



LAW COMMISSION CONSULTATION RESPONSE, DEC 2024

INTRODUCTION

The Community Land Trust Network is the official charity supporting Community Land Trusts (CLTs) in England and Wales. We are a membership body and represent 360 CLTs with over 2,100 affordable homes and other assets. 209 of these CLTs are incorporated as Community Benefit Societies, with a further 58 incorporated as registered societies (prior to the 2014 act). CLTs are separately defined in law in section 2, para 7A of the Leasehold Reform (Ground Rent) Act 2022, and all CLTs incorporating as CBSs must meet the criteria in that definition.

RESPONSES TO CONSULTATION QUESTIONS

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)?

We are unsure.

For the reasons given in question 6, the distinction between a co-operative and a community benefit society is not clear-cut. Attempts to make it so in statute would risk leaving the FCA adjudicating and complicating the creation of a range of societies with different approaches to determining their purpose and governance.

However, we support the suggestion that a definition might help authorities/others to determine whether societies should be eligible for benefits such as a favourable tax treatment or philanthropic funding. A recent example that has arisen is the recent

changes to Stamp Duty Land Tax multiple dwelling relief. CLTs that are charitable or that are Registered Providers still qualify, but others - which can have good reasons not to want to be charitable or an RP - do not.

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?

While generally acceptable, we have five concerns about this definition:

First, we question whether ‘business’ would be understood to capture the full breadth of activities of CBSs, including CLTs. For example some CLTs buy and steward land for nature recovery - is this a business? Clarification on this would be helpful.

Second, the requirement that membership is ‘open to all’ risks conflicting with the geographic requirement for CLT membership. While some CLTs do allow members to join from anywhere, many require members to live or work in their defined geographic area. This is in line with the statutory definition of CLTs which requires that ‘individuals who live or work in the particular area have the opportunity to become members of the trust’.

Third, some CLTs make membership a condition of some benefits, for example for those seeking to buy or rent their homes. This ensures that the beneficiaries are involved in the democratic governance of the organisation. Since joining only involves

buying a £1 share we do not think this acts as a barrier, and the allocation of homes (or other benefits) is always based on fair and open policies directed at achieving benefits for the wider community. We do not think the requirement to join to bid for a home contravenes the principle of voluntary membership. Nor should it undermine the legal duty of the CLT to still act for the sole benefit of the community, as beneficiaries will often be members and be party to decision making already.

Fourth, we believe it is necessary for CLTs to be able to refuse membership, and expel members, if they are actively opposing the CLT's objects and aims. This issue arises where, for example, a CLT is seeking to develop housing in the locality and opponents join in order to disrupt the CLT. We think it reasonable that the board, or general meeting, can - within their rules - refuse or expel such members, while remaining open to anyone who does support the society's aims and objectives. This should be clarified in any statutory wording or guidance relating to 'open to all'

Fifth, while we support the principle of one vote per member in general meetings and other proceedings, we think it right that CLTs are able to set out in their rules or policies a defined allocation of places on their board. A common model is to reserve one third of the board places for beneficiaries (such as occupants of homes or workspace), one third for other local members, and one third for non-members who bring outside expertise or link with stakeholders like a local authority. This again needs to be provided for in any statutory wording or guidance.

In the case of CLTs, these matters are addressed in part by the statutory definition of a CLT, which the FCA would then need to apply in tandem with the statutory definition of a CBS.

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?

No. There is a risk that existing societies may not qualify, requiring them to amend their rules. The uncertainty could lead to problems, for example a breach of loan conditions on a live project.

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?

No. If it is applied retrospectively this is too short, given the potential legal and commercial implications. These will need time to address, and if they involve legal or other costs societies may need to fundraise for these.

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?

We have mixed views on this, and would urge caution. One option might be to enable CBSs to register with the Charity Commission but retain the 'exempt' form, either for any CBS or for certain circumstances.

One effect of the current 'exempt' status, not noted in the consultation paper but related to the point about not having a charity registration number, is recognition by charitable funders. Some trusts and foundations do not recognise the exempt CBS, either because they are unaware of it or because they view the lack of a charitable regulator as a problem. Enabling charitable CBSs to register with the Charity Commission would resolve this issue.

However, we are concerned about the impact that this would have on CBSs for three reasons.

First, the Charity Commission is under-resourced and so known to be very slow in responding to enquiries compared to the FCA. Registration of new CBSs is a quick, straightforward matter, but we have heard experiences from our members of long, extremely frustrating processes to register new charities, particularly when the applicant's model is not a 'traditional' charity, as few CBSs/CLTs are. An agile regulator is also incredibly valuable when changes are required while working on complex projects with many interrelated moving parts - for example the sale of land, commercial lending, grants and contractors.

