

THE CHARITY COMMISSION'S POWERS AND POLICY ON EXPENDITURE OF PERMANENT ENDOWMENT

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In August 2005 in Volume 8 No 3 of the Charity Law and Practice Review an article by Derek Robinson reviewed some aspects of the Charity Commission's policy on permanent endowment². Since that time significant developments have taken place in that policy. In addition the Charities Act 2006 ("the 2006 Act") has provisions relating to permanent endowment which are likely to come into force in early 2008. Guidance from the Commission will be issued prior to those provisions coming into force.

The nature of permanent endowment

Although the concept of permanent endowment is perhaps as old as charity itself, the courts have only been called on to consider the legal meaning of the term in a limited number of cases.³ Consequently, the Charity Commission has played a key role in the interpretation of the law and its application in practice.

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2 "Expenditure properly chargeable against the permanent endowment of a charity: A review of the Charity Commission's practice", Derek Robinson, CL&PR 8/3 [2005] 23.

3 Under the Charitable Trusts Act 1853 the jurisdiction of the Charity Commissioners extended only to endowed charities, with "endowment" being defined broadly in section 66 as property belonging to or held in trust for a charity, whether expendable or not. Accordingly, case law tends to refer to "endowment" rather than "permanent endowment".

Under section 96(3) of the Charities Act 1993 (“the 1993 Act”)

*“a charity shall be deemed to have a permanent endowment unless all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this Act “permanent endowment” means in relation to any charity, property held subject to a restriction on its being expended for the purposes of the charity.”*⁴

It is an interesting feature of this definition that there is nothing in it which necessarily has the quality of permanence. Thus there may be permanent endowment until a particular situation arises where the property can be sold and the proceeds applied without distinction between capital and income.

The existence of permanent endowment can give rise to problems where a charity wishes to transfer its property to another charity, for example where two charities seek to merge, and the trusts of the permanently endowed charity do not provide for its termination. In the absence of a specific statutory provision – such as the small charities procedure under section 74 of the 1993 Act⁵ – the permanently endowed charity cannot be wound up as part of the merger.⁶ It is of course possible for one charity or its charity trustees to become the trustee or trustees of the other’s permanent endowment.

In general there are two types of permanent endowment. Firstly, there is capital held to provide an income for the charity and which cannot itself be expended as income. This is usually referred to as “investment permanent endowment”. Secondly, there is land or other assets which are held on trust to be used for a specific purpose or purposes of the charity (“functional trusts”⁷) – e.g. a playing field may be held by a recreational charity upon such trusts or an art gallery may hold some or all of its collection upon such trusts.

4 The definition first appeared in s. 45(3) Charities Act 1960.

5 S.74 does not apply to land held on functional trusts, nor does it apply to exempt or incorporated charities.

6 *Re Faraker, Faraker v Durell* [1912] 2 Ch 488.

7 There is an important distinction between land held in perpetuity on functional trusts and land purchased for the use of the charity with [does “with” mean “by the application of” ?] income or expendable endowment or even with permanent endowment (where this is not replacing land held on functional trusts). In the latter cases the property is functional property but it is not held on trust for a particular purpose or purposes of the charity. Thus selling the property in these cases will not involve a change of purpose (see below).

Permanent endowment can be established in the governing document of the charity, in a particular conveyance or deed of gift, or, where there is power to do so⁸, by means of a declaration of trust by charity trustees that previously unrestricted charity assets are henceforth to be held as permanent endowment⁹. It is certainly possible for such documents to contain provisions setting out circumstances in which, in the case of investment permanent endowment, the capital can be liquidated and spent in the same way as income or, in the case of permanent endowment held on functional trusts, the land or assets can be sold and the proceeds either held as investment permanent endowment or expended for particular purposes of the charity.

However, in many cases there are no such provisions. In the case of investment permanent endowment, particular investments can usually be sold and the proceeds used to purchase alternative investments provided the capital is not expended but continues to be used to provide an income for the charity. In the case of permanent endowment held on functional trusts, the land or assets may be capable of being sold if the purpose is to purchase replacement land or assets to be used for the same purpose. There is some permanent endowment of this kind which by its very nature cannot be sold and replaced by other property, e.g. property where its unique quality derives from its connection with a particular historical figure.

There is an important distinction between investment permanent endowment and permanent endowment held on functional trusts. In the case of investment permanent endowment the restriction on expending the capital is an administrative restriction¹⁰. In the case of permanent endowment held on functional trusts, sale of the endowment and the use of the proceeds for a purpose other than the replacement of the endowment in question may involve a change of purpose.

