Charity Law Association Working Party
Law Commission's Review of the Co-operative and Community Benefit Societies Act 2014
Response

1. The CLA

1.1 The Charity Law Association ("CLA") has approximately 960 members, mostly lawyers but also accountants and other charity professionals. It is concerned with all aspects of the law relating to charities.

1.2 The CLA has formed a working party to respond to the Law Commission's Review of the Co-operative and Community Benefit Societies Act 2014.

1.3 The members of the working party are:

Saffa Mir (co-chair)	Penningtons Manches Cooper LLP
Laura Moss (co-chair)	Wrigleys Solicitors LLP
Julian Blake	Stone King LLP
Rhona Delaney	Brodies LLP
Oliver Hunt	Bates Wells LLP
Samara Lawrence	Oxfam
Nicola Morriss	Birketts LLP
Laurel Sleet	Wrigleys Solicitors LLP
Tom Wainwright	Trowers & Hamlins LLP

1.4 The members of the working party serve in a personal capacity, and the views expressed in this submission should not be taken to be the formal opinion of the organisations they represent. Similarly, the views in this paper should not be seen as constituting the views of the members of the CLA as a whole.

2. Introduction and general comments

2.1 In this response, we start by making some general comments before considering the different options proposed by the Law Commission and then addressing the Law Commission's specific questions.

2.2 The Law Commission will be aware that the proposed definitions of 'co-operative society' and 'community benefit society' have received a mixed response. The majority of the working party strongly believes that these should not be treated as separate, distinct legal forms in the legislation and that this would exacerbate the already problematic regime,

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whereby societies must choose at the point of registration whether they are a co-operative or a community benefit society. Societies exist on a spectrum and may often benefit both their members and the wider community. The separation of societies into purely being for 'member' benefit or 'community' benefit is, in our view, a false dichotomy and would leave too much to the discretion of the FCA, as regulator, in deciding whether a society meets the test.

2.3 This can be illustrated by two examples:

2.3.1 pre-commencement societies (i.e. those registered before 1 August 2014) are able to convert from being a co-operative society to being a community benefit society, simply by amending their rules. We have experience of assisting societies with this, for example a pre-commencement society originally set up as a bicycle co-operative decided after a few years of operation that its focus was really on community benefit, rather than member benefit. As a pre-commencement society, it was (rightly, in our view) able to pursue conversion and become a charitable community benefit society, which would not have been possible had it been registered on or after 1 August 2014, or under the current proposals; and

2.3.2 several housing co-operatives are not-for-profit registered providers of social housing and so provide both community benefit (through the provision of social housing) and member benefit (through being a co-operative). Searching for the term 'co-op' on the Regulator of Social Housing's index of registered providers brings up 207 results (as at 18 November 2024). To force them into one 'box' would be inappropriate. Similarly, there are housing associations registered as community benefit societies which include tenants on their board and/or as members, so they benefit both members and the wider community.

2.4 The majority of the working party would instead support a legislative definition of 'society', which makes the legal form distinct from being a 'company'. This might use as its starting point the International Co-operative Alliance's Statement on the Co-operative Identity: a society is an "autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise."

2.5 We would support the proposals being put forward by other lawyers that a society is a 'common purpose' organisation, where the common purpose may be collective, community or charitable.

2.6 In our view, a key feature of the society structure is that it is a democratic, member-led organisation. Member control is key and for this reason, we suggest strengthening statutory provisions to support a society's accountability to its membership e.g. a requirement to publish employee and director remuneration, and a statutory power for members to remove directors.

2.7 Registration with the Charity Commission: in general we welcome the proposal that charitable community benefit societies will cease to be exempt charities, and must become

registered with the Charity Commission. We are conscious that this will place an additional burden on those charitable societies which already have a principal regulator (specifically, registered providers of social housing), but recognise that this is the situation which already exists in Scotland. However, we would query whether the Charity Commission will receive additional resources to cope with this responsibility, as it is already extremely stretched as a regulator and would need staff members who have appropriate expertise and understanding of how societies operate in order to regulate them properly.

3. Consultation Questions 1 – 4

3.1 Please see our comments above about the false dichotomy of co-operatives vs community benefit societies.

3.2 As a working party of the Charity Law Association, we have not commented further on the proposed definition of 'co-operatives', but would query the accuracy of the phrase 'open to all' and the fact that its identity is linked to a requirement for transactions with members. See further our comments on consultation questions 5 – 8.

4. Consultation Question 5

We provisionally propose that there should be a new statutory definition of a community benefit society. Do you agree in principle (subject to the formulation of a suitable definition)?

4.1 Please see our comments above about the false dichotomy of co-operatives vs community benefit societies. Our comments on the proposed definition are subject to our overarching point that there should not be a statutory distinction between community benefit societies and co-operative societies.

4.2 If the Law Commission continues to pursue the proposals for separate statutory definitions of co-operative and community benefit societies, we would emphasise the importance of flexibility. Rigid criteria could inadvertently exclude some organisations that operate with a community-centric mission but may not fit a narrow definition. A new definition should highlight the collective benefit and adaptability, rather than strictly dictating operational structures. A broader definition should allow societies to innovate without risking cancellation due to overly prescriptive criteria.

