

CHAPTER 2:

CHARITABLE LEGAL FRAMEWORK: ADMINISTRATIVE AND STRUCTURAL REFORMS

- 1.1 This chapter assesses the impact of the measures to be included in the Charities Bill, with the exception of the regulation of public collections and the changes to excepted and exempt charities.
- 1.2 These measures affect all charities directly. Many of the measures are permissive rather than prescriptive. The Bill seeks to promote growth in the sector through a flexible rather than restrictive legislative framework.

PURPOSE AND INTENDED EFFECT

Objective

- 1.3 That charity be redefined in law, based on the principle of public benefit and falling under one of twelve new purposes of charity.
- 1.4 That a package of legal measures be introduced that would facilitate mergers and, more generally, the administrative running of charities. These measures include the following:
 - Raising the threshold below which small charities can make certain changes (such as transferring assets and modifying objects) from £5,000 to £10,000 annual income. The criteria and procedure for transferring property or changing objects would be broadened and simplified.
 - Making it easier for trustees to make administrative amendments to their governing documents.
 - Speeding up the formal scheme making procedure and reduce the cost to charities by making advertising the changes a matter of Charity Commission (the Commission) discretion.
 - Including specific provision in the Charitable Incorporated Organisation (CIO) legislation to facilitate transfers and mergers.
 - Providing for the benefit of all future legacies and gifts to transfer automatically to the newly incorporated or merged charity.
 - Producing regulatory guidelines on due diligence in charity mergers, based on a light-touch approach.

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- 1.5 The criteria for allowing trustees to spend capital would be revised.
- 1.6 A new legal form designed specifically for charities, the CIO, would be introduced, which would only be available to charitable organisations. Five years after the introduction of the CIO the Government would consider whether the introduction of the CIO had been effective and further whether other forms of incorporation should continue to be available for charities.
- 1.7 Auditors of all charities would have the same statutory protection from the risk of action for breach of confidence or defamation, as do the auditors of charities which are not companies.
- 1.8 The Home Secretary would be given power to introduce statutory regulation of fundraising which he would exercise if he considers the self-regulation initiative to have been ineffective or inadequate. The Government accepts that self-regulation should be the first resort in improving fundraising standards and practices. The advantage of self-regulation in that area is that fundraising organisations would be centrally involved in devising and implementing regulation and would be more committed to it. However, the Government recognises that there is a risk that self-regulation might not be successful. The criteria which the Home Secretary would use to judge the success or failure of self-regulation would be published.
- 1.9 The legislation would be amended to require a specific statement of the return that would be made to charitable, philanthropic and benevolent purposes from promotional ventures.
- 1.10 A trustee body would have a statutory power to pay an individual trustee to provide a service to a charity (outside their duties as a trustee) if they reasonably believe it to be in the charity's interests to do so.
- 1.11 Charity trustees would be able to apply to the Commission as well as the court for relief from personal liability for breach of trust where they have acted honestly and reasonably.
- 1.12 The income threshold for audit would be raised to £500k per annum. An asset threshold of £2.8million would be introduced for unincorporated charities required to prepare more sophisticated accruals accounts (currently those with incomes over £100k per annum). It would not apply to unincorporated charities allowed to prepare accounts on a receipts and payments basis. A professional qualification would be required for independent examiners of larger non-audited charities, that is those with income above £250k but below £500k per annum.
- 1.13 The threshold for compulsory registration would be raised to £5,000 with voluntary registration allowed for charities below the new

threshold. The two criteria relating to permanent endowment and use/occupation of land would no longer apply.

- 1.14 The Commission would have clear strategic objectives in statute setting out what it exists to achieve as regulator and to report its performance against its objectives in its annual report.
- 1.15 The Commission would be a statutory corporation, operating at arms length from Ministers, with the relationship defined in statute.
- 1.16 The number of Commissioners would be increased from five to nine, with at least one Commissioner appointed with knowledge of conditions in Wales. The appointing Secretary of State would specifically have to consult the Welsh Assembly about that appointment. There would be separate Chair and Chief Executive posts.
- 1.17 An independent tribunal would be introduced to hear appeals against the legal decisions of the Commission as registrar and regulator.

Risk Assessment

- 1.18 Failure to update the legal framework by adopting those measures would have a negative long-term impact on the ability of charities to expand and modernise to create a more vibrant and diverse voluntary sector.
- 1.19 The definition of charitable purposes is nearly 400 years old. Should it remain unchanged, the legal definition of charity might fail to match the public perception of what is charitable. A clear focus on the need to provide public benefit is essential to ensure continued confidence in the charity brand and public support for the granting of fiscal benefits to charities.
- 1.20 The proposals such as the CIO, payment of trustees for services, the measures set out in 1.4 and the spending of small levels of capital by trustees are designed to make it easier for charities to operate. Failure to implement them is likely to stifle initiative and innovation and prevent the expansion of the sector.
- 1.21 The risk of not introducing the specific statement of the return from promotional measures is that the general public would be either confused or deliberately misled as to how much of their money is given to the charity benefiting from the promotion. Either would detract from public confidence in the charitable sector.

However, forcing companies to make a specific statement of the return made to charities from promotional ventures might deter companies from creating such ventures. Companies might view the requirement to reveal such details as a breach of confidentiality. Those risks are

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minor and out-weighted by increased transparency and accountability considerations.

- 1.22 Failure to increase the audit threshold represents an unnecessary burden to small and medium-sized charities and would not be in line with the general increase in the threshold for companies in the private sector. However, increasing the threshold by too much would pose a risk to public confidence. The public generally requires more information from charities than small businesses with a similar turnover. This has been reflected in the legislation.
- 1.23 If the changes to the structure and governance of the Commission are not implemented it would be impeded in developing into a modern effective regulator commanding the confidence of the charitable sector and of the general public.

Options

- 1.24 Three broad options have been identified in regard to the proposals mentioned in this Regulatory Impact Assessment.

Option 1 – leave the relevant legislation unchanged.

- 1.25 The charitable sector would not have a modern fit for purpose legal and regulatory framework.

Option 2 – Implement all of the proposals set out by the strategy unit in ‘Private Action, Public Benefit’.

- 1.26 Some of the Strategy Unit proposals met with strong opposition during the period of consultation. Some were adapted as a result of the consultation and one proposal was dropped due to Government concerns about unfair competition. Continuing with these proposals unchanged might lead to resentment that strongly expressed public views were being ignored.

- 1.27 There was considerable support in the consultation for the inclusion of 3 further heads of charity over and above the 10 set out by the Strategy Unit (SU). These 3 were:

- the promotion of animal welfare ;
- the provision of social housing; and
- the advancement of science (to be added to the proposed purpose for the advancement of culture, arts and heritage)

These three purposes which are well-established as charitable are currently covered by the category ‘other purposes beneficial to the community’. However, they have strong public recognition. Their inclusion as specific purposes in their own right would help to align the legal definition of charity with the public understanding of what is charitable. The Joint Committee also recommended the inclusion of

further purposes to be specifically included in the list of charitable purposes, which the Government has accepted.

- 1.28 There are risks inherent in implementing the Strategy Unit recommendation that charity law should be amended to allow charities to undertake all trading within the charity, without the need for a trading company, subject to a specific statutory duty of care. The Government does not favour this proposal as it risks offending the principle of there being a level playing field with private sector businesses. At present, companies owned by charities are in the same position as any other company. It is a matter of choice whether or not profits are passed on to shareholders within the Gift Aid arrangements. Charities may currently undertake primary purpose trading, and ancillary trading, the profits of which benefit from income tax exemption. In addition, non-primary purpose trading may be carried out within the charity with an income tax exemption on profits up to a certain level. These relieve smaller charities of any administrative burden in conducting modest trading activity. The implementation of the recommendation would present a significant risk of generating unfair competition for other businesses.
- 1.29 Roughly a third of the 128 respondents on the proposal relating to audit thresholds had concerns about it or unequivocally opposed it. Most of these felt that raising the threshold to £1million would lead to a greater risk of abuse by medium-sized charities due to the lack of rigorous scrutiny. Increasing the threshold to £1million runs the risk of alienating those who opposed the measure, reducing the accountability of medium-sized charities and possibly result in there not being enough competent independent examiners to take on the extra work that would result from the changes.
- 1.30 Over 95% of the small charities who responded to the consultation opposed setting the registration level at £10,000 per annum, with the removal of voluntary registration below that level, on the grounds that small charities derive much of their credibility with funders, the public, local authorities, banks and other organisations from their registration with the Commission. Loss of registration could damage small charities.

Option 3 –Implement those proposals accepted by the Government and set out in ‘Charities and Not-for-Profits: A Modern Legal Framework’ as amended by the Government’s response to the Joint Committee’s report on the draft Charities Bill (where appropriate).

- 1.31 This would meet the objective of providing a modern fit-for-purpose framework for the sector and would minimise the risks.
- 1.32 The measures on trading that were rejected by the Government were supported by charities with 84% of the 297 respondents being in favour. Failure to take this measure forward may alienate those who

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

The level of the statutory exemption for small trading is a matter for Finance Bill legislation rather than for the Charities Bill and any changes would be considered as part of the normal Budget process. However, the Government regards the current exemption, together with the extra statutory concession on fundraising events, as sufficient to allow charities to engage in small amounts of trading without the extra administration costs of setting up a subsidiary.

