some concerns were raised about the Commission's capacity to maintain a register of charges similar to that provided by Companies House. Further work needs to be undertaken to assess how we can make these provisions work effectively.
48. The Commission is currently considering various options, and we will provide further information later this year.

### **Questions 8 & 9: Special Procedures for Key Constitutional Decisions**

***Q.8 - Do you agree with our proposal to extend the special procedural requirements to cover any decision which might lead to the dissolution of a CIO, and to generally require members of a CIO to be given 14 days' notice of such decisions??***

***Q.9a - Should the special procedural requirements apply to any other decisions which might be made in the course of the administration of a CIO? If so, when should they apply?***

***Q.9b - Should there be any additional special procedural requirements? If so, what should they be?***

49. There were 64 responses to question 8. 70% of respondents agreed with the proposed approach, 16% qualified their support, and 14% disagreed with the proposed approach. 8 respondents pointed out that the special procedural requirements for CIOs in the Charities Act 1993 are different from those for companies, which are less restrictive. Some respondents considered that the requirement for unanimity in written resolutions would be impractical, when compared with the more pragmatic approach under company law (where a 75% majority is sufficient). Some respondents argued that the notice period for a meeting to consider a matter covered by the special procedural requirements should be longer (21 days or 28 days were suggested).
50. Some respondents pointed out that the special procedural requirements create a difficulty for certain religious charities that do not vote on resolutions, but instead reach a view by consensus. They suggested an amendment to the provisions to allow for a decision on a resolution to be taken without a vote and without any expression of dissent.
51. There were 51 responses to question 9a. 45% of respondents identified other decisions to which they felt special procedural requirements should apply, including: removal of trustees or members; payment of trustees; constitutional changes – particularly those affecting members' rights; change of name or objects of the CIO; and significant transfer of the CIO's assets. One respondent suggested that special procedural requirements could be applied as a matter of constitutional choice to a transfer of all, or most, of the CIO's assets to another body which is not a CIO.
52. There were 30 responses to question 9b. 80% of respondents felt that there should not be any additional special procedural requirements. 20% of respondents disagreed. Suggestions for additional special procedural requirements included; placing members under a duty to take into account the views of the charity trustees in these decisions, and imposing quorum requirements for members meetings.

### **Government and Commission Response**

53. We recognise that the special procedural requirements that apply to CIOs, in relation to the passing of a resolution in writing, will be more onerous than those which apply to companies. However, these special procedural requirements are imposed by the Charities Act 1993, and cannot be changed without Primary Legislation. We continue to hold the view that the general regulations should impose special procedural requirements in relation to a decision of the CIO to wind up voluntarily or by the court, and that for the sake of consistency the procedure should follow that set out in the Charities Act 1993 and in the draft regulations.
54. In relation to question 9a, the 1993 Act imposes the special procedural requirements in relation to any constitutional amendment, so this would already cover most of the suggestions for decisions described in paragraph 51 above. For

example, a CIO wishing to change its objects would have to pass a resolution under the special procedural requirements, and would have to obtain the prior written consent of the Commission. The question of removal of trustees by the members of the CIO is addressed in paragraph 59 below. In view of the number of different suggestions about what should be included, the best option would appear to be to allow flexibility in the model constitutions (with appropriate guidance) on this point.

55. In relation to question 9b, it will be possible for a CIO to have special procedural requirements in relation to constitutional amendment that are more restrictive than those required in the Charities Act 1993 and the draft regulations. This could provide for longer notice periods of Members' meetings, for example.

### **Question 10: Members' rights**

***Do you agree with the approach outlined in section 4.10 [of the consultation document] regarding members' rights, or should there be a greater guarantee of members' rights for CIOs, along the lines of those in company law or otherwise?***

56. There were 63 responses to this question. 65% of respondents supported the approach, or gave qualified support. 35% of respondent disagreed with the approach, arguing that members should have certain rights guaranteed in the regulations. Of those that disagreed with the proposed approach, most argued that the members of a CIO should have the same guaranteed rights as members of a company under company law. Such rights would include the right to demand a meeting of members, the right to demand a poll, the right to vote by proxy, and the right to remove a trustee (this is covered in paragraph 59 below).
57. Those who argued against giving members statutory rights suggested that the approach suggested was the most flexible, enabling individual CIOs to determine what members rights should be provided for in their constitutions. Several respondents pointed out that prescribing rights in the regulations could hinder the proper administration of CIOs, as it could lead to minority interests taking control of the CIO's administration.