4.3 We propose aligning the definition with the ICA's definition as referred to above, supporting organisational structures that prioritise democratic governance and community-focused purposes over profit.

5. Consultation Question 6

We provisionally propose the following ingredients for a new statutory definition of a community benefit society. A community benefit society is:

(1) A society for carrying on any business;
(2) For the sole benefit of the community;
(3) Membership is voluntary;

(4) Membership is open to all;
(5) One vote per member. Do you agree with these elements? Are there any that you do not agree with? In particular, do you think it accurate to describe the membership of any community benefit society as "open to all", and if so why?

5.1 Noting our preference to avoid a statutory definition of 'community benefit society', the working party generally agrees with most of these proposed elements, especially regarding the societal focus on community benefit. However, we have concerns about some parts of the definition, particularly the "open to all" membership requirement and the 'sole benefit' requirement.

5.2 A requirement to have an "open membership" might conflict with the goals of societies serving specific communities, such as racial justice initiatives or housing groups. These societies often have specific eligibility criteria aligned with their mission, and requiring fully open membership could undermine their targeted support efforts. Charities may restrict their benefits to people with particular protected characteristics under the Equality Act 2010, so the Law Commission might consider mirroring this for societies.

5.3 Particularly within large housing associations, open membership could introduce administrative burdens and regulatory issues that would not suit their organisational model. Societies should have the discretion to design their membership in a way that aligns with their objectives while still adhering to community benefit principles.

5.4 If societies are required to have an open membership, it is imperative that this is qualified, to make it clear that societies have the ability to set criteria for membership and reject membership applications where necessary. There are plenty of examples where community benefit societies have set criteria for membership, restricting who may apply, and this may be for acceptable reasons. For example, the Old Forge Community Pub in Knoydart, Scotland required at least 75% of shareholder members to live locally, to ensure that the pub will always be managed by the community it serves.

5.5 The requirement that the society operates for the 'sole benefit' of the community is problematic, because many community benefit societies will also benefit their members in some way. This may be a relatively significant benefit, for example tenant members of a housing association, or may be relatively insignificant, for example discount drinks for members of a community-owned pub. Both examples would potentially breach a requirement for a society to 'solely' benefit the wider community. If a statutory definition of community benefit society is pursued, a better formulation would be that the society 'primarily' benefits the wider community. We would also invite the Law Commission to consider charity law here, which permits some limited benefits to members and trustees. Requiring societies to 'solely' benefit the wider community, to the exclusion of the membership, would be (a) impossible to apply in situations where members are drawn from that local community and (b) be more restrictive than charity law.

5.6 There is some debate about what constitutes a 'community'. For example, is there a minimum or maximum size? Are communities always geographic or can there be a 'community of interests'? Would a society set up to manage a community housing scheme

with ten members, all of whom live in the community housing, qualify as a community benefit society or would they need to become a co-operative society. What if there were 100 members, instead of just ten, or if the society owned housing schemes across the county? It would be up to the regulator to decide whether these societies qualified as co-operatives or community benefit societies, failing to solve the current problems about leaving such decisions to the discretion of a subjective entity.

5.7 There are parallels here with the debate in charity law about what constitutes 'public benefit'. The Law Commission might consider reviewing some of those principles to see if they could be applied to community benefit societies. However, we would repeat our assertion that any definition of community benefit society is sufficiently flexible to permit a range of 'communities' to benefit.

5.8 We support the general principle of "one vote per member" as it aligns with democratic governance models. However, this must recognise the flexibility and variety of governance structures within which societies operate. In some cases, societies operate with weighted votes within certain classes of membership, particularly when societies have distinct types of members contributing differently to the organisation. To illustrate, there might be three classes of membership within a society, with each class having one third of the votes (regardless of how many members in each of those classes). Members within each class each have one vote when deciding how that class will vote, collectively. It is one member, one vote, but with a twist. In our view, variations like this should continue to be permitted, because they remain true to the democratic ideals of the society form.

6. Consultation Question 7

We provisionally propose that any new statutory definition of a community benefit society should apply to all community benefit societies and not only those registering after the introduction of the new definition. Do you agree?

6.1 We have serious concerns regarding the retroactive application of any new statutory definition. Enforcing compliance with a new definition for pre-existing societies could disrupt long-term projects, especially those with complex operational structures or obligations. This could impose a substantial administrative burden and require significant adjustments to their governing documents.

6.2 If a definition incorporated a 'one member, one vote' requirement, this would need to take into account how casting vote provisions in existing rules might be affected.

6.3 One member of the working party has experience of similar regulatory changes in Scotland, where retroactive definitions caused operational challenges and confusion among established societies.

6.4 We recommend that any new definition be applied only to societies registering after its introduction to avoid unnecessary upheaval for existing organisations.