- 1.33 Increasing the audit threshold to £500,000 rather than £1m would have less of a de-regulatory effect for medium-sized charities. There would be a discrepancy between the audit threshold of small businesses, which is £5.6m and that of charities. However, there is a greater public interest in the accounts of charities and a higher risk to the sector should any individual charity abuse the system.
- 1.34 Setting the registration threshold for charities at £5,000, means that there would continue to be a group of charities that are registered but not monitored on a systematic basis. That is because the Commission does not undertake systematic monitoring of charities with an income below £10,000 per annum. The public might derive false comfort from believing mistakenly that all registered charities are systematically monitored.

However, those charities would benefit from the information and advice of the Commission via Commission mailings. The Commission's regulatory powers apply in full to unregistered charities below the threshold.

- 1.35 Businesses involved in promotional ventures with charities may have concerns about revealing information which might be commercially sensitive and decline to participate, with consequent lost income to charities. That risk is considered to be low.

Professional fundraising firms might suffer as a result of this measure, if potential donors conclude that too much of their donation is going to the fundraisers rather than to the charity. The public might not appreciate the longer-term gains to charities. It would be for professional fundraisers to provide a balanced case on this issue.

Benefits:

Option 1 – leaving the existing legislation unchanged.

- 1.36 There would be no additional costs from this option and charities are familiar with the operation of the current legislation, even though in some areas it might be outdated and complex.

Option 2 – Implement all of the proposals set out by the strategy unit in ‘Private Action, Public Benefit’.

- 1.37 The benefits have been identified in the foregoing paragraphs but have been found to be outweighed by the risks.

Option 3 – Implement those proposals accepted by the Government and set out in ‘Charities and Not-for-Profits: A Modern Legal Framework’ as amended by the Government’s response to the Joint Committee’s report on the draft Charities Bill (where appropriate).

- 1.38 Broadening the definition of charity so that there are 12 new ‘heads of charity’ would better reflect the modern concept of what is charitable, and includes those other purposes identified by the Joint Committee as warranting inclusion. Widening the definition may allow some organisations that were not previously so to become charitable, though it is not expected that the number of these would be very high. The Bill also provides an explanation of those matters which would be included under specified heads of charity to provide greater clarity. Reflecting a more modern definition of charity would also give the general public greater confidence in what is charitable within law.

- 1.39 Requiring charities to demonstrate that they provide public benefit would enable the general public to have confidence that organisations which have charitable status are genuinely for the public good. The public benefit principles would be stated in guidance which explains the law and issued under statutory authority, although not part of the law itself. The advantages of that approach are that it provides maximum flexibility for the law to develop in response to changes in society and that it allows for all, rather than just some, of the public benefit principles to be set out and explained. The statutory guidance would be published by the Commission as the independent regulator to ensure that it is not under Government direction or control. The guidance would be developed in consultation with appropriate persons and bodies.

- 1.40 Introducing a range of legal measures to facilitate mergers would ease the process when two charities combine. These measures are wholly permissive and there is no intention to force charities to merge, merely to facilitate the process where it seems in the best interests of the charities involved. According to research carried out by the Commission, 22% of all charities currently work collaboratively and 5%

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of charities exist as a result of a merger in the past ten years. 13% of large charities have either merged or actively considered a merger in the last 10 years (March 2003). The majority of the charities for whom it was relevant felt that as a result of the collaborative working, service delivery had improved. 6% of those who were asked had considered merging in the past 10 years but had not done so, 10% of those who did not work collaboratively stated this was either because it had been considered but not materialised or previous collaborative efforts had not worked out and they were cautious of trying again. 15% of those who considered merging but did not do so stated the reason was that the merger was too bureaucratic or complex.

Many charities will feel no need to merge but those that do are likely to reap benefits. Equally, a substantial number are put off by the bureaucratic processes involved in merging. Simplification of the merger process would benefit the charities involved and their beneficiaries.

- 1.41 Allowing trustees to spend capital, provided it is below £10,000, would be useful. Many major charities, and educational institutions in particular have large numbers of very small trusts, some of which are of considerable age. Maintaining the separation of these funds while still ensuring that the charity makes the most out of them could generate a lot of administrative work and ties down potentially useful money. By loosening the controls on these funds, with safeguards to ensure that the money is used for a similar purpose to that originally stated, this measure would improve the effective performance of many charities.
- 1.42 The creation of a new legal format, the CIO, designed specifically for charities, would benefit charities significantly. There would be no need for dual registration with the Commission and Companies House. The regime would be tailored to fit the trustee governance structure. The relationship between trustees and directors would be clarified and any overlap resolved. There would be model constitutions prepared by co-ordinating bodies, tailor-made for particular parts of the sector and an explicit statement of trustees' duty of care, consistent with the Trustee Act 2000.
- 1.43 Giving auditors of all charities the same statutory protection as the auditors of charities that are not companies would improve the accountability of charities. Auditors identifying potential malpractice would be able to draw attention to the issue, without fear of the consequences.
- 1.44 The power to pay trustees, for services to the charity, other than as trustees, would allow charities to benefit from the expertise of individuals committed to the charity. Within the safeguards set out within the Bill, use of this measure would save charities money and enable them to make the most of the resources available to them.

- 1.45 The ability of trustees to apply to both the Commission and the Courts for relief of personal liability would have the benefit of providing more reassurance to potential and existing trustees that if they act reasonably then their personal finances would not be affected by their role as trustee. This should make it easier for charities to recruit high calibre trustees.
- 1.46 Raising the audit threshold to £500,000 would reduce the burden of bureaucracy on medium-sized charities. It is estimated that the changes to the audit requirements would free over 2,000 unincorporated charities and nearly 1,500 charitable companies from the audit requirement. Although, there would be some in the sector that are disappointed that the threshold was not raised to £1 million, as originally proposed by the Strategy Unit.
- 1.47 Raising the threshold for mandatory registration with the Commission to £5,000 would also help to cut down on the costs on what can be a tight administrative budget for small charities. It also has the potential to cut registration costs for the Commission itself. However, it would mean that charities would remain on the register which are not subject to the Commission's routine monitoring. Although they would receive mailings from the Commission updating them on relevant charity matters.
- 1.48 The requirement for commercial operators to make a specific statement of return would have the benefit of clarifying the relationships between the private and charitable sectors. According to research undertaken by Business in the Community, consumers spent more than £50 million on products displaying a charity logo during 2003 – a 50% rise on the previous year. More than 83% of consumers have bought a cause-related product or service. Charities have the potential to benefit enormously from this partnership - for example Comic Relief, raised £250,000 from such an arrangement with a cake manufacturer.
- 1.49 The structural changes to the Commission would increase clarity and accountability, so that the sector and the general public could have confidence in the role the Commission plays. Its organisational status would reflect its independence while the expansion of the board would enable it to reflect a wider range of stakeholders.
- 1.50 The new Tribunal would provide charities and trustees with a better, and less expensive, opportunity to challenge the decisions of the Commission through an authoritative and legally binding process.

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Costs:

Option 1 – leaving the existing legislation unchanged.

1.51 There would be no additional costs for this option, although it would mean that the sector would not have a modern legal and regulatory framework.

Option 2 –Implement all of the proposals set out by the strategy unit in ‘Private Action, Public Benefit’.

1.52 The costs for these measures would be mostly the same as for those in option 3 – largely negligible. Removing the need for charities to have separate trading subsidiaries could have significant costs for small businesses. No accurate figures are available but both HM Treasury and the Small Business Service have stated that this proposal would incur an unacceptable level of loss of revenue to small businesses.

Option 3–Implement those proposals accepted by the Government and set out in ‘Charities and Not-for-Profits: A Modern Legal Framework’ as amended by the Government’s response to the Joint Committee’s report on the draft Charities Bill (where appropriate).

1.53 The majority of these measures are permissive, so the costs incurred are virtually entirely at the discretion of the Charities themselves. The costs to the charities of these measures are expected to be minimal. The following measures are expected to be cost neutral:

- Facilitating Mergers
- Allowing trustees to spend capital
- Auditor protection
- Payment of trustees to provide a service
- Raising the compulsory registration threshold to £5,000

The measure for trustees to apply to the Commission for relief from personal liability might involve some cost to the Commission but this would be too small to take into consideration in this document.

1.54 The costs involved in changing the definition of charitable purposes should not be high. It is not expected that large numbers of organisations would become charitable as a result of this, so the Commission would not face an increased burden.

1.55 The CIO is a permissive measure. The cost to a charity of adopting this legal form is expected to be equivalent to or less than forming a company limited by guarantee. There would be additional burdens to the Commission but their figures indicate that it should be possible to absorb any costs involved in registering this new legal form.

1.56 The cost in producing a specific statement of return from promotional ventures should be negligible. It is not possible to calculate the financial impact of the specific statement of return requirement, however, no

charity expressed concerns about this recommendation in response to the Strategy Unit consultation. This is a key measure in increasing the transparency of the sector.