### **Government and Commission Response:**

58. We believe that the approach set out in the draft regulations provides the right level of flexibility. It offers individual CIOs the ability to determine what members' rights to guarantee by including the relevant provision in the CIO's constitution. We do not accept that members of a CIO should have rights enshrined in the regulations, beyond the rights in relation to notice of meetings at which constitutional amendment or a dissolution resolution is to be considered. The model constitutions include default options that confer certain rights on members such as power to call a general meeting.

### **Question 11: Ability to remove a charity trustee**

***Do you think that the approach outlined in section 4.11 [of the consultation document] with regard to the ability of members to remove a charity trustee of a CIO is right?***

59. There were 64 responses to this question. 73% of respondents supported the approach, or gave qualified support to the approach. 27% of respondents disagreed with the proposed approach. Of those respondents who gave qualified support, most suggested that the model constitutions for CIOs should contain an optional clause giving members the right to remove a trustee, with appropriate safeguards in place. Several respondents suggested that there would need to be guidance in relation to the right of members to remove trustees of a CIO. Of those who disagreed with the approach proposed in the consultation document, most argued that members should have a statutory right to remove a trustee in the regulations, and that all association CIOs should have this provision in their constitutions.
60. Some respondents pointed out that the right to remove a trustee should not extend to nominated trustees (appointed by an external body under the terms of a CIO's constitution). One respondent suggested that the right to remove a trustee should be subject to special procedural requirements, with such a resolution needing a 75% majority on a vote of members.

### **Government and Commission Response:**

61. As stated in the consultation document, it is not considered to be good charity governance for members of a charity have an automatic right to remove those who are responsible for its administration without good reason in the interests of the charity. We are not persuaded that members of a CIO should have a statutory right to remove a trustee of the CIO, and remain of the view that such a provision should be an option for CIOs to include in their constitutions. However, we accept that this is an option that some CIOs will wish to have, and will include an optional clause in the model CIO constitutions.

### **Question 12: Membership of a CIO by an unincorporated organisation**

***Do you think that a body without legal personality should be able to become a member of a CIO? If so, how could the obligations of such a member be enforced?***

62. There were 65 responses to this question. 45% of respondents argued that a body without legal personality should be able to be a member of a CIO. 31% of respondents argued that unincorporated bodies should not be able to be a member of a CIO. 25% of respondents gave qualified support to the concept of

unincorporated membership of a CIO.

63. Many supporters of unincorporated membership argued that permitting unincorporated membership is essential if the CIO is to be widely adopted as a legal form by charities. Several respondents pointed out that many existing charitable companies have members who are bodies without legal personality, and that they were not aware of any particular problems arising. 15 respondents who gave qualified support, or who disagreed with the concept of unincorporated membership suggested that bodies without legal personality could appoint a nominee to represent the body as the member of the CIO, although several respondents suggested this may be less desirable than allowing the unincorporated body itself to be a member. Several respondents suggested that an unincorporated body could be a member of a CIO with any obligations enforced through those legally responsible for the unincorporated body.

#### **Government and Commission Response**

64. It is not our intention that the CIO regulations should prevent an unincorporated body from being a member of a CIO. It would be for each CIO to decide whether or not it would be appropriate to allow unincorporated associations to be members and to include the necessary provision in its constitution. Alternatively the CIO may choose only to permit nominated representatives of an unincorporated body. The model constitutions will be amended to reflect these choices.

#### **Question 13: Restricting constitutional amendments**

***Do you agree that a CIO should have the option to add restrictions to the power to amend its constitution contained in the 1993 Act?***

65. There were 62 responses to this question. The vast majority of respondents supported the proposal (89%). Only 6% of respondents argued that a CIO should not have the option of adding restrictions to the power to amend its constitution.
66. Several respondents suggested that such a provision needed to be accompanied by clear guidance so that CIOs could understand the disadvantages of such a provision, as well as the advantages, particularly as it may make it more difficult for the CIO to adapt to changing circumstances.