6.5 The group suggests that any change should allow existing societies to opt into the new definition if they find it advantageous, rather than mandating compliance. Or, as per

the comments above regarding an overarching definition of 'society' suggested by others, that any new definition might already include existing community benefit societies provided they meet the essential characteristics of a society contained within the overarching definition.

7. Consultation Question 8

We provisionally propose a transition period of 18 months for existing community benefit societies to comply with any new definition. Do you agree?

7.1 The working party does not agree with retrospective application of the definition. However, if retrospective application was imposed, we believe the transition period should be longer than 18 months to allow for a smoother transition, particularly for societies that may need to make substantial adjustments to meet the new criteria. It would place a significant burden on the Regulator, to have to review governing documents and/or applications from all the societies on the register to determine which category they fall into, within just 18 months.

7.2 We suggest a transition period of at least 36 months, particularly to accommodate larger societies or those with complex administrative structures. This extended timeframe would reduce the risk of operational disruptions and provide societies with more time to comply with the new requirements.

8. Consultation Question 9

We provisionally propose that charitable community benefit societies should cease to be exempt charities, so that they will be required to register with the Charity Commission. Do you agree?

8.1 We generally support the proposal for charitable CBSs to register with the Charity Commission, as this could provide enhanced transparency and regulation which feel proportionate to the tax benefits conferred.

8.2 However, we caution against imposing Charity Commission registration on societies which are Registered Providers of Social Housing as this would lead to additional regulatory burdens. As exempt charities, charitable CBSs currently benefit from some charity law exemptions, such as land disposal regulations, which would be affected by a new registration requirement. Housing associations may undertake transfer of large property portfolios which, if regulated by the Charity Commission, may require Charity Commission consent. This would be a significant burden on the Charity Commission, which is already under-resourced and overstretched.

8.3 We would suggest the Regulator of Social Housing (RSH) becomes the principal regulator for charitable CBSs registered with the RSH, if they were amenable to this. The Charity Commission should become the principal regulator for all other charitable CBSs. At paragraph 54.10 we refer to the accounting implications of such a move.

8.4 We note that racial justice organisations may be deterred by Charity Commission oversight, due to perceived biases that could impact their operations. Clear guidelines from the Charity Commission may help to alleviate such concerns.

9. Consultation Question 10

Do you think that the lead regulator for charitable community benefit societies should be the Charity Commission or the FCA?

9.1 We would consider the Charity Commission to be a more suitable option as lead regulator, as it has the existing resource and institutional knowledge to regulate charitable entities. If the FCA continues to be the Mutuals Registrar, it would retain that role (rather than the quasi-regulatory role it currently has).

9.2 We note that Scotland has a multi-regulator approach which could be a model to replicate, ensuring that oversight is proportionate to each society's specific regulatory needs.

10. Consultation Questions 11 - 27

Share capital

We are generally supportive of the Law Commission's proposals in these sections. However, please note the following comments:

10.1 We would invite the Law Commission to consider raising the cap on withdrawable share capital, currently set at £100,000 for an individual.

10.2 Question 11: we recommend that this is expanded to clarify that shares can also be both non-withdrawable and non-transferable; and both withdrawable and transferable.

10.3 Question 12 - we agree.

10.4 Question 13 - we agree with these principles, which reflect what currently happens in practice. However, could any definition take into account shares which may be transferred on death or bankruptcy? Under many society rules, even withdrawable shares may be transferred in these limited circumstances, without them becoming 'transferable' shares (with the regulatory implications that would have). Legislative clarification on this point would be welcome.

10.5 Question 14 - we agree.

10.6 Question 15 - yes.

10.7 Question 16 - yes, but consider imposing a requirement for a longer time period to be taken into account. Arguably, it is too simplistic to say that a society can meet its debts for 12 months but not for a single day beyond that. Could it be rephrased, for example, to allow the right to withdraw providing it is not reasonably likely to prejudice the rights of

other members? The capital adequacy rules under company law might assist in drafting this.

10.8 We agree that partial withdrawals should be permitted.

10.9 Question 17 - yes

10.10 Question 18 - need to carve out shares which may be transferred on death or bankruptcy - make it clear they are not transferable shares because of implications from a regulatory perspective.

10.11 Question 19 - leave to sector to decide

10.12 Question 20 - conditions 1-4 are fine; condition 5 is unnecessary (compare to old form of articles of association which used to prescribe a proxy form until this was deemed superfluous).

10.13 Question 21 - support this proposal to clarify the legislation

10.14 Question 22 - point 1 needs to clarify who this would apply to. In our view, it should be 75% of those who turn up to vote, possibly with a minimum proportion of members from the class required to be present for the vote to be valid (thus mirroring the voting thresholds for conversion of a society into a company, set out at section 113 of the CCBS Act 2014). Point 3 would be particularly welcome to clarify that shares can be converted from non-withdrawable to withdrawable.

10.15 Question 23 - third option is preferred so that a society must buy out an objecting shareholder. However, how would this work if these are non-withdrawable, transferable shares? A society cannot hold treasury shares.

