

# CHARITIES ACT 2022

Essential guide



# Contents

3	Introduction
4	Overview
5	Part 1 – Purposes, Powers and Governing Documents
8	Part 2 – Charity Land
10	Part 3 – Charity Names
11	Part 4 – Charity Trustees
12	Part 5 – Charity Mergers
13	Part 6 – Legal Proceedings
14	Part 7 – General
15	Concluding remarks

Follow us and join our online discussion

 – Trowers & Hamlins

 – @trowers

 – @trowers\_law

# Introduction

Charity law is an area of law with a long and complicated history going back to the first charitable trusts established in the medieval period, prior to The Statute of Elizabeth in 1601 as the first formal charity legislation.

Although we now have the Charities Act 2011, which was intended to consolidate and simplify charity law, charity law remains a complex area with technical issues that can often trip up the unaware.

Given the technical nature of charity law, it is not an area that is easily reformed, and the Charities Act 2022 has been a long time in the making.

The Charities Act 2022 principally implements the recommendations that came out of the Law Commission's review of technical issues in charity law, published in 2017. That report in turn followed on from Lord Hodgson's review of the Charities Act 2006 (as it then was) carried out in 2012. The Charities Act 2022 received Royal Assent on 24th February 2022. Some of the changes will also require secondary legislation and it is anticipated that the changes will be implemented in a staggered manner over the next 12 to 18 months.

So, some of these changes to charity law have been under consideration for a decade. This is therefore a very significant development for the sector and charities and their trustees need to be aware of the changes being implemented.

We are committed to ensuring that our clients and all charities and trustees are up-to-date on charity law, and we have produced this essential guide to help everyone get to grips with the new law.



**Darren Hooker**

Senior Associate

+44 (0)20 7423 8360

dhooker@trowers.com

## Overview

Lord Hodgson's report on charity law initially ran to 160 pages. The Law Commission then made a total of 43 recommendations to the Government for approval. Of those, the Government accepted 36 of the recommendations and has now enacted this in the form of the Charities Act 2022.

The overall intention of the Charities Act 2022 is to simplify charity law and make it more streamlined and easier to navigate for charities. The Government estimates that this could deliver estimated cost savings of £28m for charities over a ten-year period.

In the following sections of this guide we have set out a detailed review of each of the parts of the Charities Act 2022. Some of the most notable changes are as follows:

- Providing consistency in approach in relation to the powers available to amend a governing document and the process to be followed in doing so.
- Simplification of the processes around cy-pres applications and the circumstances in which a donor should be treated as unknown or unidentified.
- Further relaxation of the rules around permanent endowment, allowing corporate charities to make use of a statutory power to release funds from the restriction, and for that power to be freely available for all permanent endowment funds up to a value of £25,000.
- Trustees to be given a statutory power to borrow funds from permanent endowment and to allow them to make social investments which may see a negative financial return.
- A new statutory power to allow trustees to make ex-gratia payments without requiring Charity Commission approval up to a specific level (set as a sliding scale on the basis of charity size). That power is able to be delegated rather than the decision having to be made by trustees themselves.
- Changes to the requirements relating to disposals by charities which allow more people (not just those that meet the strict definition of Qualified Surveyor) to provide the necessary advice.
- Changes to the rules on disposals to connected persons, so that short term leases to employees are not caught and would not require Charity Commission consent. However, disposals by charities to their subsidiaries would still be considered a disposal to a connected person.
- The statutory power for charities to remunerate trustees for the supply of services provided to the charity is extended to also cover goods provided to the charity.
- The Charity Commission is given a statutory power to require a charity to remunerate a trustee for equitable reasons.
- A lease with an absolute prohibition on assignment is excluded from a statutory vesting of assets by way of a vesting declaration.
- Amendment of the rules around the register of mergers which should remove the need for charities to maintain a shell entity to receive ongoing legacies.
- Trust corporation status to be automatically conferred on corporate trustees however they are appointed. Trust corporation status is important for corporate trustees to be able to deal with land and at the moment can only realistically be obtained by appointment by Charity Commission scheme.