The distinction between an administrative restriction and a change of purpose is crucial when considering the Charity Commission's powers with regard to the permanent endowment in question. It is possible for the Commission to remove an administrative restriction by making an order under section 26 of the 1993 Act. However, where there is a change of purpose, in the absence of express provision, that will require a scheme of the Charity Commission¹¹.

8 *A-G v Mathieson* [1907] 2 Ch 383

9 The Charity Commission takes the view that permanent endowment cannot form part of the beneficial property of a corporate body and that such assets must be held by the corporate body acting as trustee.

10 *Re Laing Trust* [1983] 3 WLR 886

11 Under s.16 of the 1993 Act.

If charity trustees wish to spend investment permanent endowment on functional property which will continue to be permanent endowment, that will usually involve a change in the trusts on which it is held. It will not necessarily involve a change in the purpose. In these circumstances the Charity Commission could authorise the change of administrative trusts by section 26 order. Alternatively, the Commission could authorise the expenditure of the investment permanent endowment by section 26 order with an order that the investment permanent endowment be replaced. It follows that in these circumstances if the functional land purchased is subsequently sold, the proceeds of sale will not be permanent endowment but will be expendable.

No presumption that a charity has permanent endowment

There is a view that the statutory definition of “permanent endowment” involves a presumption that a charity has permanent endowment unless it is clear that all its funds are expendable. This view is based on the fact the word “deemed” is used in section 96(3). The Commission has recently clarified its policy on this aspect. Where the trusts on which a particular asset is held are not clear on whether the asset is permanent endowment, the Commission does not presume that it is.

In order to form a view that an asset is not permanent endowment, the Commission does not require a clear power to spend capital and income. The Commission only requires that there are no circumstances which indicate that there is a restriction on spending capital.

This does not necessarily mean that just because there is nothing in the governing document, there is no permanent endowment. Charities do not just receive permanent endowment at the time of their governing document. Permanent endowment can be created by a conveyance or gift. Sometimes the only evidence may be the way property has been dealt with in the past, for instance, evidence from the charity’s accounts or of the views of trustees with regard to the endowment. However, a finding that an asset is permanent endowment would need to be based on more than just the fact that only the income of a particular fund had ever been used in the past.

The value of permanent endowment

In practice, the value of both functional and investment permanent endowment funds normally fluctuates to take into account realised capital gains and losses and unrealised increases or decreases in the valuation of the relevant assets and, where

relevant, provisions for depreciation or impairment of those assets.¹² However, the acquisition of investments of the same class as those representing investment endowment will not necessarily form part of that endowment, nor will additional pieces of land added to land held on functional trusts normally be considered as permanent endowment where they are purchased from income or expendable endowment. Increases in the value of permanent endowment land due to the erection of additional buildings are considered as permanent endowment.

Until such time as a functional asset is no longer suitable to the purposes of the charity its cost or existing use value will be more relevant than the price that could be obtained on a sale in the open market.

Where the trustees have power to accumulate and add to capital unapplied investment income, such income may form part of the permanent endowment where the trusts of the charity so provide.

The value of a permanent endowment fund will be reduced by any expenditure that is properly chargeable against the capital of the fund. Such expenditure will normally include valuation and investment management fees where these relate to investments held within the endowment fund.

The normal rules of trust law for the classification of investment returns as income or capital generally apply to charities.¹³ However, the Charity Commission recognised that these rules may force trustees of permanently endowed charities to take investment decisions on the basis of the anticipated form of the return rather than by reference to the overall economic return. Following a consultation in 2000¹⁴, the Commission adopted a new approach to authorising trustees in such circumstances to adopt a total return investment policy on an individual basis - where this can be shown to be in the interests of the charity - by using its powers under section 26 of the 1993 Act.¹⁵ Such an order empowers the trustees to determine how to allocate the total return between income and capital in

¹² See Appendix 3 of “Statement of Recommended Practice: Accounting and reporting by charities”, Charity Commission, 2005 (SORP 2005).

¹³ The Law Commission consulted in 2004 on proposals to amend the current rules (see “Capital and income in trusts: classification and apportionment”, Consultation Paper No. 175, 2 August 2004). Work on this project has been suspended pending completion of the Law Commission’s project on cohabitation (due for completion in 2007)

¹⁴ “Endowed charities – A fresh approach to investment returns”, Charity Commission, July 2000.