10.16 Question 24 - fine

10.17 Question 25 - clarify in whose opinion the interest rate is 'no more than is needed' - in our view this should be in the reasonable opinion of the directors, and so regulatory intervention could only occur if the regulator could show that the directors had strayed outside of the range of reasonable interpretations of this principle. It should not be up to the regulator to decide in its own view what is necessary. This would mirror the position under charity law, where trustees are given the discretion as to how they comply with their duties. Further, in our view, the requirement for interest to be 'no more than reasonable' is unnecessary as it doesn't add anything to the qualification that it is 'no more than is needed to obtain funding' - if interest is more than is needed to obtain funding, it will not be reasonable. And if a project calls for higher rates of interest because of the risks involved, then that should be allowed without a ceiling imposed derived from another test of what is 'reasonable'. We also query whether interest rates should be no more than is necessary to 'obtain and retain' capital, rather than simply 'obtain' capital, to encourage societies to keep its liabilities under review and restructure where financially advantageous to do so.

10.18 Question 26 - see comment on question 25 above. Consider whether charitable community benefit societies should be treated differently, because the board of a charitable CBS will be bound by their duties as charity trustees and it is important that anything put in legislation does not cut across or contradict that. The current position set out in Charity Commission guidance seems to work - should this be incorporated into the legislation?

10.19 Question 27 - no we do not consider that it is necessary to introduce a new type of share capital.

11. Consultation Question 28

We provisionally propose that an officer be defined in section 149 of the CCBS Act as including a director. Do you agree?

We do not agree with the proposal to use the term 'officers' to refer to directors. 'Officers' can mean different things in different contexts, for example societies and charities often refer to 'officers' to mean a handful of directors who have specific roles, such as chair, treasurer and secretary. To refer to all directors as officers would be confusing. In this response, we refer to 'directors' throughout.

However, the Law Commission might consider imposing fiduciary duties on both directors and other people who have senior roles within a society, such as managers.

12. Consultation Question 29

We provisionally propose that officers of a society should be listed on the Mutuals Public Register. Do you agree?

12.1 We agree. A public register of directors would enhance transparency and accountability, and align CBS governance with company standards. Some organisations experience difficulties in opening bank accounts because there is no up-to-date and public list of directors.

12.2 However it is important that there are exemptions to the requirement to have a public list of directors, and that these are available to be used if required, e.g. to provide security for groups undertaking sensitive activities or for individuals who are at risk of harm from having their details publicly available on the register.

13. Consultation Question 30

We provisionally propose that a society should notify the registrar of any changes concerning its officers within 14 days. Do you agree?

We agree although would welcome clarification about the penalty for not complying with this requirement. We would expect any such penalties to be reasonable and proportionate.

14. Consultation Question 31

We provisionally propose that a society's register of members and officers, available for inspection, should include their name and a contact address. Do you agree?

We agree, however we do have privacy concerns, particularly for CBSs engaged in sensitive activities. We recommend ensuring that only business addresses be made public, with private addresses protected to ensure safety without compromising transparency. We recommend looking to company law for a model, where directors' personal addresses are shielded from public view while still maintaining corporate transparency.

15. Consultation Question 32

We provisionally propose that the contact address for members and officers might be an electronic address. Do you agree?

We agree.

16. Consultation Question 33

We provisionally propose that any contact address for members and officers which is a postal address need not be the residential address. Do you agree?

We agree.

17. Consultation Question 34

We provisionally propose that the residential address of an officer should be notified to the FCA. This would be confidential, but the FCA may use it to make contact with the officer. Do you agree?

We agree.

18. Consultation Question 35

We provisionally propose that duties owed by officers to their society should be addressed by the CCBS Act. Do you agree?

We agree.

19. Consultation Question 36

We provisionally propose that the CCBS Act should adopt the director duties set out in the Companies Act 2006. Do you agree?

19.1 We disagree with this proposal. The directors' duties for societies should be tailored to the unique, community-focused purposes of societies, which differ from profit-driven corporate duties. The framework might instead be aligned with the ICA principles, which prioritise democratic governance, social responsibility, and member engagement.

19.2 CBSs should be distinguished from companies by prioritising non-economic goals, and CBS directors should focus on community benefit rather than economic gain, with duties reflecting the social purposes of CBSs.

19.3 This area of company law is arguably overdue reform to better reflect contemporary issues and priorities. We would invite the Law Commission to consider the Better Business Act campaign as a starting point, which is pressing Government to amend Section 172 of the Companies Act 2006 to align social and environmental impact alongside the need for shareholder return (see here). Of course, societies would fall within the remit of s.172(2) of the Companies Act (achieving purposes rather than benefiting members) but even within this context, the inherent nature of societies lends itself to a more forward-thinking set of directors' duties, fit for the challenges of the future.

19.4 Please also note that directors of charitable societies will be subject to charity law duties and any legislation will need to take this into account, to avoid any risk of conflicting duties or confusion.

20. Consultation Question 37

We provisionally propose that the CCBS Act should follow company law and state that the consequences of a breach of duty by an officer would be those provided by common law or equity. Do you agree?