# Part 1 – Purposes, Powers and Governing Documents

## Amending governing documents

One of the most important changes being introduced in the Charities Act 2022 is in relation to the ability of charities to amend their governing documents.

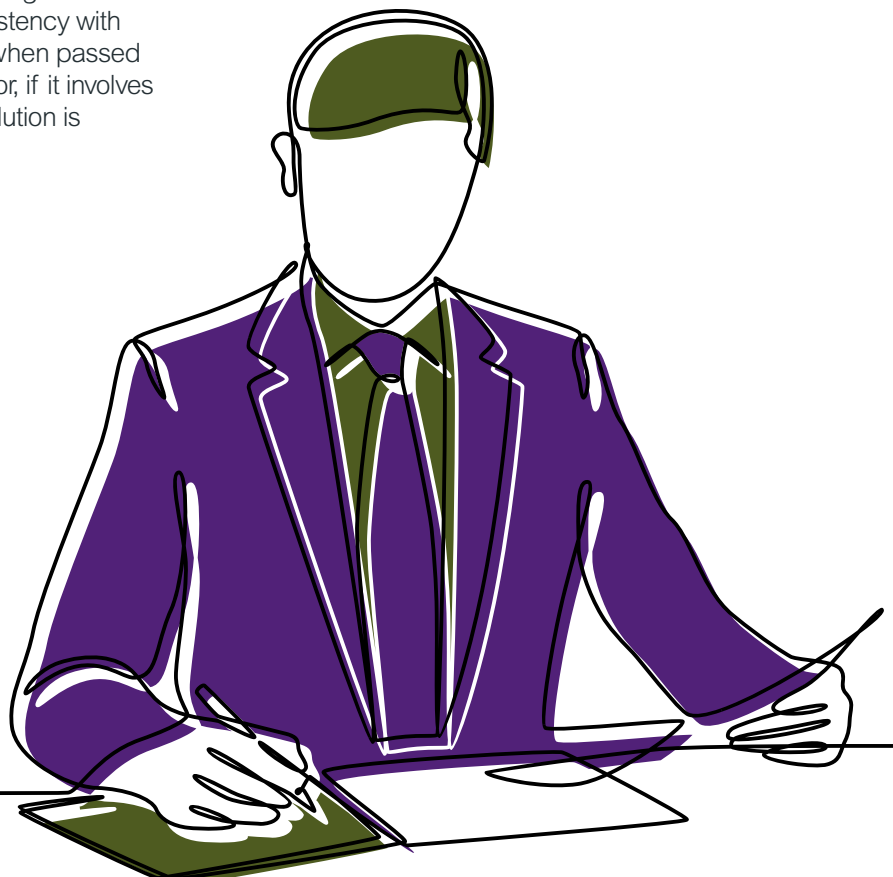
The stated intention of the Government was to reduce inconsistency across different charities by more closely aligning the ability of charities to amend their governing documents whether they are structured as unincorporated or incorporated charities.

The Charities Act 2022 now expressly states that the Charity Commission should have regard to specific considerations when considering whether to grant consent for a charitable company or charitable incorporated organisation (CIO) to amend its objects. These considerations mirror the considerations that need to be taken into account when considering a change of objects for an unincorporated charity. This therefore harmonises the tests across the different forms of charity. Although consistency is welcome, these are additional considerations for incorporated charities which did not apply previously and this may make it more difficult for incorporated charities to amend their objects.

The Charities Act 2022 sets out provisions for CIO's specifying when amendments to their governing document take effect. These also seek to achieve consistency with companies, so that resolutions are effective when passed (or at a later date specified in the resolution) or, if it involves an amendment to the objects, when the resolution is registered by the Charity Commission.