¹⁵ For details see the Charity Commission’s operational guidance “Endowed charities – A total return approach to investment”, OG 83, originally published in May 2001.

accordance with their duty to balance the present and future needs of the charity. Where a charity is so authorised, the unapplied total return– i.e. the total return less any part that has previously been allocated to income or otherwise applied for the purposes of the charity – remains part of the permanent endowment until such time as a transfer is made to income funds.¹⁶

The Commission's powers to authorise expenditure of permanent endowment

Quite separately from the new powers introduced by the 2006 Act, the Charity Commission has wide powers to allow charities to spend permanent endowment in appropriate circumstances. The Commission can also decide whether the capital that is spent should be replaced out of the charity's future income. In most cases, it exercises these powers by making an order under section 26 of the 1993 Act. But if the expenditure would be expressly prohibited by the trusts of the charity, or would change its original purposes, then the Commission would need to make a scheme under section 16 of the 1993 Act¹⁷.

When the new provisions in the 2006 Act come into force (see below), the powers referred to in the previous paragraph will mainly be relevant (a) to property which is not held on trust for investment, or (b) to cases either where the trustees want authority to spend permanent endowment on a particular project (rather than simply seeking the conversion of permanent endowment into expendable endowment), or where the trustees foresee a difficulty in complying with the conditions required for the effective passage of a conversion resolution, under the provisions to be introduced by section 43 of the 2006 Act.

The Commission's approach to authorising expenditure of permanent endowment under section 26 or section 16 of the 1993 Act

The overriding test is what is expedient in the interests of the charity. There are no fixed rules about this, and the Commission exercises its discretion flexibly on a case-by-case basis. The factors which it will take into account include:

- (1) *The nature of the expenditure, and the benefits which the charity expects to derive from it.* Most applications to spend permanent endowment are for projects which are expected to deliver long-term value to both present and future beneficiaries. An obvious example is the purchase or development of functional land and buildings. But in an appropriate case we can also

¹⁶ See para. 3(i) of Appendix 3 to SORP 2005.

¹⁷ Where there is a change in the original purposes, the Commission would need to be satisfied that the cy-pres test in section 13 of the 1993 Act was met.

authorise the use of permanent endowment for expenditure that would normally be met out of income (although we would be more likely to require replacement in these circumstances; see below).

- (2) *What other funds the charity has available.* If the charity has other unrestricted funds which could be used for the proposed expenditure, the Commission would take that into account. But this would not necessarily mean that the Commission would not authorise the expenditure of permanent endowment. For instance, if a charity wanted to sell a piece of surplus land held on functional trusts and use the proceeds to put up buildings on its retained land, we might well authorise the expenditure even if the charity had other unrestricted funds which might have been used instead.
- (3) *The balance between the interests of the present and future beneficiaries of the charity.* In the example just given, using the proceeds of part of the land held on functional trusts to pay for buildings on the retained land would accord well with this balance.

The Commission's approach to replacing permanent endowment out of future income

The Commission has power, when authorising the expenditure of permanent endowment, to require that all or part of the amount spent is gradually replaced out of the future income of the charity (section 26(4) of the 1993 Act). Such an order can also be made where the authority for the expenditure is contained in a s. 16 scheme. The test is again whether requiring replacement would be expedient in the interests of the charity. The Commission particularly considers whether expenditure without replacement would unreasonably favour the charity's present beneficiaries at the expense of future beneficiaries.

There are no rigid rules about this. In particular, there is no rule that there must be replacement unless the permanent endowment is spent on buying land. Nor is there any rule that there has to be replacement where permanent endowment is spent on property which is owned by a public authority¹⁸.

The general factors which the Commission will take into account in deciding whether to order replacement are listed below (although there may other factors specific to a particular case):

¹⁸ A charity cannot spend money enhancing property that belongs to a public authority unless there is a reasonable expectation that the property will continue to be used for purposes within the charity's objects. But where this is the case, expenditure can be authorised without requiring replacement if that is considered expedient.

- (1) *The period during which the expenditure is likely to deliver value. This may be either value in financial terms or in terms of its utility to the charity on an ongoing basis.* The shorter the period, the more likely the Commission is to require the permanent endowment to be replaced. This reflects the “long-term” purpose of the donor and the need to consider future beneficiaries.