We agree. However, there is a very limited amount of case law which relates specifically to societies. It is conventionally understood that company law may apply by analogy but some clarification about what body of common law/equity would apply would be welcome.

We do not propose the creation of any statutory derivative claim, such that a member can sue an officer in the name of the society. Do you agree?

We agree.

21. Consultation Question 38

We provisionally propose that there should be a right to appeal decisions by the registrar on whether a society meets the definition of a co-operative or community benefit society. Do you agree?

We agree.

22. Consultation Question 39

Do you think that an appeal against a decision by the registrar should be heard by the court (as is currently the case) or by a tribunal?

The working party strongly supports the introduction of an appeals tribunal for societies. One of the shortfalls of the current legislation is the lack of regulatory oversight of the FCA, in its role as registrar. In our experience, the Charity Tribunal works reasonably well

and would be a model to emulate. More oversight would give more confidence, more consistent behaviour.

23. Consultation Question 40

We provisionally propose that the power of the registrar to suspend a society's registration be repealed. Do you agree?

We strongly agree. Suspension is rarely used in practice and leaves a society in an uncertain position, legally.

24. Consultation Question 41

We provisionally propose that only after the notice period for cancellation has passed should the registrar be able to give directions to wind up the affairs of the society. Do you agree?

We agree.

25. Consultation Question 42

We provisionally propose that the notice period for cancellation be fixed at two months. Do you agree?

We agree.

26. Consultation Question 43

We provisionally propose that the CCBS Act should require the registrar to give a society reasonable warning before issuing any notice of proposed cancellation. Do you agree?

We agree.

27. Consultation Question 44

We provisionally propose that societies be given a statutory power to entrench their rules. Do you agree?

We agree.

28. Consultation Question 45

We provisionally propose that it should be for the rules of a society to decide the voting threshold needed to change an entrenched rule. Do you agree?

We agree.

29. Consultation Question 46

We provisionally propose that a society's rules should be capable of being entrenched on registration or later by special resolution. Do you agree?

We agree.

30. Consultation Question 47

We provisionally propose that the special resolution threshold which must be exceeded in order to entrench a rule should be the same as the threshold required for adopting an asset lock, that is:

(1) a first meeting where at least 75% of voters are in favour and at least 50% of members vote, followed by

(2) a second meeting where over half of voters are in favour (see section 113 of the CCBS Act).

Do you agree?

We agree.

31. Consultation Question 48

We provisionally propose that a society should be able to set voting thresholds in its own rules which are stricter than those in the CCBS Act in the following circumstances.

(1) Ratifying action by members of the committee which would otherwise be beyond the capacity of the society.

(2) Amalgamating societies or transferring engagements to another society.

(3) Converting to, amalgamating with, or transferring engagements to a company.

(4) Approving an instrument of dissolution.

(5) Disapplying the duty to appoint auditors.

Do you agree?

We agree.

32. Consultation Question 49

We provisionally propose that the restrictions on the use of the assets of a community benefit society, and the enforcement powers in that regard, as set out in the Asset Lock Regulations, be included in the CCBS Act as applicable to all community benefit societies. Do you agree?

32.1 We disagree. As mentioned earlier in the response, we do not agree that co-operatives and community benefit societies should be distinct in legislation. It therefore follows that the asset lock should not be mandatory.

32.2 Although some CBSs include an asset lock in their rules to satisfy the requirements of grant funders, this currently prevents the CBS from converting to a charity or registering as a Registered Provider of Social Housing. Even if this oddity is rectified in any new legislation, it should be up to a society to choose whether or not to include the asset lock. The asset lock should therefore be a choice of each organisation which would provide

CBSs with the autonomy to determine whether an asset lock aligns with their operational needs.

32.3 In our experience, the statutory asset lock is often a confusing concept for CBSs. As the Law Commission points out, there is an implied asset lock in a community benefit society, given that all of the assets need to be used for the benefit of the community. It is not always clear what the additional benefit of the statutory asset lock is.

33. Consultation Question 50

We provisionally propose that the CCBS Act should expressly allow for asset-locked community benefit societies to pay interest on non-withdrawable shares. Do you agree?

We agree.

34. Consultation Question 51

We provisionally propose that it should be possible for a community benefit society with a statutory asset lock to become a charity. Do you agree?

We agree.

35. Consultation Question 52

We provisionally propose that the asset lock provisions of the Co-operatives, Mutuals and Friendly Societies Act 2023, as far as they apply to co-operatives, should be consolidated into the CCBS Act. Do you agree?

We agree, although note our preference that any new CCBS Act simply refers to 'societies' rather than differentiating between co-operatives and community benefit societies.

36. Consultation Question 53

We provisionally propose that the Asset Lock Regulations which apply to community benefit societies should also apply to co-operatives which choose a statutory asset lock. Do you agree?

We agree, although note our preference that any new CCBS Act simply refers to 'societies' rather than differentiating between co-operatives and community benefit societies.

37. Consultation Question 54

We provisionally propose that section 115 of the CCBS Act should be amended so that, when a company converts to a society, it must appoint either three members, or two members if both are registered societies. Do you agree?