1.57 Raising the audit threshold is likely to reduce the total number of charities requiring audit by approximately 3,500. It is expected that this reduction would probably occur over a number of years, however, as many charities who currently have their accounts audited are likely to continue to do so immediately following the Bill. The governing documents of some charities will require them to have their accounts audited.

1.58 Structural and procedural changes to the Commission itself will incur the following costs:

Firstly, regarding the measures on board meetings, the additional resource for Governance for 2004/05 is **£114,000** to cover:

6 open board meetings,

4 regional meetings,

1 open AGM, and

1 Pay Band 4 member of staff as support.

1.59 In regard to increasing the number of Commissioners and splitting the role of Chief Executive and Chair, there would be an additional recruitment cost that would be borne by the Commission. This comprises the recruitment of 4 Board Member posts every 3 years at £50,000 per appointment (to fulfil standard senior public appointments arrangements). This gives an annual cost of **£67,000** (50 x 1.33 on average).

£114,000 plus £67,000 gives a total planned cost of **£181,000** for the governance changes.

There would also be the annual cost of the salaries of the new Board Members, the support staff for them and the addition of the new Chair role. This is estimated at **£250,000** per annum, working on the assumption that contracts are for the same hours as existing non-executive Commissioners. These costs do not take into account any redundancy costs that may occur.

1.60 In order to work out the costs involved in the normal annual costs of the Tribunal (excluding set-up costs), the average number of cases has had to be estimated. Estimates of the potential number of cases per year vary from 35 to 2,500. We have taken the figure of 75 cases per annum as the best estimate available (excluding appeals relating to public collections certificates). That represents a 50% increase in the number of estimated cases provided when the draft Bill was published and reflects the expansion in the remit of the Tribunal since then. However, last year there were only 14 cases where individuals whose complaints against the Commission's decisions were not resolved by

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the Commission's own internal review process. This could well indicate that substantially fewer cases would be brought to the Tribunal.

- 1.61 In terms of the length of each case, there is little evidence to work upon. To date there have been two cases involving appeals against the Commission that have been taken to the High Court. One lasted three days while the other lasted three weeks, so there is no established time-scale for cases. Given the extraordinary nature of the latter case but remembering that it is expected that most appellants will choose to litigate in person, which is likely to take longer, we have estimated that cases will take on average between 3 and 7 sitting days each (excluding appeals relating to public collections certificates).

In terms of appeals relating to public collections certificates the number of appeals has been estimated as a percentage of the high and low level number of applications estimated by the Commission and provided for at Chapter 3. The resulting figures are as follows:

Low Level Assumptions –

1% of 4,000 applications go to appeal	40 appeals
2.5% of 4,000 applications have conditions attached = 100 cases	
Say 10% of 100 cases appeal against conditions	<u>10 appeals</u>
Total number of appeals	50 appeals

High Level Assumptions

1% of 7,000 applications go to appeal	70 appeals
5% of 7,000 applications have conditions attached = 350 cases	
Say 10% of 350 cases appeal against conditions	<u>35 appeals</u>
Total	105 appeals

It has been estimated that appeals in relation to public collections certificates would take on average 1 sitting day to consider, that is because they would involve relatively simple legal issues.

The resulting figures are therefore 75 cases at 3 - 7 sitting days each (excluding public collections certificates), resulting in 225 - 525 sitting days per annum and 50 to 105 cases at 1 sitting day each (public collections certificate appeals), resulting in 50 - 105 sitting days per annum. The total number of cases is therefore estimated at between 125 - 180 cases per annum with 275 - 630 sitting days per annum. The Department of Constitutional Affairs have estimated that the Tribunal would attract one-off costs of **£145,000** with continuing costs of between **£700,000 and £1.4m** per annum, dependent on case volume and complexity.

The Commission estimate that their total costs for processing appeals (excluding appeals relating to public collections certificates) would be **£300,000** per annum and the cost for processing appeals relating to public collections certificates would be between **£144,000 - £302,400**. That gives a total cost for the Commission of between **£444,000 and £602,400** per annum.

Impact on Small Business

- 1.62 As outlined in Chapter 1 the overall impact on small businesses as a result of the Bill is expected to be minimal.

Issues of Equity and Fairness

- 1.63 A Race Equality Impact Assessment has been provided as Annex A to this Chapter and is summarised below.

Background

- 1.64 The National Council for Voluntary Organisations (NCVO) reported that while black and minority ethnic (BME) voluntary organisations had operated in Britain for over four decades, and despite the systematic problems affecting black and minority ethnic communities, knowledge of the sector remained largely scarce. For example, there was a lack of accurate data regarding the actual size, geographical distribution, core functions, and economic dimensions of BME organisations¹. The Commission's classification system for charities does not use definitions that enable it to produce an accurate figure for the number of BME charities on its register. Searches of the register can be carried out by charity name or objects but neither would be a reliable way of identifying the size of the BME sector. For example, it is not possible to devise reliable criteria for a search by name, and legislation means that a beneficial class cannot be defined by colour.
- 1.65 Notwithstanding the above, the Council of Ethnic Minority Voluntary Sector Organisations (CEMVO) operates a national database comprising of around 10,000 BME voluntary organisations and has carried out a mapping exercise. The analysis was based on around 8,000 organisations for which data was available. They found that, like the charitable sector as a whole, most BME organisations are small with incomes of less than £10,000 per annum. They also found that faith groups made up 17% of the BME sector and that 39.6% of organisations in the BME sector benefit people from a wide range of BME communities².
- 1.66 Not all BME organisations are small, the Commission noted that many of its faith based groups are most often medium or large. The role of religion in BME communities has meant that fast growing churches, most mosques and temples are medium-sized charities and at the top end some might move into the category of large charities³.

¹ NCVO "The UK Voluntary Sector Almanac 2004".

² NCVO "The UK Voluntary Sector Almanac 2004".

³ Medium charities are defined as having annual incomes between £10,000 and £1million per annum and large charities are defined as having incomes above £1 million per annum.

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Methodology

- 1.67 The Strategy Unit proposals were subject to extensive consultation, with over 50 consultation events held throughout the country with the aim of attracting responses from as diverse a respondent group as possible. Consultation events were held in inner city areas, such as Stratford in East London, in order to engage specifically with representatives from the BME sector.
- 1.68 Seven BME organisations responded to the Strategy Unit review and in general they were supportive of it. One umbrella body commented that a Charities Bill would ensure that charity law was effective in responding to the needs of a diverse, dynamic and changing voluntary sector. While the number of respondents from the BME sector was disappointing, four of those respondents were umbrella bodies which represent large numbers of small BME organisations.

Assessment

- 1.69 The overall impact of the changes to charity law would have a positive application for the charitable sector as a whole, including the BME sector. For example, the establishment of the Tribunal would provide a cost effective means of challenging the decisions of the Commission. It is currently open for all organisations to challenge the Commission's decisions via the Commission's own Decision Review process in the first instance and that will remain the case after the Charities Bill. The Bill also contains a number of provisions to facilitate the efficient and effective running of charities, such as the provisions relating to mergers and the remuneration of trustees when providing a service to a charity.
- 1.70 However, during the consultation process the Government has become aware of specific concerns among the BME sector about certain provisions in the Bill. The areas of concern identified are:
- ◆ the list of charitable purposes;
 - ◆ the removal of the presumption of public benefit for charities for the advancement of religion; and
 - ◆ the removal of the presumption of public benefit for charities for the advancement of education.
- 1.71 The Home Office also identified the provisions relating to the registration threshold for small charities as a matter which might impact on the BME sector. As outlined above, a large majority of BME organisations, like the charitable sector as a whole, have incomes below £10,000 per annum.

Charitable Purposes

- 1.72 In their comments on the draft Charities Bill the Commission for Racial Equality (CRE) suggested that racial equality ideals should be included

in the new list of charitable purposes⁴. Supporters of the inclusion of promoting racial equality and harmony in the list of charitable purposes argue that the BME sector plays a significant role in addressing discrimination and disadvantage in society and in building cohesive communities. That role is one of increasing importance and the BME sector have a key role to play as partners in Government initiatives⁵.

- 1.73 However, the Commission's on-going review of the register has recognised and developed equality and diversity as a charitable purpose in its own right and has registered charities furthering that purpose in a number of ways. The Commission recognised the promotion of racial harmony as a charitable purpose in 1983.
- 1.74 Of course, not all BME organisations would have the charitable purposes of promoting racial equality or racial harmony. For example, many of the BME faith based organisations might have the charitable purpose of the advancement of religion. The Commission has examined the issue of whether BME groups experience difficulties and delays in the registration process. The High Priority Section of its Race Equality Scheme considered the information provided by a limited study that was undertaken to look at this issue. The study did not find any evidence to suggest that BME organisations experienced additional difficulties and delays at the time of registration to those experienced by other organisations. However, the Commission has undertaken to re-consider this matter and has been tracking a sample of BME cases to assess how their treatment compares with other cases, that has included tracking a sample that had been rejected for registration. The Commission are also in the process of revising their application pack to include new guidance on promoting diversity within trustee bodies.
- 1.75 While the list of charitable purposes provided by the draft Charities Bill would not have excluded any purposes that are currently charitable, including the promotion of racial equality and harmony, the Government recognises that there would be benefits to including it explicitly in the list. For example, it might encourage BME organisations that are charitable to register with the Commission. Across CEMVO's database of 10,000 BME voluntary organisations, less than 14% are registered charities. Some of that might be explained by the fact that they are small organisations or that they are not charitable⁶ but it might also be because they are unaware of the charitable nature of the work they undertake. Once registered the Commission's advice giving role would be more formalised for those charities. The Commission's advice and guidance helps charities to operate in accordance with charity law and standards of best practice.