#### **Government and Commission Response:**

67. Company law allows companies to impose more restrictive procedural requirements that must be satisfied before amendments to the constitution are made. We believe that CIOs should have similar flexibility. We note the comments about the need for guidance.

#### **Question 14: Preventing the misuse of limited liability**

***Do you agree that the disqualification provisions in the Company Directors Disqualification Act and the 'prohibited names' provisions in the Insolvency Act should apply to people who have administered insolvent CIOs?***

68. There were 57 responses to this question. 86% of respondents agreed with the proposed approach, 9% qualified their support, and 5% disagreed with the approach. Some respondents found the Dissolution Regulations difficult to follow, particularly as they referenced other legislation, and suggested that the provisions be set out in full. Of those who disagreed, two respondents suggested that imposing these requirements was too harsh for charities, and that charity law should be followed instead. Two respondents suggested that the provisions should not apply where charity trustees were not at fault in an insolvency situation. One respondent suggested a central register of those disqualified from charity trusteeship.
69. One respondent questioned the need for Regulation 134, suggesting that the mischief it is designed to address could be dealt with under existing provisions of the Charities Act 1993. They similarly questioned the need for the "phoenix company" provisions, arguing that here too, mischief could be prevented under existing Charity Commission powers in the Charities Act 1993.

#### **Government and Commission response:**

70. For the CIO to command external confidence it is important that limited liability is not misused, and that there are strong sanctions in place where it is abused. We continue to consider that the existing provisions of the Charities Act 1993 may not be sufficient to prevent people who have abused their position as a charity trustee of a CIO from being able to do so again, and therefore consider that the disqualification provisions of the Company Directors Disqualification Act 1986 should apply to unfit charity trustees of an insolvent CIO as we proposed in the consultation document. Similarly we propose to retain the application of the provisions of the Insolvency Act 1986 that relate to the use of prohibited names (the "phoenix company" provisions), although we accept that this is less likely to arise in a charity context than in the context of a commercial company.

#### **Question 15: Accounting by CIOs**

***Do you think all CIOs should have to produce accruals accounts, or do you think it should depend on their level of income, the same as for non-company charities?***

71. There were 69 responses to this question. 25% of respondents thought that all CIOs should have to produce accruals accounts, whilst 75% argued for a

proportionate approach where the requirement to produce accounts on an accruals basis was dependent on the level of a CIO's annual income. It should be noted, however, that accountants and their representative bodies tended to support the view that CIOs should produce accruals accounts.

72. Of those who supported a proportionate approach, 44 respondents considered that CIOs should follow the accounting thresholds that apply to unincorporated charities. The current annual income threshold below which unincorporated charities can opt to prepare their accounts on a simpler receipts and payments basis is £250,000, whereas all charitable companies are required to prepare accounts on an accruals basis. 8 respondents argued that the £250,000 threshold was too high, and that CIOs should be subject to a lower annual income threshold below which they could opt to prepare receipts and payments accounts. Thresholds of £50,000 and £100,000 were proposed as possible alternatives for CIOs. Some respondents queried whether it was right to say that all charitable companies are required to prepare their accounts on an accruals basis.
73. One respondent polled its members, with 37% favouring accruals accounting by all CIOs, and 42% arguing that it should depend on the level of the CIO's income. Some respondents commented that the quality of receipts and payments accounts is variable, particularly as they are not subject to detailed legal requirements that accruals accounts are, and that therefore to promote confidence in the CIO model a lower threshold for accruals accounts, or a requirement for all CIOs to prepare accruals accounts, would be more appropriate. However, many respondents who suggested adopting the same thresholds as for unincorporated charities argued that the CIO would be an important structure for many smaller charities, and that a blanket requirement to prepare accruals accounts would significantly deter take-up of the CIO amongst smaller charities. They argued that CIOs should, first and foremost, be seen as charities and their accounting regime should be in line with that of other charities, rather than companies.
74. Several respondents stated that it would remain possible for grant-makers or lenders to require more detailed accounting or financial information from a CIO, but that such an arrangement should be between the funder / lender and the individual CIO, and not a blanket requirement for all CIOs.

