

July 2015

CharityFinance

www.civilsociety.co.uk

Published by Civil Society Media

What are you made of?

How a charity's values shape
its behaviour and define its culture

The ins and outs of legal advice

Large charities are increasingly adopting strategies to optimise their mix of internal, external and pro bono legal support, finds Diane Sim.

Charity Legal Survey 2015

CHARITY FINANCE'S fourth annual legal survey focuses exclusively on mid-sized to large charities and is based on data provided by 25 charities with annual income of £20m-plus, supplemented by in-depth interviews and reference to the *Charity Finance* Charity 100 and Charity 250 Indexes.

In-house teams

A characteristic feature of large charities is the existence of an in-house legal team that is responsible for some proportion of the charity's legal work.

In the case of the 25 charities surveyed this year, 60 per cent have an in-house legal team that undertakes at least 50 per cent of the charity's legal workload (see figure 1).

The number of staff in the in-house team varies enormously, according to the size, segment and legal requirements of the charity concerned.

The largest in-house team in this year's survey is at RNLI, where there are over ten staff, including qualified and support personnel, reporting to the head of legal services.

“Many in-house legal teams undertake at least half of the workload”

Although 80 per cent of the charity's legal work is undertaken by the in-house team, the charity calls regularly on the services of eight external law firms for help in

specialist areas, including intellectual property, legacies, pensions, fundraising and Scottish law. Over the last year, it has additionally enjoyed pro bono legal support worth an estimated £25,000.

However, over three-quarters of the charities with in-house legal teams have no more than three in-house lawyers, with more than half of these being effectively 'one-person bands'.

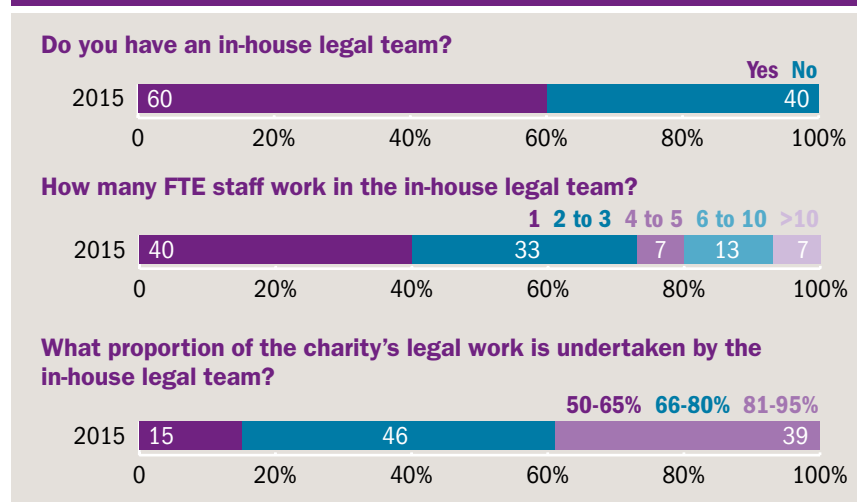
In charities where there is an in-house legal team, day-to-day executive responsibility for legal issues rests with the head of legal services or equivalent, who in turn usually reports to the finance director or chief executive officer.

In charities with no in-house team, responsibility for legal issues tends to rest with the finance director or the company secretary (see figure 4).

The charities surveyed that don't have in-house legal teams are mainly – though not exclusively – smaller charities with annual income of £30m or less.

Independent schools tend not to have in-house legal resources, although larger school groups such as the Girls' Day School Trust and state-funded, multi-academy trusts increasingly do.

figure 1: The in-house legal team



Rapid growth

The number of charities employing in-house lawyers has grown rapidly over the last 15 years. In the late 1990s the in-house Charity Lawyers Group had just eight members.

Today the recently rebranded Lawyers in Charities group (LinC) has over 250 members drawn from more than 100 charities.

Membership of the group is highly diverse with “representation from most segments of the charity sector and legal teams that range from one person to departments of 10-15 staff”, says Deborah Prince, p38 ►

Leading legal advisers

Figure 2 ranks the legal firms listed as main advisers in the annual reports of organisations in the *Charity Finance* Charity 100 and Charity 250 Indexes, which include charities with three-year average income of over £16.8m.