One common case which arises in practice is where land held on functional trusts is sold and the charity wants to spend the proceeds on new land and/or buildings. The Commission has tended in the past to draw a distinction between land and buildings in these cases, requiring replacement for the cost of the buildings, but not for the cost of land. In future the Commission will consider such cases more flexibly. Where the buildings are of a permanent nature, and the Commission is satisfied that the expenditure is in the interests of the charity, it will generally not insist on replacement.

The Commission does not want to lay down rules about what constitutes a “permanent” building in this context. But an expected life of 75 years (as envisaged in Lord Phillips’ proposed amendment to the Charities Bill in the House of Lords¹⁹) would come into that category.

In assessing long-term value, the Commission may also have regard to the principles on which private trusts allocate expenditure between capital and income. These principles are not directly applicable to charities, and any analogy has to be treated with caution. But they do have a similar overall objective of balancing the interests of present and future beneficiaries.

- (2) *The source of the money.* The Commission is more likely to require replacement if the expenditure comes from investment permanent endowment rather than permanent endowment held on functional trusts. This is because investment permanent endowment may be expected by the donor to provide a lasting income for the charity. If the capital is spent, that future income will be lost. Permanent endowment held on functional trusts, on the other hand, is intended for long-term practical use for the charity’s purposes. If the money is spent on new buildings, for example, that is likely to accord with the long-term spirit of a gift of such permanent endowment²⁰.

¹⁹ Hansard, 8th November 2005, Columns 591-596

²⁰ It is not unknown for investment permanent endowment to derive from the proceeds of sale of permanent endowment previously held on functional trusts. It will depend on the circumstances and the trusts of the charity what view is taken with regard to this.

- (3) *The nature of the charity's work and the long-term demands on its resources.* If demand for the charity's services is likely to increase in future, the Commission may be more likely to order replacement. The Commission will consider whatever evidence of this a charity wishes to submit.
- (4) *The impact of replacement on the charity's work.* The Commission recognises that replacing permanent endowment out of income can strain a charity's resources and reduce its effectiveness. In an extreme case, it could even threaten the charity's viability. The Commission takes this into account in deciding whether replacement is appropriate.

This approach and practice of the Commission is now in operation.

The Charities Act 1993

The extent of the current statutory powers of trustees of certain charities to spend permanent endowment is set out in s.75 of the 1993 Act²¹. Under this power trustees may resolve to spend permanent endowment if:

- a) they are of the opinion that the permanent endowment is too small for any useful purpose to be achieved by the expenditure of income alone ; and
- b) the permanent endowment neither comprises nor consists of any land; and
- c) the charity had less than £1,000 of income in its last financial year

Any such resolution must be passed by a majority of not less than two-thirds of the trustees voting on the resolution. Before passing such a resolution trustees must first consider whether there is any reasonable possibility of transferring the permanent endowment to another charity or charities (under s.74 of the 1993 Act).

Where trustees do pass a resolution, they must give public notice in the manner they think is reasonable in the circumstances and send a copy of the resolution to the Commission together with a statement of their reasons for passing it.

The Commission can then ask for additional information or explanation and must take into account any representations made to it by interested persons within 6

²¹ S.75 does not apply to exempt charities or charities that are corporate bodies. See also note 9 above.

weeks, before notifying the trustees (within 3 months) whether or not it concurs with their resolution.

If the Commission does concur, the trustees can spend the permanent endowment.

The Charities Act 2006

Power for small charities (and some others) to resolve to spend permanent endowment without the concurrence of the Commission

Under the 2006 Act, the section 75 power will be extended significantly²². Firstly, for some charities²³, the trustees will be able to resolve to spend their available permanent endowment (as defined – see below) without any need for the Commission to concur. In order to make such a resolution the trustees of the relevant charities will have to be satisfied that the purposes set out in the trusts to which the fund is subject could be carried out more effectively if the capital of the fund, or the relevant portion of the capital, could be expended as well as the income.

The new test is designed to help trustees overcome the restrictions of the “any useful purpose” test in the 1993 Act. Under the existing provision, it can be difficult for trustees to form the opinion that the income generated by a small endowment is so inadequate that it doesn’t serve any useful purpose.

The charities where concurrence is not required will have at least one of the following features²⁴:

- (a) the charity’s gross income in the last financial year did not exceed £1,000
OR the market value of the endowment does not exceed £10,000
or
- (b) the capital of the fund does not consist entirely of property given
 - (i) by a particular individual, or

²² By s.43 of the 2006 Act.