### **Government and Commission Response:**

75. In consulting on the accounting rules to apply to CIOs, we wanted to develop an understanding of the extent that public and business trust and confidence in CIOs would be affected by the accounting requirements we place on them, and the extent to which the accounting framework would be an incentive or disincentive for charities considering forming as or converting to a CIO.
76. There are some differences in the format of the balance sheet and profit and loss

account to be prepared by small charitable companies on the one hand and those charitable companies not covered by the small companies regime. However, this does not appear to detract from the overall requirement to provide a “true and fair view” or to provide information additional to that which is specifically required by or under the Companies Act 2006 if this is necessary to give the true and fair view.

77. Whilst we received several responses from professional advisers to charities, and representative groups of professional advisers, there was a disappointing level of response from financial institutions. However, it is clear from the responses received that the majority favour a proportionate approach to accounting requirements for CIOs, based on the level of the charity’s income. We agree with this view, particularly as we do not wish to deter smaller charities from adopting the CIO form.
78. The only question remaining is whether the £250,000 annual income threshold below which unincorporated charities can opt to prepare receipts and payment accounts will be appropriate for CIOs, or whether there should be a different, lower, threshold. We are persuaded by the argument that CIOs should follow the accounting requirements that apply to other unincorporated charities under charity law. Of course, under this approach funders and lenders would be able to apply their own additional requirements on a CIO if they consider them necessary.
79. This is an issue that we will keep under review. If it becomes apparent over time that the quality of CIO receipts and payment accounts (i.e. where CIOs with an annual income below £250,000 opt to produce them) is damaging external confidence in the CIO model, then we will consider whether the income threshold below which CIOs can opt to produce receipts and payments accounts should be reduced.

#### **Question 16: Accounts on conversion**

***Do you agree with the policy objective of accounting and reporting continuity for companies converting into CIOs? If so, do you consider the approach we are proposing is reasonable, or would you suggest an alternative approach? In particular, is the proposal to require a financial statement of the CIO’s assets and liabilities on conversion sufficient?***

80. There were 61 responses to this question on consultation. Almost all respondents agreed with the policy objective of aiming for accounting and reporting continuity for a company converting to a CIO. 46% of respondents gave unqualified support for the proposed approach, but the majority (54%) were concerned that the process we had set out in the consultation was overly bureaucratic with some suggesting it would act as a disincentive to conversion. Many of these respondents questioned the need for a conversion statement at all, preferring simple continuity of the converting organisation’s existing annual accounting and reporting cycle. They

argued that the conversion of a charitable company to a CIO does not create a new legal entity and so it is unreasonable to say that the conversion creates a new accounting period.

81. Some respondents pointed to the fact that under the proposals in the consultation drafts, an application for conversion would only be possible in the last three months of a charitable company's accounting year. One correspondent highlighted difficulties that converting companies might have in providing a valuation of their assets at the point of conversion, for the purposes of the conversion statement. Several respondents argued that requiring a conversion statement within six weeks of conversion was unrealistic, and that a period of three months should be allowed.
82. Four respondents wanted a conversion process to be set out for charitable Industrial and Provident Societies.

#### **Government and Commission Response:**

83. We continue to believe that the policy aim should be to ensure continuity of accounting and reporting for organisations that use the conversion process to become a CIO. However there is a change in the basis upon which accounts are required to be provided. Immediately prior to conversion the charity trustees of the charitable company are required to comply with company law requirements and from the date of conversion it is the charity law obligations which apply to the CIO. The company law requirements cease to apply on conversion. Whilst we expect that in most cases the charity trustees of the CIO will be the same people as the charity trustees of the converting charitable company, it is possible for them to be a different group of people.
84. We accept that whilst the proposed approach outlined in the consultation draft would ensure accounting continuity, it may not be the most effective approach and could cause some difficulties for organisations seeking to convert. For example we agree that as the draft regulations stand a company may have to apply to convert in the last three months of its financial year: however, this cannot be avoided if the converting company is to be required to provide accounts for all complete financial years prior to conversion.
85. We are grateful for those respondents who suggested alternatives. We are considering several options, which may enable a converting entity to continue its annual reporting cycle without the need for a conversion statement, which we accept could be a burden that would put off some companies from converting into a CIO. We are also considering approaches which would enable a company to apply for conversion at any point during its financial year, but we consider that a company wishing to convert into a CIO should not be in breach of any filing requirements. We will set out the revisions to the process later this year.