It shows that between them the top 350 charities use almost 500 advisers, drawn from some 200 different firms. It does not lay claim to be an exhaustive list and it likely understates the situation: 80 per cent of this year's survey participants regularly call on the services of two or more firms (see figure 6).

Last year's charity legal survey highlighted a marked trend towards

greater industry consolidation, with the creation of newly-merged entities including, among others, Wragge Lawrence Graham & Co, Bond Dickinson, Blake Morgan and Harrison Clarke Rickerbys.

Fewer mergers

This year there has been only one major transaction involving firms active in the charity legal market, namely last November's merger of Charles Russell and Speechly Bircham to form Charles Russell Speechlys.

"Both firms had an established charity team and the combination of specialist skills from the two legacy

firms means that we can offer greater depth and breadth," says Mike Scott, head of charities at Charles Russell Speechlys.

"We have 26 partners within our charities, not-for-profit and philanthropy team, supported by 28 non-partner lawyers, and there are another 26 lawyers in other parts of the firm with experience of working with charities," adds Charles Russell Speechlys' charities partner Lynne Povey.

Though clearly a significant transaction, it appears that last year's almost frenetic pace of market consolidation has – temporarily at least – slowed down.

figure 2: Legal advisers to the top 350 charities

Law firm ¹					Law firm ¹				
		100 Index ²	250 Index ³	Top 350			100 Index ²	250 Index ³	Top 350
1	Bates Wells Braithwaite	14	26	40	=23	Blake Morgan	1	3	4
2	Farrer & Co	12	23	35		Clifford Chance	1	3	4
3	Veale Wasbrough Vizards	2	20	22		CMS Cameron McKenna	3	1	4
4	Anthony Collins	5	10	15		Dentons	–	4	4
5	Bircham Dyson Bell	3	9	12		Hewitsons	3	1	4
=6	Charles Russell Speechlys ⁴	6	5	11		Pinsent Masons	3	1	4
	Withers	10	1	11		Trowers & Hamblins	–	4	4
8	Russell-Cooke	2	8	10		Turcan Connell	1	3	4
9	Winkworth Sherwood	1	8	9	=31	Berwin Leighton Paisner	–	3	3
10	Stone King	3	5	8		Brabners	1	2	3
11	Eversheds	4	3	7		Brodies	–	3	3
=12	DWF	1	5	6		Fieldfisher ⁵	1	2	3
	Geldards	1	5	6		IBB Solicitors	–	3	3
	Wragge Lawrence Graham & Co	3	3	6		Lee Bolton Monier-Williams	–	3	3
=15	Bond Dickinson	5	–	5		Linklaters	3	–	3
	Bristows	1	4	5		Morton Fraser	–	3	3
	Capsticks	1	4	5		Nabarro	–	3	3
	DAC Beachcroft	1	4	5		RPC ⁶	–	3	3
	Hill Dickinson	1	4	5		Taylor Vinters	–	3	3
	RadcliffesLeBrasseur	1	4	5		TLT Solicitors	1	2	3
	Wilsons	1	4	5		147 other firms with up to two mentions	45	131	176
	Wrigleys	1	4	5		Totals	142	340	482

(1) The law firms above are the main legal advisers listed in the annual reports of charities in *Charity Finance*'s Charity 100 and Charity 250 Indexes. Some charities list more than one firm.

(2) The 100 Index includes charities with three-year average income greater than £51.9m.

(3) The 250 Index includes charities with three-year average income of £16.8m to £50.7m.

(4) Formed from the November 2014 merger of Charles Russell and Speechly Bircham.

(5) Formerly known as Field Fisher Waterhouse.

(6) Formerly known as Reynolds Porter Chamberlain.

general counsel and company secretary at the British Heart Foundation, who chairs LinC.

Now that membership of the group has critical mass, it is in the process of “setting up special interest groups for specific segments and specific legal requirements such as fundraising, and already has a very active data protection group”, says Prince.