The Charities Act 2022 removes the previous statutory powers of small unincorporated charities to transfer property or amend their purposes. This is instead now replaced with a general power for all unincorporated charities (regardless of size) to amend any provision within their trusts (unless the consent of the Charity Commission is required). This is particularly helpful for large charities who do not have had an express power of amendment in their governing document.

The Charities Act 2022 also includes a general power of amendment for charities established by Royal Charter. That power can be exercised with the consent of the Privy Council. This is not going to be relevant for the vast majority of charities, but is an important change for some of the oldest and most significant charities, which previously would have had to go through the lengthy process of obtaining a supplemental charter if they did not have an express power of amendment in their charter.



## Cy-pres powers

The Charities Act 2011 contains provisions dealing with the application of property in a cy-pres situation. Cy-pres situations are, in short, situations where the original purpose of a gift cannot be fulfilled, and any funds donated for that purpose need to be returned or applied in another way.

In that case, the Charities Act 2011 had, until now, contained fairly involved provisions requiring a charity to make prescribed advertisements to trace unknown or unidentified donors to whom a donation should then be returned. Only after that process had been followed could a charity then consider keeping the funds and applying them for its general purposes.

The Charities Act 2022 has streamlined these provisions, effectively allowing a charity to keep and apply failed donations for general charitable purposes if:

- the Charity Commission determines that it would be unreasonable for the charity to incur expense in trying to return the donation; or
- the donation, or donations by that donor, is £120 or less and certain other conditions are met.

The new provisions also remove the ability for the donor to continue to be able to make a claim for the return of their donation for a period of six months.

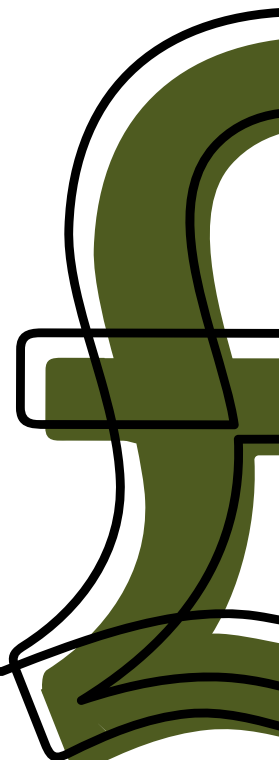
The Charities Act 2022 also now states that where a charity carries out specific fund-raising for a purpose which then becomes a cy-pres situation, the trustees may resolve to apply those funds for another charitable purpose. This resolution can be passed without the need to obtain a Charity Commission scheme, which had previously been necessary. If though the value of those funds exceeds £1,000 then the Charity Commission must consent in writing to this.

## Permanent endowment

Permanent endowment is an example of a technical area of charity law that can often confuse or trip up trustees. In short, a permanent endowment restriction is a restriction which prevents trustees from spending an underlying capital asset and only allows them to spend the interest generated from that capital asset.

Permanent endowment restrictions may apply to a donation of a particular asset or lump sum to a charity. The intention in making a donation with such a restriction is often in ensuring that a charity has an income stream that should secure its longer-term operation. The difficulty is that over time the value of the underlying capital asset can decrease with inflation as the income is routinely spent. In the longer term the asset may then generate a less meaningful income, particularly with interest rates being as low as they have been in recent years. Trustees may therefore want more flexibility in how they can use permanent endowment assets.

The Charities Act 2011 contains a power for unincorporated charities to remove a permanent endowment restriction where the charity's gross income in its last financial year was £1,000 or less and the market value of the endowment fund was £10,000 or less. Where the funds exceeded the relevant thresholds, the consent of the Charity Commission is required.



The Charities Act 2022 now expressly provides that this statutory power is available to corporate charities as well as unincorporated charities. It also removes the income test and raises the threshold for the market value of the endowment fund to £25,000. This therefore allows any charity with permanent endowment of £25,000 to remove that restriction without Charity Commission consent.