²³ The revised s.75 applies to unincorporated charities (whether exempt or not) but not to charities that are corporate bodies. See also note 9 above.

²⁴ If the charity satisfies none of the conditions in (b) and both of the thresholds in (a) are exceeded the procedure for larger charities under new section 75A of the 1993 Act applies (see below).

- (ii) by a particular institution (by way of grant or otherwise), or
- (iii) by two or more individuals or institutions in pursuit of a common purpose.

Thus small charities with an income of £1,000 or less (whatever the size of their endowment) and charities with an endowment worth not more than £10,000 (whatever the size of their income) will fall within the new section 75. Charities where the trustees have created the permanent endowment restriction under powers within the governing document will also come within section 75 whatever their income or the size of the endowment.

There is no requirement for a 2/3 majority of the trustees to vote in favour. A simple majority will be sufficient, in the absence of contrary provision in the governing document.

In addition, there is no requirement for the Commission to concur and no ostensible requirement to send to it a copy of the resolution. However, the spending of permanent endowment may alter trusts of charity and registered charities will have a duty to notify the Commission under the new s.3B(3)(b) to be introduced by the 2006 Act.

It is worth noting that permanent endowment is no longer a trigger for compulsory registration and the income threshold for registration is now £5,000 per annum (introduced on 23 April 2007²⁵).

Many small charities may therefore come off the Register of Charities and will be able to pass resolutions under s.75 without the need to inform the Commission.

Power for other charities to resolve to spend permanent endowment subject to the concurrence of the Commission

In addition to the revised section 75, the 2006 Act introduces a new section 75A. This applies to the endowment of an unincorporated charity where

- (a) the capital of the fund consists *entirely* of property given
 - (i) by a particular individual, or
 - (ii) by a particular institution (by way of grant or otherwise), or

²⁵ The requirements in s. 3(5)(c) of the 1993 Act were amended by The Charities Act 2006 (Interim changes in threshold for registration of small changes) Order 2007, SI 2007/789.

- (iii) by two or more individuals or institutions in pursuit of a common purpose.

and

- (b) the charity's gross income in its last financial year exceeded £1,000 and the market value of the endowment exceeds £10,000.

If the conditions apply and (as in the case of the new s.75) the trustees are satisfied that the purposes of the permanent endowment could be carried out more effectively if the capital could be expended as well as income, they can resolve to make all (or some) of the permanent endowment expendable.

However, the requirements of s.75A are more onerous:

- the trustees must send a copy of the resolution to the Commission, together with a statement of their reasons for passing it;
- the Commission can then direct that the trustees give public notice of the resolution in an appropriate manner (it is unlikely to do so unless the charity has a history of mismanagement, misuse of property or has attracted a high level of public interest);
- the Commission can then ask for additional information or explanations about the circumstances in which the trustees have decided to pass the s.75A resolution and whether they have complied with the requirements of the section (the Commission is unlikely to require additional information if the trustees use the declaration form that the Commission will make available for this purpose).
- the Commission must then (within 3 months) decide whether we concur with the resolution and notify the charity whether or not it concurs. If it does not notify the trustees within that period, the trustees can proceed as if the Commission had concurred.

If the Commission concurs, the trustees can expend the permanent endowment in question in furtherance of the purposes for which it is held without regard to the restrictions on expenditure of capital which previously applied to it.

Power for trustees to spend endowment of a special trust

This only applies in relation to a special trust subject to a direction under s.96(5) 1993 Act as a result of which it is treated as a separate charity for the purpose of

the section giving this power. This will also apply to incorporated charities that hold permanent endowment on special trusts, including charitable companies acting as sole corporate trustee of such assets.

A similar procedure to that in section 75A applies²⁶ for special trusts where the market value of the endowment exceeds £10,000 and the capital consists entirely of property given

- (i) by a particular individual, or
- (ii) by a particular institution (by way of grant or otherwise), or
- (iii) by two or more individuals or institutions in pursuit of a common purpose.

For special trusts which do not fall within the last paragraph, concurrence by the Charity Commission is not required once a resolution to make the permanent endowment or any part of it expendable has been properly taken. A similar condition is attached to the other similar powers. The trustees need to be satisfied that the purposes set out in the trusts could be carried out more effectively if the capital of the fund was expended.