Internal vs external advice

The presence of an in-house legal team does not obviate the need for external legal advisers, but it does impact on the volume and range of services required. Indeed the key challenge facing in-house lawyers is gauging when it is best to use in-house resources or external advice – on a paid-for or pro bono basis – or a combination of the two.

Figure 5 ranks the main issues on which the charities surveyed this year seek advice and indicates whether they tend to look to the in-house team, to external advisers or to a combination for advice.

The main areas where charities are more likely to look to external advisers for help are employment, pensions, property, constitution and governance, tax, trademarks and intellectual property.

Conversely, the main areas where they are likely to look internally for help are procurement, contracts and service level agreements, commercial and corporate law, fundraising and information technology.

While this summarises the collective picture among the charities surveyed this year, there are of course variations on the theme. At Anthony Nolan, Dorcas Cummings, who heads an in-house legal team of two, says that “most legal work is done in-house, with the exception of property and employment law, where a combination of expertise and independence is sought”.

“Most in-house lawyers have a background in commercial law”

At Alzheimer’s Society Alex Morley, who heads up an in-house legal team of six, says that property work is undertaken in-house and employment work is undertaken by an in-house employment lawyer, who reports directly into the human resources function.

“We have taken external advice this year in the area of health and social care, specifically safeguarding and the use of do-not-resuscitate (DNR) orders. We have also sought external advice on our governance review, with a view to ensuring that we take account of best practice,” he adds.

Broadly speaking, the in-house legal team is used to meet regular, recurrent and predictable needs, and external advice is sought when there is a need for specific areas of expertise not available in-house,

or when there is a need for extra capacity.

Specific areas of expertise that are not in-house may relate to areas of law in other jurisdictions.

Joanne Lark, head of legal services at BCS – the Chartered Institute for IT, undertakes most legal work in-house but needs to call on external advice when registering trademarks in different markets and when drawing up contracts with overseas suppliers.

External advice may also be sought when there is a need for independent advice – or at least a robust second opinion – or when there is a need to understand best practice and how comparable organisations handle the issue in question. External lawyers can also be used when there are sensitivities around an issue or a strong need for confidentiality.

A collaborative approach

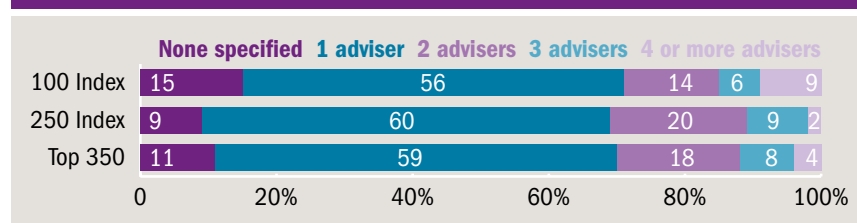
One of the main reasons why the presence of an in-house legal resource does not remove the need for external advice is because most in-house lawyers tend to have backgrounds in commercial law, rather than charity law – although there are some exceptions to this.

Most specialist charity law firms are, therefore, skilled in tailoring their approach to charities that have in-house teams and those that don’t. Many stress the importance of a collaborative approach to build good, long-term relationships.

“It is vital that the internal and external teams spend time getting to know each other, so that we are effectively an extended part of their team and everyone knows who to go to for what,” says Ann Phillips, who chairs Stone King and is a partner in its charity and social enterprise team.

The legal firms interviewed for this year’s survey cite many examples of

figure 3: Number of legal advisers used by the top 350 charities



close working relationships with in-house teams. “Successful collaboration can take the form of secondments to the in-house team to fill a temporary skills or resource gap, or being part of the charity’s selection panel helping to recruit an appropriate candidate for the in-house team,” says Chris Priestley, charity partner at Withers.

Indeed, in the case of long-term relationships between charities and their advisers, elements of what the in-house team look for externally can be quite surprising: “When we have worked with a client for say 15 to 20 years, they will look to us to fill any corporate memory gaps and shed light on why a particular approach was taken,” says Alison Paines, who heads the charities and philanthropy group at Withers.

Oxfam’s experience

A prime example of a very close working relationship between a law firm and its charity clients is provided by Joss Saunders, general counsel and company secretary at Oxfam.