Second, the regulation may be a burden for very small CLTs with little income. We note that companies require an income above £5,000 to register as a charity, and suggest the same threshold might apply to CBSs. Those under the threshold should be able to continue to incorporate and operate as exempt charities.

Second, there is a wider issue with charity law and charitable purposes which does not align easily with many CBSs/CLTs. This is beyond the scope of your specific question, but relates to concerns some members have with dealing with the under-resourced Charity Commission. For example, we provide guidance to our members on whether it is deemed 'charitable' to undertake such common (for CLTs) activities as the provision of low cost ownership homes to people priced out of the market, or of discounted commercial units to local businesses, or operating a local pub. These all fit within the purposes of the CLT to act, without private profit, in the interests of their local community, but are unlikely to qualify as charitable. The 'Elizabethan' understanding of charity prevails and means CLTs have to make judgement calls about their future potential activities when incorporating which can be difficult and expensive to unravel later on. In some ways the Community Interest Company and the Office of the Regulator of Community Interest Companies may be a better comparison.

We do not wish to weaken the protections and benefits involved with charitable status. But would welcome a reconsideration of the interaction between charity law and registered societies in general.

Consultation Question 10.

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

We do not have a strong view on this. The advantage of opting for the Charity Commission would be the confidence that stakeholders such as charitable trusts and foundations would have in its ability to regulate charitable bodies.

But we believe this question points to a wider issue, which is the lack of a regulator for CBSs more generally. Currently most CLTs are not regulated. Some register with the Regulator for Social Housing in England, and under your proposals some may register with the Charity Commission. But others have no regulator, only the FCA as registrar. If

members of the community feel the CBS is - for example - not operating within its rules, they have no regulator to appeal to, only the courts. Members of the public have sometimes contacted us to complain about the governance of a particular CLT, and are frustrated when we point out that neither we nor the FCA are a regulator.

Given the increasing prominence of CBSs in owning assets and discharging responsibilities of importance to communities, we think this is a general problem that needs further work.

It is also an issue with CLTs in particular, which have a statutory footing and enjoy certain legal benefits such as the unique ability to charge residential ground rents (in the Leasehold Reform (Ground Rent) Act 2022) and - when regulations are brought forth - the ability to exempt properties from leasehold enfranchisement (in the Leasehold and Freehold Reform Act 2024). We discussed with officials the possibility of adding CLTs to the list of community bodies able to receive the neighbourhood share of the Community Infrastructure Levy, or new Infrastructure Levy. Other changes may come forward. As this power for communities is recognised and built into law, the case grows for proper, and proportionate, regulation of community bodies such as these.

Consultation Question 11.

5.39 We provisionally propose that the CCBS Act should be amended to state explicitly as follows.

(1) Society shares can be withdrawable or non-withdrawable, and transferable or non-transferable.

(2) It is for societies by their rules to determine which of their shares are withdrawable or non-withdrawable, and transferable or non-transferable.

Do you agree?

Yes.

Consultation Question 12.

5.62 We provisionally propose that the CCBS Act should provide a definition of a withdrawable share. Do you agree?

Yes.

Consultation Question 13.

5.63 We provisionally propose the following ingredients of a definition of a withdrawable share.

(1)A withdrawable share can be cashed in, such that a society pays the value of the share, to the holder of the share, in return for the share being cancelled.

(2)A withdrawable share can be withdrawn at the option of the member or the society, depending on the society's rules.

Do you agree with each of these elements?

Yes.

Consultation Question 14.

5.85 We provisionally propose that the CCBS Act should set out the minimum conditions for withdrawing shares. Do you agree?

Yes.

Consultation Question 15.

5.86 We provisionally propose that the CCBS Act should provide that society rules can set extra conditions for withdrawing shares. Do you agree?

Yes.

Consultation Question 16.

5.87 We provisionally propose that the minimum conditions for withdrawing shares should be as follows.

A society should pay for withdrawable shares only to the extent that the officers of the society think that the society can also pay its debts at that time and as they fall due over the following year.

Do you agree?

In particular, we think that a society considering requests for withdrawal should be able to pay a proportion of the sought withdrawals, rather than all or nothing, if that is what it can afford. Do you agree?

No. The “following year” is too short a timeframe for CLTs that are developing assets, the timeframe for which averages 5-6 years. CLTs may hold share capital to be used alongside e.g. bank debt, and which is intended to be recycled when a completed project is refinanced. These timescales and terms would have been set out in the community share issue. While a CLT may be in a position to allow a shareholder to withdraw early, the society should have discretion where the terms were clear to the investor at the outset.

Consultation Question 17.

We provisionally propose that the CCBS Act should provide a definition of a transferable share. Do you agree?