⁴ The Commission for Racial Equality's response to the Joint Committee's call for evidence on the draft Charities Bill.

⁵ The Council of Ethnic Minority Voluntary Sector Organisations's response to the Strategy Unit review (paraphrased).

⁶ NCVO "The UK Voluntary Sector Almanac 2004"

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Registered charities also receive regular newsletters from the Commission which would increase their awareness of developments in the wider charity sector.

- 1.76 The Government also recognises that since the Race Relations Amendment Act 2000 came into force it has a duty to promote good race relations between persons of different racial groups. The specific inclusion of the promotion of racial equality and racial harmony in the list of charitable purposes would no doubt promote those areas of charitable endeavour. As a result, the list of charitable purposes has been amended to include the promotion of religious or racial harmony or equality and diversity.

Public Benefit

- 1.77 The Charities Bill does not provide for a statutory definition of public benefit. Currently there is a non-statutory definition of public benefit, which is based on case law. Case law provides a number of principles on what counts as public benefit. The advantage of that is that it takes account of the huge diversity of the sector and has the flexibility to evolve over time. The disadvantage of that is that testing the principles of public benefit in court is costly and the outcome uncertain. An alternative would be to have a statutory definition so that public benefit was defined in law. However, trying to define public benefit in law in a way which would be meaningful across the sector, would not be straight forward and removing all references to case law would create uncertainty. A statutory definition, set at a moment in time, would be unlikely to have the flexibility of the case law approach which has been able to evolve overtime as society's view on what is public benefit has developed. Only 2% of the 489 respondents who commented on this recommendation supported a statutory definition of public benefit.
- 1.78 However, the CRE are concerned that a non-statutory definition of public benefit would leave the definition of public benefit to the Commission and ultimately the courts, on the basis of the law as it stands. They pointed out that case law is scarce and that it might cause uncertainty for those charities for the relief of poverty, the advancement of religion and the advancement of education that had previously been presumed to be for the public benefit.
- 1.79 The Government believes that public benefit should remain at the heart of the definition of charity and that the presumption of public benefit for charities for the relief of poverty, the advancement of religion and the advancement of education should be removed. The Government is aware of the concerns of the BME sector but believes that a statutory definition would not be meaningful given the scope and wide diversity of the sector. A statutory definition might also be detrimental to groups, like those established within the BME sector.

- 1.80 A non-statutory definition has the flexibility to ensure that the definition of public benefit could evolve as society's concept of public benefit changes. For example, the Commission has recognised the promotion of racial harmony as being for the public benefit when it had previously been considered to be political.
- 1.81 However, if an organisation could not show that it delivers sufficient public benefit it would not be a charity. Some organisations would be able to clearly show public benefit, some might be able to adapt their activities so that they are charitable and provide public benefit, but others might just not be able to deliver sufficient public benefit and so would not be charitable.
- 1.82 The Commission intends to revise its publication RR8, 'The Public Character of Charities' which provides an explanation of what public benefit means in general, including the criteria which affect it. That revised version would be subject to consultation in order to make sure that the explanation was clear. That publication is available from the Commission's website at www.charitycommission.gov.uk.
- 1.83 The Commission recognises that while all charities would be subject to public benefit checks, charities cover a diverse range of activities. Because of that, different criteria would apply to different charities in different ways. The Commission would need to develop an understanding of what different charities do and what public benefit means to them. After it has revised its guidance, the Commission intends to start looking at how the particular criteria for public benefit checks might affect different groups of charities in different ways.
- 1.84 The Government firmly believes that public benefit should be at the heart of the definition of charity. It does not believe that any organisation should be presumed to be for the public benefit without having to show what benefits it provides. The Bill places a statutory requirement on the Commission as the independent regulator to issue guidance in relation to its public benefit objective. In that way the public benefit principles would be stated in guidance which explains the law and is issued under statutory authority but is not itself part of the law. That would provide for maximum flexibility for the law to develop in response to changes in society and it allows for all, rather than just some, of the public benefit principles to be set out and explained.

General Registration Threshold

- 1.85 In their joint submission to the Joint Committee, the Fellowship of Independent Evangelical Churches Limited, the Association of Grace Baptist Churches Limited, the Grace Baptist Trust Corporation and an Evangelical Fellowship of Congregational Churches suggested that while the increase to £5,000 was welcome they considered that it was too low. They argued that there are a number of very small churches which would have an income below £5,000 but there are others that would exceed that figure. They are concerned that the requirements of

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registration might force these small churches into closing as those running the churches would not want to accept the responsibilities of trusteeship. Given that 17% of BME organisations are faith related it follows that a number of small churches catering for the black and ethnic minorities would also fall into this category. Notwithstanding that, the Commission's dealing with the BME faith community suggests that the smaller poorer churches are often white organisations whereas the BME and independent sectors are growing.

- 1.86 In raising the general registration threshold from £1,000 to £5,000 and allowing voluntary registration below that level the Government has responded to the concerns of the overwhelming majority of small charities that responded to the Strategy Unit review. Increasing the threshold to £5,000 rather than £10,000 dealt in part with concerns that a rise to £10,000 would have a negative impact on the transparency and accountability of the sector. A rise to £10,000 would have removed the requirement to register from over 100,000 charities. Whether registered or not, however, the people responsible for the running of those churches are already the charity trustees, the issue of registration would make no difference to that. Trusteeship does not flow from registration, it flows from the roles and responsibilities undertaken.
- 1.87 Increasing the general registration threshold to £5,000 per annum would benefit **all** small charities with incomes between £1,000 to £5,000 per annum (apart from the currently exempt and excepted charities that would be subject to a higher interim registration threshold of £100,000 per annum). The position of those charities with incomes between £5,000 and £10,000 per annum would remain unchanged, they would continue to be required to register with the Commission, as they are now.

Monitoring

- 1.88 The points considered in the Race Equality Impact Assessment attached to this document will be considered by the Commission when it reaches a final decision on the issues to be covered in the Commission's BME focussed survey on key issues.
- 1.89 The Commission has begun to track the registration process for (self classified) BME organisations and will continue to do so. Lessons learned from that are noted for inclusion in internal and external guidance. The Commission are also targeting BME organisations in its recruitment for its customer service network so that it reflects as far as is possible the diversity of all the Commission's customers.

Conclusion

- 1.90 The aim of the Charities Bill is to provide a modern legal framework which will support and encourage a vibrant and diverse voluntary

sector. The measures tend to be permissive rather than restrictive and in that way they would have a positive impact on the voluntary and community sector as a whole, including the BME sector. The Government is alive to the concerns of the BME sector and to its obligations under the Race Relations Act 2000 and for that reason it has included the promotion of religious or racial harmony or equality and diversity in the list of charitable purposes.

- 1.91 The Government firmly believes, however, that public benefit should remain at the heart of the definition of charity and while it recognises that there are concerns about that in the BME sector, it does not believe that any organisations should be presumed to be for the public benefit. The responses to the Strategy Unit review demonstrated overwhelming support for that position.
- 1.92 The Government recognises that it has a duty to promote good race relations and believes that the package of measures contained in the Bill would enable charities set up for that purpose to thrive. For example, it would provide for a new legal form for charity, the CIO, and it would provide a package of measures to make mergers easier.

Results of Consultation

- 1.93 The consultation produced responses on all the measures described above. Every measure that has been accepted unaltered, attracted significant support.

The measure on trading received support with 84% of the 297 respondents who commented on it, in favour of it to some extent. On the small charities registration threshold 95% of the small charities who responded were opposed to the measure, though many respondents did not have a full understanding of the recommendations and how they would affect small charities. On the definition of charity, there was considerable support for 3 new categories: promotion of animal welfare, provision of social housing and advancement of science, each of which has been included in the Bill. The Joint Committee also noted support for the inclusion of additional purposes, which have also been included. There was no consensus for removing any of the categories proposed, though single-figure numbers of respondents suggested removing charitable status from: religious organisations, independent schools and 'poor relations' charities. Roughly a third of respondents to the recommendation on the payment of trustees measure opposed it. A full range of opinions were represented in both support and opposition, from those who advocated a wide general power for charity trustees to be paid to those who believed that no charity trustee should ever be paid.