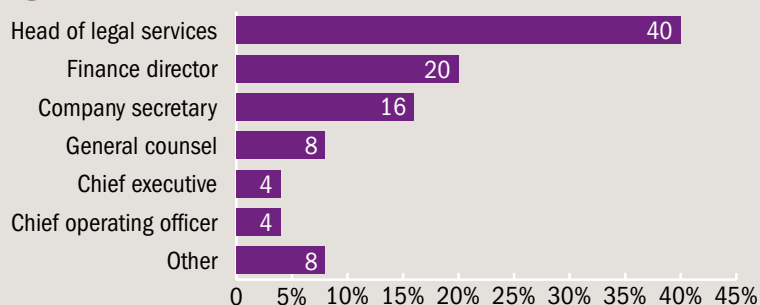
Saunders was first seconded in 1998 by a predecessor firm of Blake Morgan to work as an in-house lawyer for Oxfam, for two days a week. In 2002 his commitment increased to four days a week and last year became full-time – with the exception of two days a month, when he works as a consultant for Blake Morgan.

Over that period, he has built up the in-house team of 2.5 staff, and developed relationships with “three firms that provide invaluable support on a pro bono basis, particularly on international issues”.

According to Saunders, the hybrid nature of his role has been “actively encouraged by Oxfam, which has benefited from my continued exposure to the broader

figure 4: Reporting line

Who has day-to-day executive responsibility for legal issues in your organisation?



If your organisation has a head of legal services/general counsel, to whom does that position report?

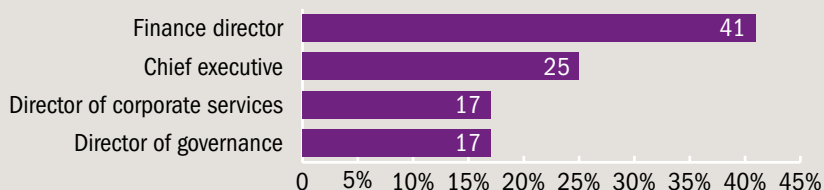
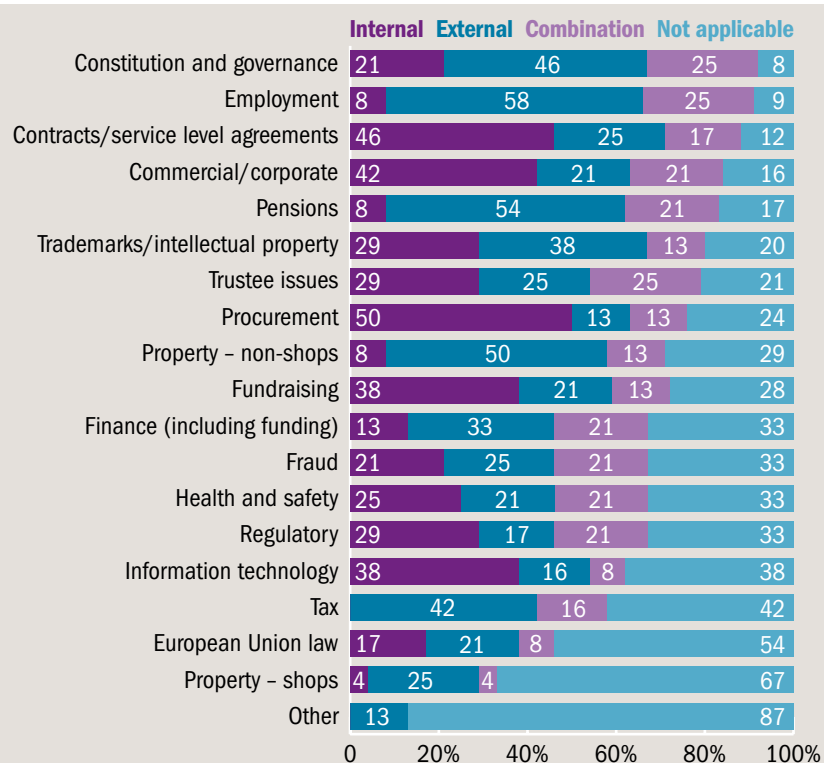


figure 5: Internal versus external sources of legal advice



Note: Survey respondents could specify all relevant issues, ranked in order of importance.

range of issues that are handled by a commercial law practice”.