Yes.

Consultation Question 18.

5.94 We provisionally propose that a transferable share be defined as one that can be passed from one person to another such that the transferee holds the share in place of the transferor. Do you agree?

Yes.

Consultation Question 19.

5.104 We provisionally conclude that the form of transfer should be left to the sector to determine rather than prescribed in legislation. Do you agree? If you do not agree, please detail what form you consider should be prescribed.

Yes.

Consultation Question 20.

5.113 As for transferable shares, we provisionally propose that the CCBS Act should be amended to state as follows.

- (1)The consent of officers of a society is needed to transfer shares.**
- (2)Officers can in their discretion refuse a transfer of shares.**
- (3)Their discretion must be exercised consistently with their duties as officers.**
- (4)The rules of a society can set further conditions on the transfer of shares.**
- (5)The rules of a society must provide for the form of any transfer of shares.**

Do you agree with each proposition?

Yes.

Consultation Question 21.

5.120 We provisionally propose that the CCBS Act should state as follows.

- (1)A society can have different classes of membership with different rights.**
- (2)A society can issue different classes of shares with different rights.**
- (3)A society can issue shares to non-user investors.**

Do you agree?

Yes.

Consultation Question 22.

5.135 We provisionally propose, in the context of changes to class rights of shares or members, that the CCBS Act should provide as follows.

(1) Class rights should only be changed if the change is approved by at least 75% of affected shareholders or members.

(2) Society rules could set a higher threshold.

(3) If shares are changed from non-withdrawable to withdrawable, that should require a solvency statement by the officers of the society, confirmed by an auditor.

Do you agree with each element?

Yes, except that in circumstances where a CBS has decided (per its rules) to disapply an audit for a given financial year, that requirement under (3) should also be disapplied.

Consultation Question 23.

We think that there should be some protection for shareholders who still object to any change in their class rights. Which of the following protections do you think is suitable? You can select more than one, or indicate your preferred option.

(1) A complainant could petition the court to wind up a society on the basis that it would be just and equitable to do so.

(2) A complainant could petition the court on the basis that any change to class rights would be unfairly prejudicial.

(3) A society would have to buy out an objecting shareholder.

(4) Any change would not take effect against a shareholder who objects in writing.

If you think that there should be a different protection, please explain.

We are unsure about this, but in consultation with our members the general view that courts are best avoided unless as a last resort, and that option 3 might be the best first option.

Consultation Question 24.

5.141 We provisionally propose that, when a society seeks to write down its shares, that should require a solvency statement by officers of the society, and a special resolution. Do you agree?

Yes.

We provisionally propose that the special resolution should require the approval of at least 75% of voters at a general meeting. Do you agree?

Yes.

Consultation Question 26.

We provisionally propose that there should be the following restrictions on interest rates paid by community benefit societies on investments, deposits and loans.

(1)Any interest rate should be no more than is needed to obtain necessary funding.

(2)Any interest rate should be no more than a reasonable rate.

(3)Interest on investments and deposits should be paid only to the extent that the officers of the society think that the society can also pay its debts at that time and as they fall due over the following year.

Do you agree?

Yes, except for (3) as noted in answer to question 16.

In particular, we think that a community benefit society considering interest payments should be able to pay a lesser rate, rather than all or nothing, if that is what it can afford. Do you agree?

No, for the same reasons given in answer to question 16.

Consultation Question 27.

Do you think that societies need a new type of share? If so, what would be its characteristics?

We have no view on this.

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 are unsure about this and fear it could cause confusion. Most of our members refer to the members of their board as 'directors', except those that are exempt charities which tend to refer to them as 'trustees'. Within the group of directors/trustees, some may take specific roles such as treasurer or chair and this subset is more usually what is referred to by 'officers'. Some CLTs may also appoint non-directors as officers, e.g. a board secretary.

Consultation Question 29.

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

Yes.

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?

Yes in principle, but we would ask whether the time limit could be extended to - for example - 28 days. Most CLTs are run by volunteers and there may be circumstances - such as holidays - which make it difficult for the secretary to submit the online form with the FCA in a short timeframe.

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?

Yes.

Consultation Question 32.

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

Yes. This is particularly helpful where members move addresses frequently, as is common for example with CLT members that rent privately in cities.

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?

Yes.

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?

Yes.

Consultation Question 35.

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

Yes.

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?

No. Societies are different from companies, and in the case of CLTs directors' duties should reflect their social, economic and environmental duties. Company law is currently too narrowly drawn to be suitable. For example, the advocates of a Better Business Act argue that legal changes are required so that directors can exercise their judgement in weighing up and advancing the interests of all stakeholders, something that is essential for CLT directors¹. The B-Corp movement also has a similar set of alternative duties that need to be written into the articles of companies seeking their certification².