86. We have identified an omission in the approach in relation to the conversion process. As it stands there is no requirement for the converting organisation to transfer its accounting records to the CIO on conversion, nor a requirement for the CIO to preserve the accounting records of the pre-conversion company. We propose to address this gap in the next draft of the general regulations.

### **Question 17: Model Constitutions**

***Do you think that the model constitutions are workable and provide good governance arrangements and sufficient flexibility for CIOs? If not, what improvements are needed?***

87. There were 62 responses to this question. Whilst almost all respondents were supportive of the model constitutions, 71% qualified their support or made specific suggestions for improving the model constitutions.
88. A common concern related to the extent to which charities would have to follow the model constitutions, and the degree of flexibility that the Commission would permit in relation to charities departing from the model constitutions. There were several specific concerns related to this from charities that operate in a federated structure, or where their constitutions would require specific additional provisions in the constitution as a result of statutory requirements. Other respondents queried whether it would be possible to have models agreed by the Commission for particular sub-sectors, such as village halls, that were tailored to meet the needs of that particular group of charities.
89. A large number of respondents made specific recommendations for changes to the model constitutions. In particular, a number of legal and professional advisors had gone to some lengths to provide detailed and constructive suggestions. Two respondents asked whether it would be possible for a foundation CIO to become an association CIO, and vice versa.
90. It is not possible to detail all of the recommendations here, but among the most significant were:
- placing more of a focus on the trustees in the Foundation model (on the grounds that membership is merely a legal technicality in practice for CIOs using this model);
  - providing a greater range of options for promoters of CIOs to choose from, rather than having to draft their own.

### **Government and Commission Response**

91. We are encouraged by the broadly positive responses to the draft model Constitutions. We recognise that many charities and advisers are concerned about

the question of flexibility, and we will endeavour to make the position clearer in guidance, but in principle we want the CIO form to be as flexible as possible to reflect the diversity of the sector.

92. It should be perfectly straightforward for a CIO to change from the Foundation model to the Association model; they are not different legal forms, merely different versions of the model constitution.
93. The Commission aims to adopt as many of the recommendations for improvements to the models as is practically possible and consistent with its regulatory remit and the legal framework. We aim to complete the revisions later this year, as explained in Next Steps.

### **Question 18: Delegation Powers**

***Do you consider it useful for the charity trustees of a CIO to have a number of default delegation powers by including them in the draft General Regulations?***

94. There were 53 responses to this question. 68% of respondents supported the approach, 28% gave qualified support, and 4% disagreed with the approach. Many respondents considered the approach very helpful. Several respondents suggested that the delegation powers needed to be included in the CIOs constitutions as well as the regulations. Those that disagreed with the proposals did so because in their view the delegation powers should be in CIOs constitutions and not in the regulations. Some respondents suggested that the regulation would be more helpful if it restated, rather than referenced, other legislation. Several respondents suggested that it would be useful to differentiate between mandatory and optional delegation powers, and that the delegation powers should be accompanied by guidance and explanatory notes. One respondent suggested the need to provide for delegation of executive authority in the model constitutions. One respondent pointed out that the existence of default powers is a fallback, and no substitute for properly drafted express delegation powers in a constitution.

### **Government and Commission Response**

95. We continue to believe that it is helpful for a CIO to have default delegation powers, and that those should be as set out in draft regulation 85. We note the comments about the drafting of the regulation.