Pro bono services

Just over 40 per cent of charities surveyed this year have received pro bono advice over the last year, which – had it been charged for – would, on average, have had a cost of some £25,000.

Based on our survey sample, it is clearly the larger, longer-established household names that benefit most

from pro bono support, rather than mid-sized charities serving special interest groups, such as trade and professional associations or independent schools.

While many are keen to increase the services they receive on a pro bono basis, it is clear that they are frequently regarded as a supplement to, rather than a replacement for, work that is undertaken by the in-house team or commissioned for a fee from external firms.

The RNLI has a four-strong panel of voluntary lawyers, with each approaching the charity independently to offer their services on a pro bono basis. “They each have their own distinct areas of expertise and we approach them for help in very specific areas, which might range from a training programme to the benefit of a second pair of eyes,” says Nicky Nelson, head of legal, compliance and company secretarial services at the RNLI.

“These areas of work tend to be discrete and independent of other areas of work undertaken in-house or externally on a paid-for basis, and are generally less time-sensitive,” she adds.

“The availability of pro bono support is a real advantage in the charity sector but the downside is that you do tend to get what you’re given,” says Prince at LinC.

“Because you’re not a paying client, you have less control over what is done and when, so you cannot afford the risk of outsourcing anything critical,” she adds.

“You also need to be careful to vet the source of pro bono support. At the British Heart Foundation, we could not, for example, accept support from a law firm that has tobacco manufacturers on its client list, as this would amount to an indirect subsidy from the tobacco industry,” she says.

Satisfaction levels

With almost 95 per cent of charities happy to recommend their main legal adviser to other charities, overall satisfaction levels with the services provided are clearly high.

Indeed, all the charities surveyed rate as ‘good’ or ‘very good’ the charity sector expertise and technical competence of their advisers, while 95 per cent rate overall service as

figure 6: Number of legal advisers regularly consulted by survey respondents

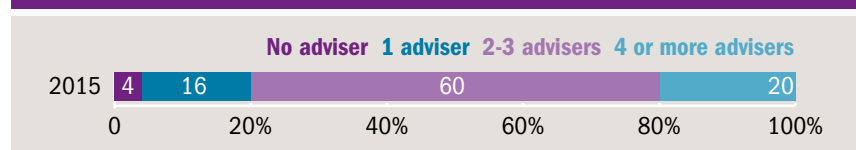


figure 7: How long have you been with your main legal adviser?

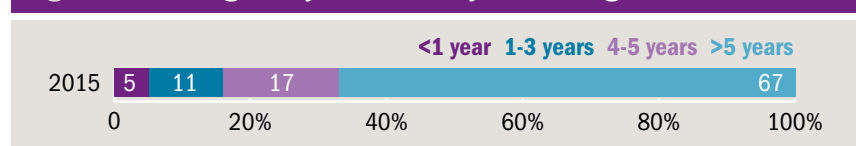


figure 8: How frequently do you formally review the services of your main legal adviser?

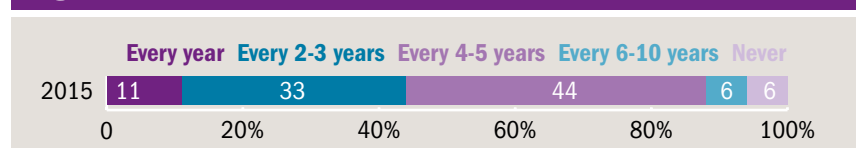
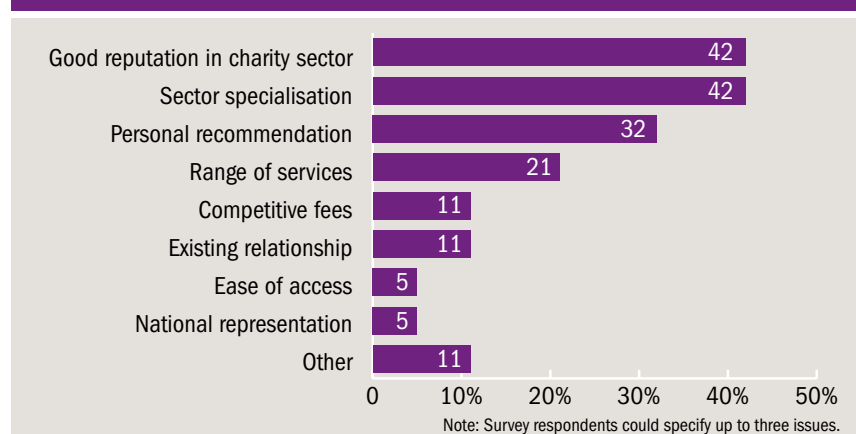