The Charities Act 2022 also now includes a new power for trustees to borrow money out of the capital asset subject to the permanent endowment restriction without needing to obtain an order of the Charity Commission. Up to 25% may be borrowed from the permanent endowment, and it must be repaid within 20 years. The Government states that this may be a helpful alternative where a charity does not necessarily want to completely remove a permanent endowment restriction but needs shorter term access to additional funds.

A charity with permanent endowment may choose to adopt a total return approach to investment. The Charities Act 2022 now allows these charities to use permanent endowment for loss-making social investments where they expect that those losses will be offset elsewhere.

### Ex gratia payments

Ex gratia payments are payments where there is no legal obligation to make a payment, but the trustees may feel that there is a moral obligation to do so. This also applies to a situation where a charity is entitled to recover certain money but wishes to waive its entitlement to do so because the trustees may feel there is a moral obligation to do so (such as under a contentious will).

Until now, the Charities Act 2011 has required trustees to obtain Charity Commission consent in order to make any ex-gratia payment which can sometimes be seen as disproportionate given the sums of money being considered in these situations.

The Charities Act 2022 now allows charities to make relatively small ex gratia payments without seeking Charity Commission permission. The amount allowable as an ex-gratia payment is determined on a sliding scale as follows:

- If the charity's gross income in its last financial year did not exceed £25,000, the relevant threshold is £1,000;
- If the charity's gross income in its last financial year exceeded £25,000 but did not exceed £250,000, the relevant threshold is £2,500;
- If the charity's gross income in its last financial year exceeded £250,000 but did not exceed £1,000,000, the relevant threshold is £10,500; and
- If the charity's gross income in its last financial year exceeded £1,000,000, the relevant threshold is £20,000.

This is a very welcome amendment, and will be particularly helpful in instances of disputed legacies where charities can sometimes feel they are caught between their legal obligation to recover assets of the charity and a moral obligation not to do so.

## Part 2 – Charity Land

### Dispositions and mortgages

The Charities Act 2011 contains restrictions relating to the disposal of land by charities. In short, a charity must obtain the consent of the Charity Commission unless an exemption applies or it can follow the process set out in the Charities Act 2011.

It has been considered that the process needed to be followed is unduly restrictive and costly, particularly for charities such as housing associations where disposals of property are a routine part of their business.

The Charities Act 2022 now clarifies that a liquidator, receiver, mortgagee or administrator who is disposing of a charity's assets does not need to comply with that disposal process set out in the Charities Act 2011, since they are already subject to duties which should ensure they obtain the best terms.

The Charities Act 2022 also clarifies the exemption that applies to a disposal made to another charity on terms that do not achieve the best terms that can reasonably be obtained. In summary, the exemption will only apply where the disposal is only to further the transferring charity's purposes and price is not a contributing factor at all. If price is a motivating factor, even only in part, then the transferring charity will have to comply with the disposals process.

The Charities Act 2022 removes the requirement on trustees to have to follow a surveyor's advice on advertising, providing more flexibility to the trustees which may be helpful in specific circumstances.

Until now, when going through the disposal process in the Charities Act 2011 trustees have been required to obtain written advice from a "Qualified Surveyor" which has had a specific meaning as set out in the legislation. This term is now being replaced by the term "Designated Adviser" which includes fellows of the National association of Estate Agents and fellows of the Central Association of Agricultural Valuers. In simple terms this allows a broader range of people to provide the required advice to trustees.

Additionally, the Charities Act 2022 now allows trustees, officers and employees who are appropriately qualified to provide that advice including where they do so in the court of their employment with the charity.

Disposals to a "connected person" require the specific consent of the Charity Commission. The Charities Act 2022 now provides that a disposal of a short, fixed term or periodic tenancy to an employee to use as their home is not to be considered a disposal to a connected person.