## Other issues raised on consultation

96. In all, the responses we received to the consultation drafts came to over 600 pages of material. As well as the responses to the specific questions in the consultation document, many respondents made other detailed comments about the draft Regulations or model constitutions. We have not set out all the detailed comments about drafting that we received, but they are all being considered in the development of the next drafts of the regulations and model constitutions.
97. A number of respondents made the general point that the CIO provisions in some areas followed company law too closely, and that first and foremost a CIO should be considered as a charity rather than a corporate entity. Several respondents suggested that we rely less on company law and in some cases develop specific provisions for CIOs to reflect their position as a charity, albeit with limited liability.
98. Several respondents were concerned that there were too many criminal sanctions proposed against the trustees of CIOs, particularly in relation to information provisions such as the requirements to keep and maintain a register of trustees and members.
99. Some respondents argued that it should not be possible for a CIO to have a sole trustee. This is permitted by the Charities Act 1993, and therefore cannot be ruled out by the regulations or model constitutions.
100. Some respondents queried whether a CIO would be able to hold permanent endowment as corporate property. We don't consider that it would be possible for a CIO to hold permanent endowment as corporate property, but we are considering whether there could be means of easing the administrative burden on CIOs that hold endowments on special trusts.
101. Several respondents raised issues relating to conversion, or of an unincorporated charity setting up a new CIO and transferring its assets into it. Issues raised included, whether a converting company would be able to keep its existing charity registration number, and similarly whether an unincorporated charity setting up a new CIO would be able to do likewise. Some respondents highlighted possible barriers to becoming a CIO, such as the impact (particularly for unincorporated charities) of becoming a CIO if the charity has a defined benefit pension scheme for its employees. This was also raised in the context of a charitable company converting into a CIO. Others were interested in whether there will be a conversion process for charitable industrial and provident societies, and some raised questions about how legacies would work on conversion.
102. We will review all these detailed comments and issues in developing the next drafts of the regulations and model constitutions, and will update the guidance and

frequently asked questions about the CIO later this year.

## Conclusion and Next Steps

103. As previously stated, we are very grateful to all those who took the time and effort to respond to the consultation. The range and quality of responses is helping us improve the CIO form, and we believe that it will make the CIO more appropriate for, and attractive to, charities whilst commanding the external confidence as a legal form with limited liability that it will need if it is to prove successful.
104. Having considered all the responses we are now making changes to the draft Secondary Legislation and Model Constitutions. We expect to have completed the revisions to the draft Regulations and model constitutions by the end of 2009.
105. The draft Regulations will need to be approved by Parliament, before the CIO can come into force. Alongside this process, the Charity Commission will be developing the systems, processes and guidance that will need to be in place for the CIO to become a reality.
106. We aim to begin implementation of the CIO provisions in late spring 2010. However, a final decision has not been made on whether the CIO provisions will be implemented as a whole, or whether implementation will be phased (for example enabling new CIO formations first, with conversions becoming possible at a later date). This is because at this stage we have no firm indication of the level of demand, and we must consider the potential impact on the Charity Commission's resources if demand for the CIO is high. Over the coming months we will be assessing the likely level of demand, and this will inform decisions about how the CIO provisions are brought into force.
107. We propose to set out the detailed implementation plans for the CIO later this year, at the same time as the revised Regulations and Model Constitutions are published, and guidance and frequently asked questions updated.

## Annex A: List of Consultation Respondents

Respondent	Type of organisation / individual
Action with Communities in Rural England (ACRE)	National umbrella of the Rural Community Action Network
Adrian Ashton	Consultant
Adrian Wild	Individual
Alec Sandison	Governance and Finance consultant
Alison McKenna	President of the Charity Tribunal
Anthony Collins Solicitors	Solicitors
Association of Charitable Foundations	Membership charity representing charitable foundations
Association of Charity Independent Examiners (ACIE)	Association of Independent Examiners
Association of Chartered Certified Accountants (ACCA)	Professional accountancy body
Association of Chief Executives of Voluntary Organisations (ACEVO)	Membership charity
Association of NHS Charities	Membership Organisation of NHS charities
Association of Show and Agricultural Associations	Charity
Association of Tax Technicians	Membership charity for tax professionals
Baker Tilly	Accountants
Baptist Union of Great Britain	Membership charity
Bircham Dyson Bell	Solicitors
Blackheath Society	Charity
Box Moor Trust	Charity
Brian Craven	Trustee
BTP Associates	Chartered Accountants and Business Advisers
Cath Sell	Finance Director of a charity
Chancery Bar Association	Specialist Bar Association with around 1000 members
Charity Finance Directors' Group (CFDG)	Membership charity
Charity Law Association	Membership organisation for charity lawyers and professionals
Charity Trustee Networks	Membership charity representing charity trustees
Charlie Cattell	Consultant