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Summary and recommendation

Option	Benefits	Costs
1. Leave the relevant legislation unchanged	<ul style="list-style-type: none"> ▪ There would be no additional costs. ▪ Charities are familiar with the operation of the current legislation, even though in some areas it might be outdated and complex. 	<ul style="list-style-type: none"> ▪ The charitable sector would not have a modern legal and regulatory framework for the sector.
2. Implement all of the recommendations set out in the Strategy Unit review 'Private Action, Public Benefit.'	<ul style="list-style-type: none"> ▪ Increasing the audit threshold to £1 million and allowing charities to trade within the charity without the need for a separate trading company would ease the burdens currently placed on charities. Although there are risks associated with that. ▪ Raising the registration threshold to £10,000 would ease the burden on small charities. 	<ul style="list-style-type: none"> ▪ Same as for option 3 – largely negligible actual additional costs. ▪ During the consultation period some of the proposals met with strong opposition or requests for modification. Continuing with those proposals unchanged might lead to resentment that strongly expressed public views were being ignored. ▪ The proposal enabling charities to undertake trading within the charity without the need for a separate trading company risks offending the principle of there being a level playing field with private sector businesses. ▪ Roughly one third of the 128 respondents who commented on raising the audit threshold felt that raising the threshold to £1million would lead to greater risk of abuse by medium-sized charities due to the lack of rigorous scrutiny. ▪ Over 95% of small charities who commented on the proposal to raise the registration threshold to £10,000 were opposed to it.
3. Implement the Strategy Unit proposals accepted by the Government and set out in "Charities and Not-for-Profits: A Modern Legal Framework" as amended by the Government's response to the Joint Committee's report.	<ul style="list-style-type: none"> ▪ It would meet the objective of providing a modern fit-for-purpose framework with only a few identifiable risks. For example, measures to facilitate mergers. ▪ Increasing the audit threshold to £500,000 rather than to £1million will have less of a de-regulatory effect on the medium-sized charities but it would reduce the risk of abuse, which might occur if the threshold rose to £1million. ▪ The extension of the list of charitable purposes would provide for the specific inclusion in the list of those purposes that have strong public recognition. 	<ul style="list-style-type: none"> ▪ Businesses involved in promotional ventures with charities might have concerns about the specific statement of return. They might be concerned about revealing information which might be commercially sensitive. However, that risk is considered to be low. ▪ Professional fundraising organisations might suffer as a result of the statement of return if potential donors conclude that too much of their donation is going to the fundraisers rather than the charity. ▪ Cost of the governance changes to the Commission have been estimated at continuing annual costs of £181,000 per annum and the annual staffing costs in terms of

	<p>It would help to align the legal definition of charity with the public understanding of what is charitable.</p> <ul style="list-style-type: none"> ▪ Raising the registration threshold to £5,000 only, and allowing charities to register voluntarily below that threshold, would ease the burdens placed on the smallest charities while at the same time enabling them to register if they wished to do so. ▪ The Tribunal would provide a costs effective mechanism of challenging decisions of the Commission. 	<p>salaries for the new Board Members, their support staff and the Chief Executive post have been estimated at £250,000 per annum.</p> <ul style="list-style-type: none"> ▪ The estimated costs to the Government of the Tribunal are estimated as one-off costs of £145,000 with continuing annual costs of between £700,000 and £1.4m per annum dependent on volumes and complexity. ▪ The Commission estimate that their total costs for processing appeals would be between £444,000 and £602,400 per annum
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1.94 Our clear preference is for Option 3. It will deliver our objectives and maintain an appropriate balance between empowering the sector while providing the right degree of transparency and accountability.

RACE EQUALITY IMPACT ASSESSMENT

Background

The Charities Bill

1. The Charities Bill was published in draft on 27 May 2004 and it set out for consultation a number of provisions to change the legal and regulatory framework for the charitable and wider not-for-profit sector.

2. The Cabinet Office Strategy Unit report 'Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector' (September 2002) made a number of recommendations for changes to the legal and regulatory framework for the charitable and wider not-for-profit sector. The responses to the public consultation on this report, which ran from September 2002 to December 2002, demonstrated considerable support for many of the proposals. The Government's response to the Strategy Unit report, 'Charities and Not-For-Profits: A Modern Legal Framework', which took account of the responses to the consultation, was published on 16 July 2003. The proposals, with very few exceptions, were accepted by the Government and those requiring legislation form the basis of the Bill. The Charities Bill was published in draft on 27 May 2004 and has been subject to pre-legislative scrutiny by a Joint Committee of both Houses. On 30 September the Committee published a report of its recommendations for changes to the draft Bill, the majority of which have been accepted by Government.

3. It has been over a decade since charity law was last reformed and many aspects of current legislation are considerably older in origin. The Charities Bill has been drafted in the light of the responses to the Strategy Unit review and aims to promote a dynamic and vibrant voluntary sector which continues to enjoy the high levels of public confidence upon which the sector depends. As there are a number of charitable organisations targeted at the black and minority ethnic community, improvements in the legal framework for the sector would benefit them.

The Black and Minority Ethnic (BME) voluntary sector in the UK

4. The origins of many BME organisations in Britain are to be found in large-scale immigration from the Caribbean and Asian Subcontinent during the 1950s and 1960s. The arrival of numbers of non-European, non-English speaking peoples on the outskirts of metropolitan areas placed a considerable strain on mainstream social provision. The often inadequate response to the needs of the new arrivals gave way to the development of community-based associations and local BME self-help groups across the country. Since then many of those organisations have evolved to cover larger areas of service provision, such as education and immigration. Research suggests that BME voluntary organisations have performed four major functions: overcoming

social isolation; affirming values and beliefs; carrying out social and pastoral work; and acting as quasi-unions defending the interests of their members⁷.

5. The National Council for Voluntary Organisations (NCVO) reported that while BME voluntary organisations had operated in Britain for over four decades, and despite the systematic problems affecting black and minority ethnic communities, knowledge of the sector remained largely scarce. For example, there was a lack of accurate data regarding the actual size, geographical distribution, core functions, and economic dimensions of BME organisations⁸. The Charity Commission's (the Commission) classification system for charities does not use definitions that enable it to produce an accurate figure or the number of BME charities on its register. Searches of the register can be carried out by charity name or objects but neither would be a reliable way of identifying the size of the BME sector. For example, it is not possible to devise reliable criteria for a search by name, and legislation means that a beneficial class cannot be defined by colour.

6. Notwithstanding the above, the Council of Ethnic Minority Voluntary Sector Organisations (CEMVO) operates a national database comprising of around 10,000 BME voluntary organisations and has carried out a mapping exercise. The analysis was based on around 8,000 organisations for which data was available. They found that, like the charitable sector as a whole, most BME organisations are small with incomes of less than £10,000 per annum. They also found that faith groups made up 17% of the BME sector and that 39.6% of organisations in the BME sector benefit people from a wide range of BME communities⁹.

7. Not all BME organisations are small, the Commission noted that many of its faith based groups are most often medium or large. The role of religion in BME communities has meant that fast growing churches, most mosques and temples are medium-sized charities and at the top end some might move into the category of large charities¹⁰.

The Charity Commission

8. The Commission is the non-ministerial government department responsible under the Charities Act 1993 for the registration, support and supervision of charities in England and Wales. It has considerable powers of investigation and intervention.

9. The Race Relations (Amendment) Act 2000 strengthens the 1976 Race Relations Act and establishes a statutory requirement for all public bodies to set out how they will outlaw race discrimination in all their functions (as an employer a policy maker and service provider). Since May 2002 public bodies

⁷ NCVO "The UK Voluntary Sector Almanac 2004"

⁸ NCVO "The UK Voluntary Sector Almanac 2004".

⁹ NCVO "The UK Voluntary Sector Almanac 2004".

¹⁰ Medium charities are defined as having annual incomes between £10,000 and £1million per annum and large charities are defined as having incomes above £1 million per annum.

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such as the Commission are required to produce a race equality scheme. A public body needs to set out actions plans each year and substantially review every three years. A race equality scheme must identify the way a public body will work towards the elimination of all forms of race discrimination, seeks to promote equality of opportunity and seeks to promote good relations between persons of different racial groups. The Commission's Race Equality Scheme is its action plan for setting out its key functions and priorities for working towards race equality in the way it carries out its work.

Methodology

10. The Strategy Unit proposals were subject to extensive consultation, with over 50 consultation events held throughout the country with the aim of attracting responses from as diverse a respondent group as possible. Consultation events were held in inner city areas, such as Stratford in East London, in order to engage specifically with representatives from the BME sector.

11. Seven BME organisations responded to the Strategy Unit review and in general they were supportive of it. One umbrella body commented that a Charities Bill would ensure that charity law was effective in responding to the needs of a diverse, dynamic and changing voluntary sector. While the number of respondents from the BME sector was disappointing, four of those respondents were umbrella bodies which represent large numbers of small BME organisations.

Assessment of Impact

12. The overall impact of the changes to charity law would have a positive application for the charitable sector as a whole, for example, the establishment of the charity appeal tribunal would provide a cost effective means of challenging the decisions of the Commission. It is currently open for all organisations to challenge the Commission's decisions via the Commission's own Decision Review process in the first instance and that would remain the case after the Charities Bill. There is no evidence to suggest that BME organisations are deterred from using the Decision Review process where they are dissatisfied. However, the Commission does not carry out any specifically BME focussed monitoring here, although it does carry out some general monitoring and would be developing new ways of obtaining feedback on the Review process.