There are some clarifications regarding the statements that need to be contained in disposal documentation to confirm that charities have complied with the Charities Act 2011 disposal process. Importantly, the Charities Act 2022 now requires a statement to be included in both the contract to exchange and the completed transfer.

The Charities Act 2022 also includes some further protection for buyers, including that a buyer who is entering into a contract in good faith can still enforce a contract even if the required certificate has not been included by the trustees.



## Universities and colleges

The Charities Act 2022 makes amendments to what Government describes as “numerous and complex powers” of the Universities and College Estates Act 1925. The amendments seek to simplify the powers, by providing a consolidated general power in respect of land transactions, removing the need to obtain Ministerial consent prior to certain transactions and removing restrictions and powers in relation to dealing with capital money.



## Part 3 – Charity Names

The Charities Act 2011 contains a power for the Charity Commission to require a charity to change its formal legal name. The Charity Commission has been able to exercise this power in a number of different circumstances, including where the name is the same as, or too like, the formal name of another charity.

The Charities Act 2022 extends that power to apply both to formal legal names and to working names which a charity may have adopted. Similarly, the power may be used where that name is the same as, or too like, the working name of another charity.

The power has also been extended to apply to all charities whether or not they are registered with the Charity Commission. This could therefore apply to exempt charities, although the Charity Commission is required to consult with that exempt charity's principal regulator (such as the Financial Conduct Authority for community benefit societies) before making that direction.

The Charities Act 2022 also removes the time limit in the 2011 Act which required the Charity Commission to make a direction within 12 months of the name being adopted.

The Charities Act 2022 also allows the Charity Commission to refuse applications to register a CIO if the proposed name is the same as, or too like, the working name of another charity.

Part of the difficulty with working names is that they may not be registered and so it is not clear on what basis the Charity Commission may check the availability of working names. Nevertheless this provision of the Act recognises that charities may often use different branding for different aspects of their operations and extends the Charity Commission's powers appropriately.

For charitable companies, the Charities Act 2022 amends the Companies Act 2006 to provide that the directors may pass a resolution to amend the name of that company where the Charity Commission has required it to do so. Otherwise, a change of name of a company would require a resolution of its members.

There is also now to be included a power for the Charity Commission to delay registration of a charity where the Charity Commission deems that the applicant is unsuitably named. The delay cannot be indefinite and there is a process to then follow which culminates in the Charity Commission being required to take enforcement action to compel the charity to change its name within 60 days (subject to extensions and delays for legal proceedings). If the period expires without the enforcement compelling the charity to change its name, then the Charity Commission must register the charity with its proposed name.



## Part 4 – Charity Trustees

### Appointment of trustees

The Charity Commission is to be provided with additional powers to resolve uncertainties or defects in the appointment or election of charity trustees.

Effectively the Charity Commission can ratify the appointment of a trustee (with that person's consent) where there is uncertainty or it is known that the appointment is invalid.

This can avoid the need for the charity to repeat an appointment or election process. This can be particularly helpful for large membership charities, where the work and cost involved in running an election process can be significant. It should also help to resolve situations where a schism has arisen in the governance of a charity with differing groups claiming validity of their appointment.

Alongside this power, the Charity Commission has powers to appoint trustees, remove trustees, vest property into a trustee and confirm the validity of actions taken by an individual.

### Supply of goods and services

The Charities Act 2022 introduces additional flexibility by allowing trustees to be remunerated for providing either (i) goods, (ii) services, or (iii) goods and services to their charity. There is no longer a specific requirement for goods to be provided only in connection with services.

Additionally, the statutory power to pay for the provision of goods or services is now stated to apply in addition to any other relevant power the charity may have. So, a charity can rely on the statutory power unless a proposed payment is expressly prohibited by its governing document.