We agree.

38. Consultation Question 55

We provisionally propose that the CCBS Act should provide expressly that partial transfers of engagements are possible, to companies or to other registered societies. Do you agree?

We agree.

39. Consultation Question 56

We provisionally propose that, where a society converts to, amalgamates with, or transfers its engagements to a company, any transfer of the society's property should vest without conveyance. Do you agree?

We agree. We would welcome this being clarified in the legislation.

40. Consultation Question 57

We provisionally propose that section 112 be amended to remove reference to a society's registration being void. Do you agree?

We agree.

41. Consultation Question 58

Do you think that the registrar should advertise the cancellation of a society's registration or its dissolution in a local newspaper as well as in the Gazette?

Advertising in a local newspaper would better suit the nature of a society, which often have a geographically localised membership. The Law Commission might also consider a requirement to advertise cancellation of a society's registration or dissolution at its premises and/or registered office.

42. Consultation Question 59

We provisionally propose that the CCBS Act should enable HM Treasury by regulation to disapply duties under the CCBS Act temporarily for special reason (such as a pandemic). Do you agree?

We agree.

43. Consultation Question 60

Do you think that the CCBS Act should empower the registrar to require electronic only filing of documents?

We disagree. Filings should be permitted to be electronically or by paper. There can be technological issues when filing documents electronically, and other regulators such as Companies House still permit paper filings. Requiring electronic-only filing of documents would exclude those who do not have easy access to a computer, or who are not technologically literate. If this is introduced, any electronic filing system should be compatible with software used by other regulators, such as HMRC, to make is administratively easier for societies to comply with their regulatory requirements.

44. Consultation Question 61

We provisionally propose repealing the need for signatures on a society's filed accounts. Do you agree?

We agree. However, any amended requirement should still require the accounts to show the name(s) of those who signed or authorised the accounts and the date of approval (as currently required under company law and charity law). The same principle should apply to any audit report, audit exemption report or independent examiner's report appended to the accounts.

45. Consultation Question 62

Do you think that the registrar should have the power to impose a civil penalty in the form of a fine on a society which is late in filing their annual return (in line with equivalent penalties under company law)?

We agree.

46. Consultation Question 63

We provisionally propose as follows.

(1) The registrar should be able to direct a society to change its name after registration if the name has since become undesirable in the opinion of the registrar.

(2) There should be a right to appeal such a direction.

Do you agree?

46.1 We agree in principle but we would welcome clarification on the definition of "undesirable".

47. Consultation Question 64

We provisionally propose that the Mutuals Register be identified explicitly in the CCBS Act as the sole register which the registrar of societies is to maintain. Do you agree?

We have no strong view on this but on balance we agree.

48. Consultation Question 65

Do you think that the seal of the registrar of co-operatives and community benefit societies be provided for under the CCBS Act?

We have no strong view on this but on balance we agree.

49. Consultation Question 66

We provisionally propose that the registrar should be able to use their available powers of intervention where the registrar believes that intervention is appropriate in the circumstances (rather than 'only to the extent necessary to maintain confidence' in societies). Do you agree?

We disagree with this proposal. This would give too much discretion to the registrar.

50. Consultation Question 67

We provisionally propose that the CCBS Act should provide the following regime for society audits.

(1) Any person appointed to audit the accounts should be a qualified auditor.

(2) A society should be able to opt out of the duty to audit accounts when the society is below a certain size.

(a) There should be a single threshold (above which a society cannot opt out of the requirement to audit).

(b) That threshold should be both that turnover is not in excess of £10.2m and assets are not in excess of £5.1m.

(c) That threshold should be capable of revision by statutory instrument.

(3) The registrar should continue to be able to insist upon an audit.

Do you agree?

50.1 The working party is grateful to Dr Gareth Morgan, who has provided commentary on this question.

50.2 We agree that the current audit requirements for CBSs that would be "small" in Companies Act term are exceptionally demanding as explained in paras 7.192-7.194 of the consultation document. So, broadly speaking, we support the changes proposed in Q67, but subject to the following comments.

50.3 The current regime is particularly challenging for a CBS with income over £90K which as a minimum must appoint a registered auditor to prepare an audit exemption report. And even that is only permitted if someone remembers to get a resolution passed by the members before the relevant year end dispensing with the audit requirement.

50.4 As implied in para 7.197, this goes way beyond the requirements of an independent examiner's (IE's) report as would be permitted for the vast majority of charities with an income up to £1M in England and Wales under s.145 of the Charities Act 2011. Up to £250K income for other charities other than CBSs a lay examiner can be appointed (someone with independence and appropriate skills and experience) but even in the band £250K–£1M income the requirement is only to appoint an IE who is a qualified member of one of relevant professional body (with a wide range of bodies listed). But the fact that

a CBS in this range must use a registered auditor even to prepare an audit exemption report excludes the vast majority of qualified accountants. And above £250K income, a charitable CBS has to have a full audit under s.84(6) of the 2014, whereas for most charities in E&W an IE is permitted up to £1M income. (In Scotland and Northern Ireland the upper income limit for independent examination is £500K, but the same problems apply for a charitable CBS in the £90K to £500K band.)