13. The introduction of a charity appeal tribunal would especially benefit smaller local community organisations (including those with incomes under £5,000 per annum) that might have been deterred from appealing against a Commission decision due to the cost of progressing a case to the High Court. The recommendation relating to the introduction of the charity appeal tribunal received strong support with 92% of the 120 respondents who commented, in favour of it. Three respondents from the BME sector specifically commented on the recommendation in relation to the tribunal, and they were all supportive of it. A solicitor who represented BME organisations commented that the

tribunal would be of benefit to BME organisations in challenging the Commission's decisions

14. The Bill also contains a number of provisions to facilitate the efficient and effective running of charities, such as the provisions relating to mergers and the remuneration of trustees when providing a service to a charity, which would benefit the charitable sector as a whole, including the BME sector. Measures to facilitate mergers might particularly benefit smaller organisations that might wish to merge in order to save resources and or because they have found joint working to be of benefit. Respondents from the BME sector also generally supported the provision of a new legal form for charities, the Charitable Incorporated Organisation (CIO). The Government recognises that the company form is popular with many charities, but that ambiguity over areas of overlap and the differing requirements between company and charity law meant that trustees were often confused about their obligations. The CIO would be an incorporated legal form specifically tailored to charities and would remove the difficulties outlined above.

15. Not all of the Strategy Unit's recommendations required legislation and some are being taken forward administratively by the Commission. For example, the Strategy Unit highlighted the benefits to be had if charities are encouraged, rather than restricted, from playing an advocacy and campaigning role. Charities' strong links into local communities, the high levels of public trust and confidence they command, and the diversity of causes they represent all mean that they are well placed to carry out this role. The report recommended that the Commission's guidance on political campaigning should reflect those benefits, by placing a greater emphasis on the campaigning activities that charities can undertake, as opposed to the restrictions. The Commission accepted that recommendation and in September 2004, following consultation with the sector, it published its revised guidance on campaigning. Given the activities typically undertaken by the BME sector (paragraph 4) changes to the Commission's guidance on campaigning would be of benefit to the sector. One BME Information and Advice Centre specifically welcomed the proposal.

16. However, during the consultation process the Government has become aware of specific concerns among the BME sector about certain provisions in the Bill. Those concerns related to:

- ◆ the list of charitable purposes;
- ◆ the removal of the presumption of public benefit for charities for the advancement of religion; and
- ◆ the removal of the presumption of public benefit for charities for the advancement of education.

17. The Home Office also identified that the provisions relating to the registration threshold for small charities as a matter which might impact on the BME sector. As outlined above, a large majority of BME organisations, like the charitable sector as a whole, have incomes below £10,000 per annum.

Charitable Purposes

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Wider context

18. The Strategy Unit found that the current law was confusing and unclear and that the four heads of charity do not accurately reflect the range of organisations which are, or should be, charitable today. They recommended that a new statutory definition, comprising of ten purposes of charity, should be introduced. The Government provided for an extended list of twelve charitable purposes in the Charities Bill. It believes that the new heads of charity cover the main areas of charitable endeavour undertaken today, while ensuring a degree of flexibility to allow new organisations to become charitable as society's understanding of what is beneficial to the community develops. The list of charitable purposes was not designed to be an exhaustive list, the purposes are framed in general wording around which case law could continue to develop.

Provisions

19. Clause 2 of the Charities Bill 'Meaning of "charitable purpose"' provides for a new list of charitable purposes, comprised as follows:

- the prevention or relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health or the saving of lives;
- the advancement of citizenship or community development;
- the advancement of the arts, culture, heritage or science;
- the advancement of amateur sport;
- the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- the advancement of environmental protection or improvement;
- the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- the advancement of animal welfare;
- any other purposes within subsection (4) of clause 2 of the Bill.

Impact

20. In their comments on the draft Bill the Commission for Racial Equality (CRE) suggested that racial equality ideals should be included in the new list of charitable purposes¹¹. While the draft Charities Bill did not include a purpose specifically for promoting race equality, the Government has amended the list so that it specifically includes the promotion of religious or racial harmony or equality and diversity.

21. Supporters of the inclusion of promoting racial equality and harmony in the list of charitable purposes argue that the BME sector plays a significant role in addressing discrimination and disadvantage in society and in building cohesive communities. That role is one of increasing importance and the

¹¹ The Commission for Racial Equality's response to the Joint Committee's call for evidence on the draft Charities Bill.

BME sector have a key role to play as partners in Government initiatives¹². The inclusion of promoting racial equality would sit well with the CRE's advocacy of the advancement of an integrated society through the promotion of good race relations / community matters. The CRE pointed out that the promotion of good race relations between persons of different racial groups has been a public duty since the Race Relations Amendment Act 2000 came into force¹³.

22. The Commission's on-going review of the register has recognised and developed equality and diversity as a charitable purpose in its own right and has registered charities furthering that purpose in a number of ways. For example, in June 2003 the Commission registered the North East Centre for Diversity and Racial Equality, which promotes equality and diversity by working towards the elimination of racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. The Commission recognised the promotion of racial harmony as a charitable purpose in 1983.

Consultation

23. 489 respondents commented on the Strategy Unit recommendations in relation to the definition of charity. Of those respondents only five commented that they would like to see the inclusion of either promoting racial equality or the tackling of discrimination as a specific charitable purpose. A further respondent suggested that the list should include either the "prevention of social exclusion" or "the advancement of social inclusion".

24. Three respondents expanded on their reasons for that. One suggested that there was anecdotal evidence that BME organisations found registration with the Commission difficult. They argued that the inclusion of the promotion of racial harmony would make registration for organisations working with excluded communities easier and that it would send a strong and positive message to all sections of the community. Another argued that its inclusion would ensure the importance attached to the BME sector in eliminating social exclusion and promoting social cohesion was underpinned and enforced. The third felt that its inclusion would lead to greater clarity.

Assessment

25. Of course not all BME organisations would have the charitable purposes of promoting racial equality or racial harmony. For example, many of the BME faith based organisations might have the charitable purpose of the advancement of religion. The Commission has examined the issue of whether BME groups experience difficulties and delays in the registration process. The High Priority Section of its Race Equality Scheme considered the information provided by a limited study that was undertaken to look at this issue. The study did not find any evidence to suggest that BME organisations experienced additional difficulties and delays at the time of registration to

¹² The Council of Ethnic Minority Voluntary Sector Organisations's response to the Strategy Unit review (paraphrased).

¹³ The Commission for Racial Equality's response to the Joint Committee's call for evidence on the draft Charities Bill.

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those experienced by other organisations. However, the Commission has undertaken to re-consider this matter and has been tracking a sample of BME cases to assess how their treatment compares with other cases, that has included tracking a sample that had been rejected for registration. The Commission are also in the process of revising their application pack to include new guidance on promoting diversity within trustee bodies.

26. The Commission has begun tracking the registration process for (self classified) BME organisations. These cases are analysed and compared against, for example, average case times and for any specific trends and issues affecting such applications. Lessons learned are noted for inclusion in both internal and external guidance. The Commission will continue to do this on a quarterly basis. It has also conducted a (general – not BME specific) survey of the experience of small organisations that did not proceed to registration. This survey will be repeated on a larger scale.

27. The Commission suggest that where surveys have identified difficulties in the registration process for BME organisations the difficulties that have been identified are less to do with process and more to do with the suitability of the governing documents for faith groups. The Commission have dealt with a steady flow of difficult cases (which have arisen out of its wider case work) involving BME charities where the governing document did not accurately reflect what they do or how they operate. Difficulties with a governing document could lead to significant breaches of a charity's own rules and at worst intractable disputes among the trustee body. The Commission are currently investing time and effort into developing a model governing document for independent churches. They have encountered language difficulties in terms of words and meanings, for example "elders" rather than "trustees" as well as cultural difficulties such as the provisions relating to voting, for example, in many of the faith charities there might be members but they do not vote. The Commission also produces a great deal of guidance for charities more generally on governing documents, including a number of standard governing documents for charities to use.

28. When the Commission has completed its work with the independent churches they intend to move onto other faith groups and have already started to work with Islamic charities.

29. Notwithstanding the difficulties highlighted above, it is unlikely that the inclusion of the promotion of racial equality or racial diversity as a charitable purpose would have any impact on the treatment of organisations set up for those purposes at the point of registration. The Commission have for a number of years recognised the promotion of religious or racial harmony and the promotion of equality and diversity as charitable purposes, falling under the current fourth head of charity - other purposes beneficial to the community¹⁴. That being so, in general the Commission are prepared to accept that promoting good race relations, endeavouring to eliminate discrimination on

¹⁴ Charity Commission website www.charitycommission.gov.uk "Promotion of Equality and Diversity for the Benefit of the Public".

the grounds of race and encouraging equality of opportunity between persons of different racial groups as charitable objects ¹⁵.

30. Charities with those objects are required to demonstrate that they operate for the public benefit and that position would not be affected by the Charities Bill. They would be required to demonstrate that they operate for the public benefit even if the promotion of racial equality and harmony was specifically included in the list of charitable purposes.