### Remuneration of charity trustees

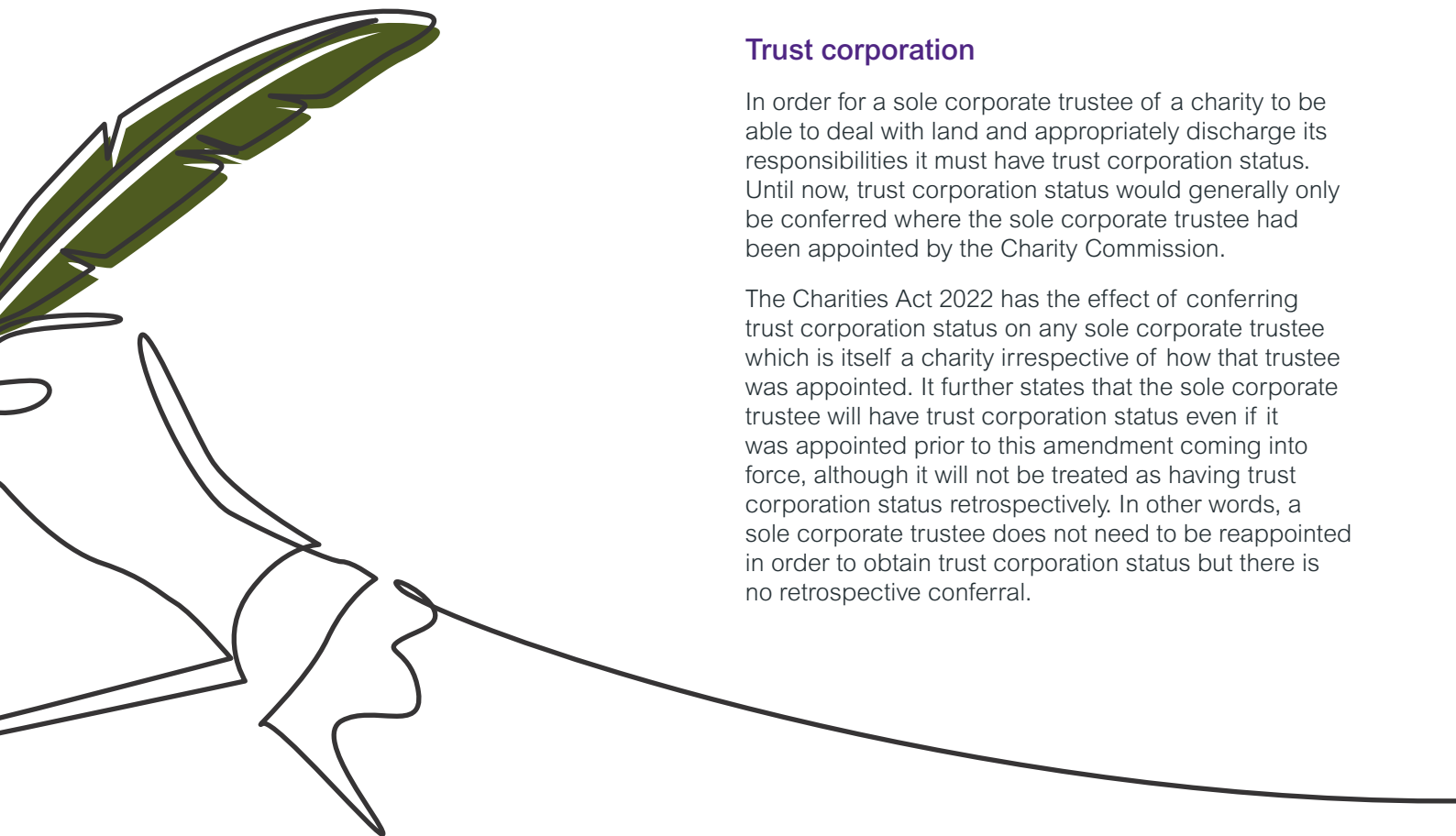
There is no change to the general position that trustees should not be paid to provide services as trustees or be paid as an employee of a charity.