figure 9: Why did you choose your main legal adviser?



‘good’ or ‘very good’ (see figures 10 and 11).

The area where charities rate their main legal adviser less highly is value for money, which only 44 per cent rate as ‘good’ or ‘very good’, and the majority – some 56 per cent – rate it as ‘average’.

Costs are clearly an issue for charities, which were asked this year about their strategies for keeping legal costs under control. “It is necessary to try to strike the right balance between using pro bono lawyers, retained lawyers and in-house counsel, depending on the matter requiring legal input,” advises Morley at Alzheimer’s Society.

“When using external advisers, obtain prior estimates, ask for interim reports and bills and use the in-house legal team to focus questions and interpret advice,” counsels the senior legal adviser at a charity with annual income of £78m.

Where external advisers can help is by providing a “better blend between expensive senior staff and knowledgeable more-junior and less-expensive staff,” says the finance director at a charity with annual income of £25m.

“ Use the in-house team to focus questions and interpret advice ”

There is plenty of evidence of initiatives taken by legal advisers to keep costs down. Veale Wasbrough Vizards have developed a dedicated helpline available for a fixed monthly fee to academies, to which around a third of its 450 academy clients subscribe, says head of charities Con Alexander.

More recently the firm has launched a compliance toolkit for independent schools, accessible via

a portal for a fixed monthly fee, which enables them to keep up-to-date with regulatory changes and update standard policy documents.

Creating efficiencies is one of the major objectives of the networking service provided by LinC. “Any member of LinC can tap into a network of 350 in-house lawyers to ask for advice on a particular issue or for a recommendation on who to consult,” says Prince.

“The service has, on occasion, enabled clients facing common issues to jointly commission external advice and share costs,” she adds.

Rising demand

Looking ahead, neither charities nor their legal advisers expect the need for legal advice on the part of the charity sector to abate over the next few years.

As figure 13 shows, over 60 per cent of charities surveyed expect their need for legal advice to increase

Getting technical

The start of this month sees the end of the 15-week period set by the Law Commission for comments on its consultation paper on *Technical issues in charity law*, which runs to some 300 pages.

The paper originates from the Law Commission’s *Eleventh programme of law reform*, published in 2011, which identified certain aspects of charity law for review, giving priority to areas thought to create uncertainty or to involve an unnecessary regulatory or administrative burden. It also addressed issues arising from the review of the Charities Act 2006, conducted by Lord Hodgson.

Charities participating in our survey this year are either unaware

of the consultation exercise or sceptical about its relevance to them. “The document is too long for a busy person to study and there is no indication that my views will make any difference anyway,” says the chief executive of a charity with annual income of £30m.

“Technical issues are not of much practical relevance to us,” says the senior legal adviser of a charity with annual income of £78m.

Alexander, at Veale Wasbrough Vizards, believes that a number of the recommendations made in the report could potentially deliver tangible benefits to charities across the board.