31. Consideration was given to the specific inclusion of promoting racial equality in the list of charitable purposes, even though it has long been recognised by the Commission as a legitimate charitable purpose. While the list of charitable purposes provided by the draft Charities Bill would not have excluded any purposes that are currently charitable, including the promotion of racial equality and harmony, the Government recognises that there would be benefits to including it explicitly in the list. For example, it might encourage BME organisations that are charitable to register with the Commission. Across CEMVO's database of 10,000 BME voluntary organisations less than 14% are registered charities. Some of that might be explained by the fact that they are small organisations or that they are not charitable ¹⁶ but it might also be because they are unaware of the charitable nature of the work they undertake. Once registered the Commission's advice giving role would be more formalised for those charities. The Commission's advice and guidance helps charities to operate in accordance with charity law and standards of best practice. Registered charities also receive regular newsletters from the Commission which would increase their awareness of developments in the wider charity sector.

32. The Government also recognises that since the Race Relations Amendment Act 2000 came into force it has a duty to promote good race relations between persons of different racial groups. The specific inclusion of the promotion of racial equality and racial harmony in the list of charitable purposes would no doubt promote those areas of charitable endeavour.

Monitoring

33. In addition to the measures described at paragraphs 24 and 25 above, the Commission are also targeting BME organisations in its recruitment for the customer service network. That would ensure that the customer service network reflects as far as is possible the diversity of all the Commission's customers. The customer service network is designed to provide an opportunity for feedback and suggestions on a wider range of Commission policy and procedures to help the Commission develop services to meet customer needs.

Recommendation

34. The Government does not believe that there would be a material benefit for charities established to promote religious or racial harmony or

¹⁵ Hubert Picarda "The Law and Practice Relating to Charities" (Third Edition) (Butterworths, 1999) Page 188.

¹⁶ NCVO "The UK Voluntary Sector Almanac 2004"

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equality and diversity by the specific inclusion of that purpose in the list of charitable purposes. That is because they have long been recognised by the Commission as legitimate charitable purposes. However, the Government recognises that there would be benefits to its inclusion in terms of promoting charities with those purposes and in encouraging BME voluntary sector organisations to consider whether they should be registered with the Commission. For that reason the Government has amended Clause 2 since the publication of the draft Bill so that the promotion of religious or racial harmony or equality and diversity would be included in the list of charitable purposes.

Public Benefit

Wider context

35. The Government believes that public benefit should remain at the heart of the definition of charity. The Charities Bill, therefore, provides that to qualify as charitable all organisations would have to show (1) that they have charitable objects and (2) that they are established for the public benefit. Currently charities concerned with the relief of poverty, the advancement of education and the advancement of religion are presumed to be for the public benefit.

36. The Government believes that it is for the regulator, the Commission, to decide whether on balance an organisation provides a net public benefit. That could involve making difficult judgements about both public benefit and public harm, but it makes sense for a regulator, independent of Government, rather than Government itself to do that job.

37. Following the Charities Bill the Commission intends to undertake a programme of checks on charities already on the Commission's register to establish whether they are providing public benefit and to offer guidance on that where appropriate. If the Commission found that individual charities were not delivering a public benefit it would take further action. That might include helping the charity change its activities so that it benefits enough of the community to show public benefit or to use its powers to enforce change. In extreme cases the Commission might take action to make a legal scheme to ensure that the assets of the organisation would in future be applied to other purposes close to any purposes that have ceased to be charitable¹⁷.

38. The Charities Bill does not provide for a statutory definition of public benefit. Currently there is a non-statutory definition of public benefit, which is based on case law. Case law provides a number of principles on what counts as public benefit. The Strategy Unit found that the advantage of the case law approach is that it takes account of the huge diversity of the sector and has the flexibility to evolve over time. The disadvantage is that testing the principles of public benefit in court is costly and the outcome uncertain. An alternative would be to have a statutory definition so that public benefit was

¹⁷ Charity Commission website at www.charitycommission.gov.uk "Public Benefit Checks - how will we carry them out?"

defined in law. However, the Strategy Unit concluded that trying to define public benefit in law in a way which would be meaningful across the sector would not be straight forward and that removing all references to case law would create uncertainty. A statutory definition, set at a moment in time, would be unlikely to have the flexibility of the case law approach which has been able to evolve overtime as society's view on what is public benefit has developed.

Provisions

39. Clause 3 'The "public benefit" test' provides that in order to be charitable an organisation must be for the public benefit and that no organisation would be presumed to be for the public benefit. Clause 3(3) clarifies that any reference to public benefit is a reference, as that term is understood for the purposes of the law relating to charities in England and Wales.

Impact

40. In their response to the draft Charities Bill the CRE expressed concern that a non-statutory definition of public benefit would leave the definition of public benefit to the Commission and ultimately the courts on the basis of the law as it stands. They point out that case law is scarce and decisions in existing cases might be challenged and overturned by the Commission or the courts. They suggest that it would cause uncertainty for existing charities whose charitable purpose falls within one of the first three heads of charity, that had previously been presumed to be for the public benefit. The CRE argued for a clear definition of public benefit.

41. They were concerned that the removal of the presumption of public benefit from the advancement of religion would act contrary to good race relations and that it would have a negative impact on minority faith communities. They were also concerned to ensure that any redefinition would safeguard smaller religious communities so as not to discourage diversity. In terms of the removal of the presumption of public benefit for charities for the advancement of education the CRE requested that consideration be given to the disproportionate impact that might have on independent faith schools.

42. It appears that concerns about the impact of the removal of the presumption of public benefit on minority faith communities and independent faith schools stems from a misunderstanding about the application of the current definition of public benefit. For example, in looking at public benefit the principle would be that the current common law tests would still apply as the Charities Bill does not provide for a redefinition of public benefit. In accordance with the common law, churches which celebrate religious celebrations in public confer public benefit. The fact that only a small section of the public attends that celebration would not alter that position.

43. Evidence suggests that for a number of years the presumption of public benefit has been of limited practical benefit to charities for the relief of poverty, the advancement of religion and the advancement of education. That is because, at the point of registration the Commission has examined the public

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benefit credentials of all applicants, without distinguishing between those pursuing purposes said to enjoy the presumption and those pursuing other purposes.

Consultation

44. Of the 489 respondents who commented on the Strategy Unit recommendations relating to the definition of charity one respondent was concerned that the removal of the presumption of public benefit from the advancement of religion might exclude certain BME religious organisations from obtaining charitable status. They pointed out that those organisations provide much needed culturally sensitive services that are of benefit to their constituents and respond to specific needs¹⁸.

45. In their response to the draft Charities Bill CEMVO further commented that they were concerned that the application of the public benefit test might exclude some BME religious organisations from obtaining charitable status. It appears that concerns like this centre on the need for charities to make provision for wider access. They argued that the specifics of the test and how it was to be applied would need to be carefully examined to ensure that it was not unintentionally exclusionary or discriminatory. In response to the Strategy Unit review two respondents expressed concern that the Commission had been unable to register an organisation because the beneficial class was too narrow and so the organisations were not charitable.

46. Only 2% of the 489 respondents who commented on this recommendation supported a statutory definition of public benefit.

Assessment

47. The Government believes that public benefit should remain at the heart of the definition of charity and that the presumption of public benefit for charities for the relief of poverty, the advancement of religion and the advancement of education should be removed. The Government is aware of the concerns of the BME sector but believes that a statutory definition would not be meaningful given the scope and wide diversity of the sector. A statutory definition might also be detrimental to groups, like those established within the BME sector.

48. A non-statutory definition would have the flexibility to ensure that the definition of public benefit could evolve as society's concept of public benefit changes. For example, the Commission has recognised the promotion of racial harmony as being for the public benefit when it had previously been considered to be a political activity. As a further example, in 1995 the Commission reviewed the application of the Recreational Charities Act 1958. The 1958 Act confirms that it is charitable to provide recreational facilities for people in need by reason of youth, age, infirmity or disablement, poverty or social and economic circumstances. It was not clear whether those categories might be further defined by reference to race, nationality, ethnic or national origins or religion. As a result of their review the Commission

¹⁸ The Council of Ethnic Minority Voluntary Organisation's response to the Strategy Unit review.

determined that, where they are satisfied that a special need exists, it would be charitable to set up a community association or other recreational organisation primarily for the use of some identifiable racial minority group¹⁹.

49. However, if an organisation could not show that it delivers sufficient public benefit it would not be a charity. Some organisations would be able to clearly show public benefit, some might be able to adapt their activities so that they are charitable and provide public benefit, but others might just not be able to deliver sufficient public benefit and so would not be charitable.

50. The Bill places a statutory requirement on the Commission as the independent regulator to issue guidance in relation to its public benefit objective. In that way the public benefit principles would be stated in guidance which explains the law and is issued under statutory authority but is not itself part of the law. That would provide for maximum flexibility for the law to develop in response to changes in society and it allows for all, rather than just some, of the public benefit principles to be set out and explained. In addition, the Commission intends to revise its publication RR8, 'The Public Character of Charities' which provides an explanation of what public benefit means in general, including the criteria which affect it. That revised version would be subject to consultation in order to make sure that the explanation was clear. That publication is available from the Commission's website at www.charitycommission.gov.uk.