The Charities Act 2022 does though include a power for the Charity Commission to order a charity to remunerate a trustee (or to authorise a trustee to retain a benefit already received) where the trustee has done work for the charity and it would be inequitable for the trustee not to be remunerated for that work. Previously this authorisation would have required an order of the Court.

### Trust corporation

In order for a sole corporate trustee of a charity to be able to deal with land and appropriately discharge its responsibilities it must have trust corporation status. Until now, trust corporation status would generally only be conferred where the sole corporate trustee had been appointed by the Charity Commission.

The Charities Act 2022 has the effect of conferring trust corporation status on any sole corporate trustee which is itself a charity irrespective of how that trustee was appointed. It further states that the sole corporate trustee will have trust corporation status even if it was appointed prior to this amendment coming into force, although it will not be treated as having trust corporation status retrospectively. In other words, a sole corporate trustee does not need to be reappointed in order to obtain trust corporation status but there is no retrospective conferral.



## Part 5 – Charity Mergers

### Gifts to merged charity

Some gifts left to charities in a will may specify that the gift is only to take effect if the charity is still in existence, and if it has ceased to exist then the gift should be applied in some other way. This can be problematic for charities that go through mergers or corporate restructures that involve the setting up or transfer to a new charity since it may mean they lose those legacies. This has led to an undesirable practice of charities that do merge or restructure leaving “shell” charities in place purely for the purpose of capturing these legacies that would otherwise be lost and passing them on.

The Charities Act 2022 is intended to address this issue by enabling gifts to a charity which has merged or restructured to take effect as a gift to the new charity. This will be the case even where the gift specifies that it will only take effect if the charity is still in existence.

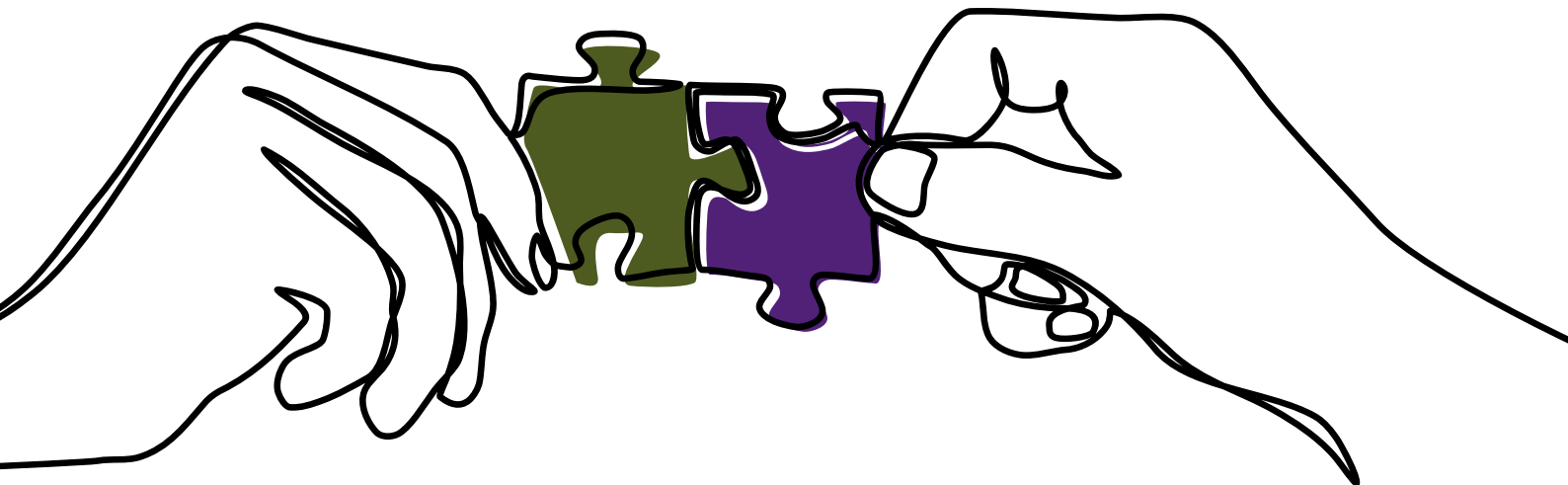
This new interpretation applies to any gift made in the future even if the instrument that gave rise to the gift (most likely a will) was executed before this provision comes into effect. This should therefore eliminate the need for charities to maintain shell entities and accordingly reduce cost and administration for charities.