Consultation Question 37.

¹ <https://betterbusinessact.org/about-the-act/>

² <https://bcorporation.uk/b-corp-certification/before-you-certify/legal-requirement/>

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?

Yes.

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?

Yes.

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?

Yes.

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?

We would prefer a tribunal.

Consultation Question 40.

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

Yes.

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?

Yes.

Consultation Question 42.

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

Yes.

Consultation Question 43.

7.46 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?

Yes. We would hope that the FCA would exercise some flexibility, having issued a warning or the notice period for cancellation. For example, some CLTs have been cancelled for failing to submit an annual report and accounts. This may be due to secretarial oversight, or a lack of understanding of the reporting requirements. In one or two cases this has occurred where the CLT was party to legal agreements, for example with a legal agreement to lease land to a housing association, which became void when the FCA cancelled the society. In these cases, if the society receives the notice and acts to remedy the situation, it may in practice need more than two months to prepare the accounts and submit the report. We can provide further details of examples if needed. As a membership body for CLTs, we try to inform officers of their responsibilities to avoid this situation happening in the first place.

We would also propose that the FCA gain a statutory power to restore a cancelled society to the register, something that already exists in company law. This is important where, for example, a CLT is deregistered while owning land or being party to legal agreements.

Consultation Question 44.

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

Yes.

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?

Yes.

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?

Yes.

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?

Yes.

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?

Yes. We would add to this list (6) Expelling a member.

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?

Yes.

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?

Yes.

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?

Yes.

Consultation Question 58.

7.143 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?

No, the local newspaper seems unnecessary and the notices are unlikely to attract attention.

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?

Yes.

Consultation Question 60.

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

No.

Consultation Question 61.

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

Yes.

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)?

No. We think this is disproportionate, particularly when CBSs are run by volunteers, and risks increasing insurance premiums for directors and officers.

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?

Yes.

Consultation Question 67.

7.201 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?

Yes. We agree that the current arrangement is confusing and unnecessarily complicated. The suggested thresholds are reasonable. The ability to disapply the requirement to audit is important for small societies with limited income, for whom annual audits would represent an expense that would be difficult to pay for.

Consultation Question 68.

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

Yes, we agree that the legal status of a CBS suggests it should have to report on them similar to community interest companies and charities.

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?

Yes, this would bring the requirement into line with company law and make administration easier for CLTs.

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?

Yes. We would further suggest that “community land trust” is added to this list. While not directly related to this consultation - as community land trusts can, and have, also be incorporated using other legal forms such as the community interest company - a similar logic applies, and most CLTs are CBSs.

The term Community Land Trust was defined in law in the Housing and Regeneration Act 2008, section 79. (It was moved to the Leasehold Reform (Ground Rent) Act 2022 by the Social Housing (Regulation) Act 2023). It enjoys certain legal advantages, for example Section 2 of the Leasehold Reform (Ground Rent) Act 2022 exempts landlords that are Community Land Trusts from the ban on residential ground rents, and Schedule 3 of the Leasehold and Freehold Reform Act 2024 provides for Community Land Trusts to exempt their homes from leasehold enfranchisement - two areas of law on which the Law Commission has previously worked.

The term ‘community land trust’ is also recognised and used in such places as the glossary of the National Planning Policy Framework³, local planning policy documents such as in East Cambridgeshire⁴ and Southwark Council’s land commission⁵.

³ <https://www.gov.uk/guidance/national-planning-policy-framework/annex-2-glossary>

⁴

<https://eastcambs.gov.uk/sites/default/files/Com%20Led%20Dev%20SPD%20as%20adopted%2025%20Feb%202016.pdf>

⁵ <https://www.southwark.gov.uk/council-and-democracy/southwark-land-commission>

It has recently come to our attention that a company was registered with 'Community Land Trust' in the name, but which did not meet the criteria specified in legislation. It was incorporated with a name designed to confuse, by an individual who objected to the work of a local CLT.

It is a relatively simple matter to establish if the rules, or articles of association, or constitution of an organisation match the statutory criteria for a CLT.

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?

Yes. Most of our members have their registered office as a residential address of a director, lacking any premises of their own, so this requirement is not appropriate.

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?

Yes. However, we would propose that this be allowed by default in cases where a CBS' rules are silent on the matter, rather than requiring that they be expressly provided for in rules.

Consultation Question 76.

7.255 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?

Yes.

Other comments

While it is unclear whether the proposed changes will require some or all CBSs to change their rules or make other provisions, we note the possibility may incur significant costs. We therefore suggest that either the Law Commission or the government should undertake and publish an impact assessment at an appropriately early point to consider this point.