51. The Commission recognises that while all charities would be subject to public benefit checks, charities cover a diverse range of activities. Because of that, different criteria would apply to different charities in different ways. The Commission would need to develop an understanding of what different charities do and what public benefit means to them. After they have revised publication RR8 they intend to start looking at how the particular criteria for public benefit checks might affect different groups of charities in different ways.

52. As a starting point the Commission intends to look at how different charities with different charitable purposes believe they meet the public benefit requirement. For each group of charities covered by the charitable headings in the Charities Bill the Commission intends to contact the main umbrella / representative bodies and ask for their views on how particular groups of charities might show public benefit²⁰.

53. The impact of the removal of the presumption of public benefit from charities for the advancement of education and the advancement of religion would be kept to a minimum. Charities have been asked for some years, at the point of registration, the same questions on public benefit whether or not they were presumed to be for the public benefit. The Government believes that public benefit should remain at the heart of the definition of charity and it

¹⁹ Charity Commission publications RR1a - Recognising New Charitable Purposes (www.charitycommission.gov.uk).

²⁰ Charity Commission publication "Public Benefit Checks - how will we carry them out?" (www.charitycommission.gov.uk).

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can see no principled justification for retaining the presumption of public benefit for charities for the relief of poverty, the advancement of education or the advancement of religion.

Monitoring

54. The impact of this on charitable status will be tracked via the measures described in paragraphs 24 and 25 and included in the detailed work the Commission will carry out on the issue of public benefit generally and public benefit tests in particular.

Recommendation

55. We do not recommend any change to the provision of this Clause as the Government firmly believes that public benefit should be at the heart of the definition of charity. It does not believe that any organisation should be presumed to be for the public benefit without having to show what benefits it provides.

General Registration Threshold

Wider context

56. Currently a charity is required to register with the Commission if they have an annual income of £1,000 or more, unless it is excepted or exempted from the requirement to register. Charities with an income of less than £1,000, but who hold a permanent endowment or who have use or occupation of land, must also register. Charities that are not required by law to register may do so voluntarily, unless they are exempt from the requirement to register and therefore prohibited from registering with the Commission. It has been estimated that 65.4% of BME organisations have incomes below £10,000 per annum ²¹, which is very close to the position of the charitable sector as a whole.

57. The Strategy Unit recommended that the compulsory registration threshold should be raised from £1,000 to £10,000 per annum and that the two criteria relating to permanent endowment and use / occupation of land should no longer apply. It also recommended that charities with incomes below £10,000 would no longer be able to register voluntarily with the Commission. The reason for that was because the Commission's active monitoring applies to charities with incomes above £10,000 per annum and so they concluded that a £10,000 threshold, which would involve ongoing monitoring, would be more meaningful.

58. 420 respondents commented on the recommendations relating to the registration threshold for small charities and there was clear majority opposition to them. In the light of the responses to the consultation exercise the Charities Bill provides for a rise in the registration threshold to £5,000 per annum with voluntarily registration allowed below that level. It would also remove the application of the criteria relating to permanent endowment and the use or occupation of land.

²¹ NCVO "The Voluntary Sector Almanac 2004" Page 184.

Provisions

59. Clause 7 of the Charities Bill provides for new section 3A "Registration of charities" to be inserted into the Charities Act 1993. It provides that any charity with an income below £5,000 would not be required to register with the Commission²².

Impact

60. In their joint submission to the Joint Committee, the Fellowship of Independent Evangelical Churches Limited, the Association of Grace Baptist Churches Limited, the Grace Baptist Trust Corporation and an Evangelical Fellowship of Congregational Churches suggested that while the increase to £5,000 was welcome they considered that it was too low. They argued that there are a number of very small churches which would have an income below £5,000 but there are others that would exceed that figure. They are concerned that the requirements of registration might force these small churches into closing as those running the churches would not want to accept the responsibilities of trusteeship. Given that 17% of BME organisations are faith related it follows that a number of small churches catering for the black and ethnic minorities would also fall into this category. Notwithstanding that, the Commission's dealing with the BME faith community suggests that the smaller poorer churches are often white organisations whereas the BME and independent sectors are growing. The Commission also report that their dealings with similar groups in the sector suggest that a number of individual churches are keen to register with them regardless of whether they are required to do so or not.

Consultation

61. Of the 168 small charities that commented on the Strategy Unit recommendations on the registration threshold, over 95% opposed it. Their opposition typically focused on one specific effect of the recommendations: that small charities which are below the threshold for compulsory registration would not be able to register voluntarily with the Commission. Respondents felt that the removal of their registered charity status would deprive small charities of much of their credibility with funders, the public, local authorities, banks, and other organisations. Respondents argued that removing the possibility of small charities registering would remove their credibility and, in some cases, jeopardise their existence. They saw the charity law compliance that follows after a charity is registered as far from onerous, and a small price to pay for the credibility that registration gives²³.

62. One umbrella body suggested that the proposal to raise the registration threshold to £10,000 per annum was warmly welcomed by smaller organisations in the BME sector but that it would be fairer to allow charities to register voluntarily below that level. A network of BME community

²² Schedule 6 to the Charities Bill provides for new part 8A of the Charities Act 1993 "CHARITABLE INCORPORATED ORGANISATIONS". New section 69A(3) provides that a charity which is not a registered charity may not be constituted as a CIO. In order to be a CIO, therefore, a charity would be required to be registered with the Commission, regardless of its income.

²³ Charities and Not-for-Profits: A Modern Legal Framework (Home Office 16 July 2003).

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organisations felt that the recommendation was useful but they were concerned about the role of the Inland Revenue in determining small charity status. While a third representative from the BME sector was concerned that raising the threshold would have a negative impact on the relatively small number of funders that provide assistance to black-led charities.

Assessment

63. In raising the general registration threshold from £1,000 to £5,000 and allowing voluntary registration below that level the Government has responded to the concerns of the overwhelming majority of small charities that responded to the Strategy Unit review. Increasing the threshold to £5,000 rather than £10,000 dealt in part with concerns that a rise to £10,000 would have a negative impact on the transparency and accountability of the sector. A rise to £10,000 would have removed the requirement to register from over 100,000 charities.

64. In their submission to the joint Committee the Fellowship of Independent Evangelical Alliance et al were unable to quantify the number of churches that might be affected by the increase in the threshold to £5,000 as opposed to £10,000. However, the churches with incomes below £5,000 would have the option of de-registering with the Commission and new churches would not be required to register until their incomes breached the £5,000 threshold.

65. It has been suggested that the people responsible for the running of those churches might not wish to take on the responsibility of trusteeship and so, if required to register with the Commission, the churches might be forced into closing. However, the people responsible for the running of those churches are already the charity trustees, the issue of registration would make no difference to that. Trusteeship does not flow from registration, it flows from the roles and responsibilities undertaken.

66. Increasing the general registration threshold to £5,000 per annum would benefit **all** small charities with incomes between £1,000 to £5,000 per annum (apart from the currently exempt and excepted charities that would be subject to a higher interim registration threshold of £100,000 per annum). The position of those charities with incomes between £5,000 and £10,000 per annum would remain unchanged, they would continue to be required to register with the Commission, as they are now.

Recommendation

67. We do not recommend any change to the provision of this Clause in the light of the above assessment.

Changes to the Charity Commission

68. The Charities Bill contains a number of provisions relating to the Commission as the regulator for charities in England and Wales. For example, the Charities Bill provides the Commission with clear strategic

objectives, setting out what it exists to achieve as regulator and to report its performance against its objectives in its annual report. It also increases the number of Commissioners from five to nine, with at least one Commissioner with knowledge of conditions in Wales.

69. While the changes to the Commission would have a direct impact on the Commission, they would also have a positive impact on the charitable sector. Two respondents from the BME sector specifically welcomed the changes to the Commission and felt that it would give it a clearer focus as regulator. They also felt that the increase in the number of Commissioners would ensure more diverse representation, which would benefit the BME sector.

Conclusion

70. The aim of the Charities Bill is to provide a modern legal framework which will support and encourage a vibrant and diverse voluntary sector. The measures tend to be permissive rather than restrictive and in that way they would have a positive impact on the voluntary and community sector as a whole, including the BME sector. The Government is alive to the concerns of the BME sector and to its obligations under the Race Relations Act 2000 and for that reason it has included the promotion of religious or racial harmony or equality and diversity in the list of charitable purposes.

71. The Government firmly believes, however, that public benefit should remain at the heart of the definition of charity and while it recognises that there are concerns about that in the sector it does not believe that any organisations should be presumed to be for the public benefit. The responses to the Strategy Unit review demonstrated overwhelming support for that position.

72. The Government recognises that it has a duty to promote good race relations and believes that the package of measures contained in the Bill would enable charities set up for that purpose to thrive. For example, it would provide for a new legal form for charity, the CIO, and it would provide a package of measures to make mergers easier. That might be particularly beneficial to BME organisations that typically have incomes below £10,000.

73. The points raised in this document will be considered by the Commission when it reaches a final decision on the issues to be covered in the Commission's BME focussed survey on key issues. As outlined in paragraphs 24 and 25 the Commission will continue to monitor the experience of BME organisations in their dealings with the Commission. The outcome of the on-going monitoring exercise might result in amendments to both the Commission's internal and external guidance, where appropriate.