A similar interpretation is also applied in relation to CIOs where they amalgamate or one transfers its operations to another CIO.

### Vesting declarations

A vesting declaration is a means by which a charity can undertake a relevant merger and vest all of the assets of the transferring charity into the recipient charity without the need for any other document to evidence it.

The Charities Act 2022 now expressly states that a lease containing a covenant against assignment is to be excluded from the vesting if that would give rise to an actionable breach of the lease (i.e. the other party has not consented to the assignment or waived their right to enforce the covenant).



## Part 6 – Legal Proceedings

### Tribunal

The Charities Act 2022 has inserted a new provision into the Charities Act 2011, providing a power to the Charity Tribunal to make an authorised costs order. This is to enable charity trustees to obtain assurance in advance that any legal costs they incur in proceedings before the Charity Tribunal are considered a proper use of funds and therefore will be payable by the charity.

This is helpful for trustees who might otherwise be worried that they could incur costs on behalf of a charity in proceedings only to later find that they should not be payable by the charity.

An application for a costs order is not to be considered “charity proceedings” which would otherwise require the consent of the Charity Commission in order to be brought.



## Part 7 – General

### Public notice of Charity Commission consent

The Charities Act 2022 includes provisions that extend the ability of the Charity Commission to give public notice of certain matters. This includes an ability for the Charity Commission to give public notice of a proposal to make an order or public notice of a request for Charity Commission consent (i.e. before the order has been made or consent has been given).

### Minor amendments

The Charities Act 2022 makes various other minor and consequential amendments. This includes, for example, removal of the term “illegitimate child” within the definition of “connected person” since this is already covered within the definition of “child”.



## Concluding remarks

The Charities Act 2022 is a welcome piece of legislation that goes a significant way to reducing technical issues which can often be problematic for charities. Its implementation should see a genuine reduction in cost and time for charities and their trustees in dealing with, and taking advice, on technical areas.

For further information about the Charities Act 2022 and how it may affect you, please contact:



**Ian Davis**

Partner

+44 (0)20 7423 8412  
idavis@towers.com



**Sharron Webster**

Partner

+44 (0)20 7423 8479  
swebster@towers.com



**Charisse Crawford**

Partner

+44 (0)1392 612596  
ccrawford@towers.com



**Emma Burrows**

Partner

+44 (0)20 7423 8347  
eburrows@towers.com



**Helen Honeyball**

Partner

+44 (0)1392 612550  
hhoneyball@towers.com



**Helen Briant**

Partner

+44 (0)121 214 8867  
hbriant@towers.com



**Navinder Grover**

Partner

+44 (0)20 7423 8208  
ngrover@towers.com



**Kyle Holling**

Partner

+44 (0)20 7423 8292  
kholling@towers.com



**Richard St John Williams**

Partner

+44 (0)161 838 2097  
rstjohnwilliams@towers.com



**Darren Hooker**

Senior Associate

+44 (0)20 7423 8360  
dhooker@towers.com



**Tom Wainwright**

Senior Associate

+44 (0)161 838 2068  
twainwright@towers.com

All rights reserved to Trowers & Hamlins LLP. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.

Trowers & Hamlins LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamlins LLP is authorised and regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamlins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlins LLP's affiliated undertakings. A list of the members of Trowers & Hamlins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlins LLP recommends that no action be taken on matters covered in this document without taking full legal advice. © Trowers & Hamlins 2022