<b>Respondent</b>	<b>Type of organisation / individual</b>
Children Rights Alliance for England	Consortium of 6 national children's and young people's charities
Chris Powles	Finance Director of a social enterprise
Churches' Legislation Advisory Service (CLAS)	Membership charity
Coal Industry Social Welfare Organisation	Charity
Community Accountancy National Network (CANN)	Charity
Community Matters	National federation of community associations
Companies House	Company Regulator (Phil Coates)
Co-operatives UK	Membership organisation and Industrial and Provident Society
Croydon Citizens Advice Bureau	Charity
David Lang	Consultant, solicitor, former trustee
David Porter	Solicitor
Derby Shakespeare Theatre Company	Charity
Dr. Ken Ashford	Accountancy consultant
Frank Griffiths	Charity former treasurer
Friends of King Alfred Buses	Charity
Graham Taylor	Individual
Her Majesty's Land Registry	Government department
Heritage Care	Industrial and Provident Society
Hospital Broadcasting Association	Membership charity
Ian Vincent	Secretary of the Croquet Association (but personal views)
Independent Examiners Ltd	Charity consultants & independent examiners
Institute of Chartered Accountants in England and Wales (ICAEW)	Professional accountancy body
Institute of Chartered Accountants of Scotland	Professional accountancy body - Scotland
Institute of Chartered Secretaries and Administrators	Professional body for company secretaries and corporate administrators
Jerry Symonds	Senior Internal Auditor for charities
Keith Anderson	Fareham CAB
Leagle Consulting	Legal consultants

<b>Respondent</b>	<b>Type of organisation / individual</b>
London Voluntary Service Council (LVSC)	Membership infrastructure support charity
Marie Curie Cancer Care	Charity
National Association for Voluntary and Community Action (NAVCA)	Membership charity
National Audit Office	Auditor of UK Government and other public bodies
National Childrens Bureau	Membership body
National Council for Voluntary Youth Services (NCVYS)	Umbrella / membership charity
National Council of Voluntary Organisations (NCVO)	Largest general membership body for charities and voluntary organisations in England.
National Union of Students (NUS)	Membership organisation
NWET	Charity
Paul Boielle	Community Accountant & Trustee
Paula Arthur/West Sussex ChangeUp Consortium	Infrastructure support body
Pepe Chisenga	Individual
Powys Association of Voluntary Organisations (PAVO)	County Voluntary Council for Powys
Pre School Learning Alliance	Membership charity
Professor Gareth Morgan	Professor of charity studies
Quakers	Membership charity
R L Glasspool Trust	Grant making Charity
Redbridge CVS	Local umbrella/infrastructure charity
Riding for The Disabled	Membership charity
Royal Bank of Scotland Group	Financial Institution
Royal Society for the Prevention of Cruelty to Animals (RSPCA)	Charity
RSPCA Llys Nini branch	Charity
Sandy Adirondack	Charity consultant and trainer
Scout Association	National membership charity
Sheen Stickland LLP	Solicitors
Stewardhsip	Umbrella body and charity
Stone King Sewell	Solicitors
Stratford Town Trust	Charity
Surrey Supported Employment	Social enterprise
The Insolvency Service	Government department
Tom Fitch	Community Accountant

<b>Respondent</b>	<b>Type of organisation / individual</b>
Tourettes Action	Charity
Trowers & Hamlin	Solicitors
Voluntary Action North Lincolnshire	Local umbrella/infrastructure charity
Voluntary Action Sheffield	Local umbrella/infrastructure charity
Voluntary Norfolk	Charity
Wales Council for Voluntary Action (WCVA)	Membership charity
Walker Morris	Solicitors
West Lancashire Shop Mobility	Charity
Wigan and Leigh Council for Voluntary Service	Local umbrella/infrastructure charity
Winckworth Sherwood	Solicitors
Winifred Pritchett	Charity trustee