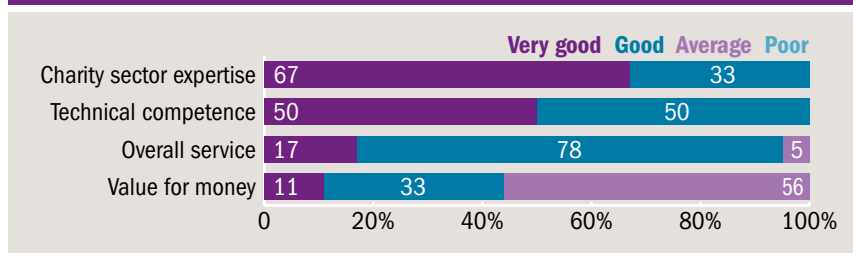
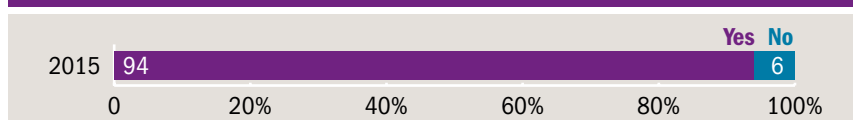
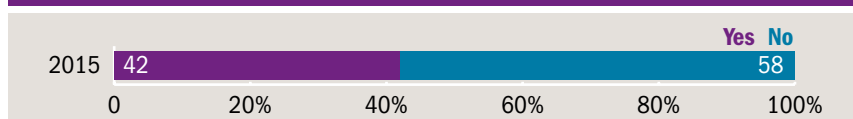
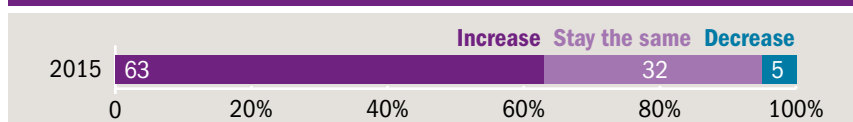
“The proposed amendments to the governing documents of charities governed by Royal Charter or Act of

Parliament will relieve a small group of a large burden, but the proposed simplification of the rules governing property transactions will benefit many more charities,” he says.

Removing barriers

Philip Kirkpatrick, deputy managing partner and joint head of charity at Bates Wells Braithwaite, believes that some of the measures proposed will help remove some of the barriers to charity mergers, by making it much easier for new entities to receive assets gifted to predecessor charities.

The Law Commission expects to publish a final report, informed by consultation responses received, and issue a draft bill next year.

figure 10: How do you rate your main legal adviser?**figure 11: Would you recommend your main adviser to other charities?****figure 12: Do you use any legal advisers on a pro bono basis?****figure 13: How do you expect your need for legal advice to change over the next three years?**

over the next three years, 32 per cent expect it to stay at the same level and just 5 per cent expect it to decrease.

This should not really come as a great surprise. A reduction in the level of advisory support available from the Charity Commission, as a result of a virtual halving of its budget between 2007/08 and 2015/16, has generally meant that charities have had to look elsewhere for guidance and reassurance on regulatory issues.

“The Charity Commission provides much more guidance now on its website but charities still need help in interpreting and applying the rules that are relevant to their specific situation,” comments Mike Scott, head of charities at Charles Russell Speechlys.

“**Many charities are proactively seeking a regulatory health check**”

Coupled with the more vigilant stance taken by the Charity Commission in the wake of the Cup Trust case, many legal advisers report an increase in the number of charities proactively seeking a regulatory health check, and reassurance that they are compliant with the requirements.

And while there are initiatives aimed at reducing the regulatory requirements that charities are subject to, such as the Law Commission’s consultation paper on technical issues in charity law

(see box on page 41), there are plenty of others set to increase them.

More complexity

A recent example is the joint announcement last month of more robust fundraising standards promised by the Fundraising Standards Board, the Institute of Fundraising and the Public Fundraising Regulatory Association, in the wake of the sad death of pensioner Olive Cooke (see news analysis on page 8).

Another area of growing complexity is procurement, following the publication in February of the *Public Contracts Regulations 2015*, which implement new European directives.

The new regulations affect “charities which bid for contracts from public authorities, and charities which are themselves contracting authorities for the purpose of the public procurement regime,” notes Stone King partner Hannah Kubie.

Another growth area is social finance. This is giving rise to some interesting initiatives at law firms that specialise in this area, notably the setting up of an eight-strong advisory and impact team at Bates Wells Braithwaite, headed by Jim Clifford who was recruited from Baker Tilly in May 2014.

The BWB team provides social finance advice and impact measurement and assessment services to clients in both the private and not-for-profit sectors. ■



Diane Sim is
a research analyst
at Charity Finance