50.5 This means all CBSs above £90K income that follow the requirement to use a registered auditor to produce the exemption report (as the 2014 Act requires) face considerably higher accountancy costs than charities of a similar size. This requirement applies to both charitable and non-charitable CBSs. But this requirement does not seem to be enforced in any way by the FCA Mutuals team. So, in practice, the requirement is only enforced by the actions of members, suppliers, external funders and lenders, who may complain or withdraw funding if the CBS's accounts are non-compliant.

50.6 However, in the case of a charitable CBS, there are further complications, which are different across the jurisdictions of the UK. We note that the consultation (paras 1.13 and 1.14) invites comments on the implications for Scotland and Northern Ireland. We note that the 2014 Act extends to Scotland with partial application in Northern Ireland (as explained in para 1.13) but we would argue for a single Act to apply UK-wide.

50.7 In the case of a charitable CBS, the accounting and audit requirements of the CCBS Act generally apply in addition to the relevant requirements under charity law, as mentioned in para 7.197 of the consultation, but we would argue that these implications need to be considered separately in relation to each UK jurisdiction give that charity law is devolved.

50.8 The issue is most easily understood in a Scottish context, where there is no system of 'exempt charities'. So a Scottish charitable CBS will necessarily be registered with OSCR and must apply the requirements of the 2014 Act in addition to the accounting requirements in s.44 of the Charities and Trustee Investment (Scotland) Act 2005. This means, for example, that a charitable CBS with income in the range £90K to £250K needs both (a) an audit exemption report by a registered auditor under the CCBS Act and (b) an independent examiner's report under the 2005 Act. Whilst the same person can often be appointed to fulfil both roles it is not an ideal situation – a registered auditor who has experience of CBSs may have little familiarity with charities. But almost any user of the accounts would agree that this dual requirement is very wasteful.

50.9 The same principles would generally apply in Northern Ireland where a CBS is subject to the 2014 Act and also registered with the Charity Commission for Northern Ireland (CCNI) under the Charities Act (Northern Ireland) 2008 and thus subject to the accounting requirements in ss.63-68 of that Act. (However, some Northern Irish charitable CBSs may not yet be registered with CCNI.)

50.10 In England and Wales (E&W) the issue is complicated by the status of charitable CBSs as exempt charities under s.22 and Sch.3 of the Charities Act 2011. Whilst that Act empowers the DCMS to amend the exemption and bring charitable CBSs into the normal requirements of registration with the Charity Commission for England and Wales (CCEW)

this has been delayed several times and no longer appears to be part of the DCMS plans. We believe that the removal of exempt charity status for charitable CBSs in E&W would be beneficial in bringing them into a similar framework of charity regulation to other charities.

50.11 However, as things stand, the core accounting requirements of the Charities Act 2011 do not, for the most part, apply to exempt charities (by virtue of s.136 of the 2011 Act which only sets out the most minimal requirements). This is supposedly because exempt charities would generally be subject to accounting requirements under other legislation or to principal regulators other than the Charity Commission. In the case of a CBS this is true to some extent in terms of regulation under the 2014 Act and by the FCA. But the 2014 Act and the FCA make no attempt to regulate a charitable CBS as a charity. It follows that in most respects a charitable CBS in E&W is devoid of any effective charity regulation (except in terms of the limited circumstances where the Charity Commission can intervene with an exempt charity under the 2011 Act).

50.12 It thus follows that if the audit requirements of the CCBS Act are relaxed on the lines suggested by the consultation, there will be no requirement for most CBSs in E&W under the thresholds of £10.2M income/£5.1M assets to have any external scrutiny of their accounts even if they are charities. This would be highly unsatisfactory. There is already a problem with many charitable funders being reluctant to support charitable CBSs because they do not have a registered charity number, but at least they currently have the requirement of accounts scrutiny under the 2014 Act in the form of an audit exemption report (£90K to £250K) or audit (if over £250K).

50.13 So we feel it is essential that one or other of the following outcomes is implemented in conjunction with the proposed revisions of the 2014 Act:

50.13.1 either Charitable CBSs in E&W must lose their exempt charity status and be required to register with the Charity Commission in the same way as other charities which will require them to following the accounting and audit/independent examination requirements in ss.144-145 of the Charities Act 2011 (which can be achieved by an Order under s.23 of that Act); or

50.13.2 the CCBS Act as revised must incorporate requirements for audit or independent examination of a charitable CBS under £10.2M income (if so, it would be best to cross-refer to ss.144-145 of the Charities Act 2011 rather than restating these requirements in full in the CCBS Act as revised).

50.14 We note that either of those solutions would have the beneficial effect of requiring the accounts of charitable CBSs to be prepared in accordance with the Charities SORP in order to give a true and fair view under s.80 of the 2014 Act as the auditor or IE would then be empowered to give an adverse ('qualified') report if they did not.

