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Special Public Bill Committee: Call for Evidence

I am a Senior Lecturer in Law at the University of Liverpool. The government response to the Law Commission's 2017 report *Technical Issues in Charity Law* relates, in many aspects, to my published interests. In this submission, I draw out points from my work insofar as they are relevant to the Call for Evidence.

Whether the Government were Right to reject, or Only Partially Accept, Certain Recommendations of the Law Commission

Recommendation 11 on the Return of Failed Appeal Funds to Donors

The government recommends measures be adopted which further limit the circumstances in which a failed appeal fund (i.e. a public charitable collection) might be returned to donors.

No statutory provision currently regulates the circumstances where a *non-charitable* appeal fund has failed (e.g. a collection for specific animals; a private memorial; individual medical bills; a social justice campaign to change the law). For this reason, all such non-charitable funds would, upon failure, be returned directly to donors.

There is nothing *prima facie* wrong with returning gifts in failed non-charitable appeals to donors. However, in some circumstances, return will not be possible. This is the case where a non-charitable fund is collected by anonymous means (e.g. cash collection boxes). Even in the era of online collections, it seems likely that anonymous cash collections will persist in the medium term.

In my view, the law should not require an impossibility. For this reason, the new statute should provide that where non-charitable appeal funds cannot be returned to donors (e.g. in the context of anonymous cash collections) they should, at the discretion of the Charity Commission, be treated 'as if' they are charitable donations, so that they might be applied to public purposes and so kept in charity.

Recommendation 28 on Ex-gratia Payments

The government recommends that small *ex-gratia* payments might be made without Commission consent.

In my chapter, J. Picton, 'Mapping Bad Charity' in R. Hewitson et al (eds), *Modern Studies in Property Law*, vol 11 (Oxford, Hart, 2021), I show that the law is unclear on whether trustees might make *ex gratia* payments to the victims of abuse by a charity founder or major donor.

This might be a live issue in the context of winding up an organisation (eg the Jimmy Saville charitable trust), or in the context of a religious organisation seeking to make reparations. In

such circumstances, the trustees might wish to make an *ex-gratia* payment in recognition of their suffering.

Currently, the law requires that trustees act only in the best interests of the charity. In abuse cases, it is not clear whether voluntarily paying victims out of funds can be justified in those terms as the payment will lead to a financial detriment suffered by the organisation. In the context of a winding up, it might leave creditors out of pocket. This is a circumstance which might lead to litigation.

While the proposed statutory reforms permit *ex-gratia* payments without Commission consent, it is not clear from the proposed new statutory wording on what principled basis the payments might be made, or how it might interact with the best interests principle. The case-law is not instructive because it has developed in a very different context.

I recommend that the bases upon which *ex-gratia* payments can be made are non-exhaustively defined by the new statute. In particular, the new statute should directly set out that trustees are able to make reparative payments in the light of harms cause by a founder or major donor.

Whether there are any other Technical Provisions which would assist Charities but have not been suggested so far

Gifts that are made by will to charity through the means of a trust are regulated and controlled by the Charity Commission for England and Wales under its concurrent jurisdiction with the High Court. This jurisdiction is of particular relevance where a gift fails (e.g. it is made to an organisation which has already closed down) because it allows the Commission to stop the failed gift returning to the testamentary donor's estate. Instead of return, if there is a general charitable intention, the Commission can act to keep the gift in charity and direct it to a similar purpose to that intended by the testamentary donor.

However, sometimes gifts are made without professional drafting and without the interposition of a trust (eg 'a gift to Cancer Research UK outright'). Because the Charity Commission does not have jurisdiction over these gifts made free from a trust they are dealt with directly by the Crown's Law Officers (eg the Solicitor General). Unfortunately, there is currently no published information on how many such gifts are dealt with by the Crown's Law Officers, or what processes and procedures are used in disposing of them.

In my article, J. Picton, 'Reforming the Prerogative Cy-près Doctrine' (2014) 6 *Conveyancer* 473 – 481, I argue that the Crown's jurisdiction should be removed. In my view, the Charity Commission should be given a statutory power to deal with these gifts. Such gifts should be treated in the same manner as ordinary charitable gifts, so that they might be saved for charity if there is a general charitable intention.

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