Available endowment fund

The powers described above, i.e. the new sections 75, 75A and 75B of the 1993 Act to be introduced by the 2006 Act, apply to an “available endowment fund”. An available endowment fund is defined²⁷ as meaning:

- “(a) the whole of the charity’s permanent endowment if it is all subject to the same trusts, or
- (b) any part of its permanent endowment which is subject to any particular trusts that are different from those to which any other part is subject.”

In spite of the inclusive nature of the definition, in order to be available, endowment must be in a form which is capable of being expended. If it is held on trusts to be used for a particular purpose or purposes of the charity, it may not be capable of being put in a form which is capable of being expended. The 1993 and 2006 Acts do not confer a power to sell designated permanent endowment or power to liquidate.

²⁶ Under s. 75B of the 1993 Act, as amended by the 2006 Act.

²⁷ In s.75(7) of the 1993 Act, as amended by the 2006 Act.

The issue here turns on the distinction between permanent endowment restrictions which are administrative restrictions preventing expenditure and those where the restriction is part of the purpose e.g. land held to be used in perpetuity for the charity.

In any event, of course, in the case of permanent endowment held on functional trusts, it is difficult to see that it would be possible for the trustees to decide that the purposes set out in the trusts could be carried out more effectively if the property was liquidated. Such purposes involve the use of the property in a certain way. Accordingly, it is difficult to see that charity trustees would be justified in passing the necessary resolution in respect of this type of permanent endowment. In addition, section 75(4) and 75A(4) clearly envisages a fund in which the capital “could be expended as well as income accruing to it.” In the case of permanent endowment held on functional trusts, there is unlikely to be any income accruing to it.

Land held on functional trusts could certainly be sold for the purpose of purchasing other land to be held for the same purpose²⁸. However, in the absence of an express power of sale, the statutory power of sale in the Trusts of Land and Appointment of Trustees Act 1996 would not be available for a sale where there was no intention to replace the property. Such a sale would be a breach of trust. Section 6(6) of the Trusts of Land and Appointment of Trustees Act states that the power of sale conferred by the Act “*shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity*”.

There may, however, be some circumstances in which liquidating part of the property would not involve a change in the purposes for which the property was held. As previously mentioned, a sale of part of land held on functional trusts may be possible without changing the purpose for which it is held. In these circumstances, it may be possible to imply a provision that the proceeds of such a sale would be held as investment permanent endowment to generate an income which could be expended in furtherance of the purpose for which the remainder of the land is retained. There is thus no change of purpose. Such a fund would of course fall within the definition of an available endowment fund.

There may even be some circumstances where the whole of a property held on functional trusts could be sold without changing the purpose e.g. where a charity carries on a school and operates from different sites. Thus it may be possible to imply a provision that the proceeds from the sale of the surplus site should be held

as investment permanent endowment to generate an income for the provision of a school at the other site(s).

However, where the proceeds of sale cannot be used in furtherance of the original purpose and holding those proceeds other than for the purpose of replacing the original land or assets would involve a change of purpose, a cy pres scheme will be required in the usual way.

Concurrence

The trustees cannot proceed to spend the permanent endowment which is the subject of their resolution until the Charity Commission has either concurred or failed to respond to the charity within a period of three months from the date the Charity Commission is notified.

There are minimum requirements for concurrence by the Charity Commission with the resolution of the trustees. In particular, when considering whether to concur, the Commission must take into account

- (a) any evidence available to it as to the wishes of the donor or donors
- (b) any changes in the circumstances relating to the charity since the making of the gift or gifts (including, in particular, its financial position, the needs of its beneficiaries, and the social, economic and legal environment in which it operates).²⁹

Clearly where there is evidence of the wishes of the donor which indicate a wish for the endowment not to be spent, the changes in circumstances since the making of the gift would need to be such that the intention of the donor may well have been different in those circumstances.

Also, the Commission must not concur unless it is satisfied

- (a) that its implementation would accord with the spirit of the gift or gifts even though it is inconsistent with the permanent endowment restrictions.
- (b) that the charity trustees have complied with their obligations in passing the resolution.

Where the circumstances of the case are such that the donor may have changed his/her wishes had s/he been aware of them, a proposal might accord with the spirit of the gift.

Similarly, if charity trustees have improperly sold land held on functional trusts, that may mean that the charity trustees could not reasonably have been satisfied that the purposes set out in the trusts could be more effectively carried out if the capital was expended.

More guidance will be forthcoming in respect of our view of the new powers and this will be available in due course. The new powers are due to be implemented in early 2008.