50.15 Note: Both alternatives – 51.13.1 or 51.13.2 – would only need to affect charitable CBSs in E&W, as those in Scotland and Northern Ireland are already covered by the charity accounting requirements in those jurisdictions.

50.16 On a broader point, we suggest that the new thresholds proposed in Q67 should be drafted to cross-refer to the small company definition in the Companies Act 2006, so that if company law thresholds are changed the changes would also apply to Co-Ops and CBSs.

51. Consultation Question 68

Do you think that co-operatives should be required by legislation to report on how their activities pursue their objectives?

Do you think that community benefit societies should be required by legislation to report on how their activities pursue their objectives?

51.1 We agree. This would bring societies in line with CIC legislation and the increased accountability and transparency would be a positive step for the sector.

51.2 It is essential that charitable CBSs (at least) are required to report on this basis under CBS law (especially in England and Wales, given that the normal requirement for a trustees' annual report under s.162 of the Charities Act 2011 does not apply to exempt charities, by virtue of s.167 of that Act). However, given that a CBS is established for specific purposes to benefit the community, we feel it would be beneficial to make this a requirement for all CBSs.

52. Consultation Question 69

Do you think that the CCBS Act should allow a society's financial year to end up to seven days earlier or later than the previous year (as with company law)?

We agree.

53. Consultation Question 70

We provisionally propose that section 81 of the CCBS Act be repealed (to remove the duty to display a balance sheet at a society's registered office). Do you agree?

We agree. A balance sheet on its own is very little use without a full set of accounts, and in any case providing such information on a noticeboard at the registered office is not very useful. So long as the Annual Report and Accounts of societies are publicly available (via the FCA, at least) there is no need for this.

54. Consultation Question 71

We provisionally propose that, subject to its rules, a society should additionally be able to execute a document by one authorised signatory attested by a witness. Do you agree?

We agree and would welcome this change to bring society administration more in line with company legislation.

55. Consultation Question 72

We provisionally propose that, subject to its rules, a society should be able to appoint, by deed, an attorney to execute documents on its behalf. Do you agree?

We agree.

56. Consultation Question 73

We provisionally propose that 'cooperative', 'co-op' and 'coop' should be included alongside 'co-operative' on the list of sensitive (protected) business names. Do you agree?

We agree.

57. Consultation Question 74

We provisionally propose that the requirement to display a society's registered name outside every place where it carries on business be repealed. Do you agree?

We agree.

58. Consultation Question 75

We provisionally propose that, subject to the rules of a society, the CCBS Act should expressly allow meetings to be virtual or hybrid. Do you agree?

We agree and would welcome this change. We would invite the Law Commission to consider whether this should be subject to a society's rules, or whether it should apply regardless of a society's rules. The latter approach would permit societies who have not updated their rules to hold virtual or hybrid meetings, similar to the legislative provisions which were introduced during the Covid-19 pandemic.

59. Consultation Question 76

We provisionally propose that, when a society notifies the FCA of an amendment to the society's rules, the society need send only one copy of the amendment if this is sent by electronic means. Do you agree?

We agree.

60. Consultation Question 77

Do you think that the CCBS Act should explicitly provide that society rules may provide for an indivisible reserve?

We do not have a strong view but consider this could be a useful option for societies to have.

61. Consultation Question 78

Co-operative banks

Not answered

62. Consultation Question 79

Credit unions

Not answered

63. Consultation Question 80

As regards the topics set out in Chapter 8, we have provisionally concluded against reform. Do you think that any of those topics needs revisiting, and if so why?

Please see below. If the Law Commission was to revisit any of these topics, we would expect the proposals to be put forward for consultation in the same way as everything else in the consultation document.

64. Consultation Question 82

Are there any factors unique to Scotland which you think we should know about?

No comments

65. Consultation Question 84

Are there any other ways in which the CCBS Act might be improved to support the formation and development of new societies?

65.1 We refer to para 8.47 of the consultation document, where the Law Commission states that it is currently possible to convert a CIC into a CBS. Regulation 5 of the Community Interest Company (Amendment) Regulations 2009 only permit a CIC to convert to a society with a statutory asset lock. However, it should be permissible to convert a CIC into a charitable CBS. We request the Law Commission to consider including this power in any new statute.

65.2 We would request that the Law Commission considers introducing a statutory power for members to remove directors, to correspond with section 168 of the Companies Act 2006. This would reflect the democratic nature of a society, where member control is paramount.

65.3 We also request the Law Commission to strengthen the provisions around member accountability, for example by introducing a requirement on societies to report on employee remuneration (e.g. employees paid over a certain threshold). This would link to the democratic, member-led nature of societies where member control is a key feature.

66. Consultation Question 86

Does the CCBS Act cause societies to incur unnecessary costs and burdens, such that there are other reforms which are needed to reduce those burdens and support the more efficient operation of societies?

We strongly request the Law Commission considers a process for restoration of societies to the register who have been cancelled. Cancellation of a society's registration can be extremely difficult and expensive to resolve, especially where the society holds property.

10 December 2024