



Attorney General's Office

The Rt Hon. the Lord Etherton QC
Special Public Bill Committee

Rt Hon Suella Braverman QC MP
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Dear Lord Etherton,

Charities Bill – written evidence submission

1. The Clerk to the House of Lords Special Public Bill Committee has written to me on behalf of the Committee, requesting that I submit written evidence to assist you and your colleagues in your scrutiny of the Charities Bill. In particular, I have been asked to address the Government's decision not to accept Recommendation 43 of the Law Commission's report entitled *Technical Issues in Charity Law*.
2. I am grateful for this opportunity to set out my position as Attorney General. The contents of this letter constitute my written evidence submission.

The Attorney General's public interest portfolio

3. The unique portfolio of the Attorney General has evolved over some 700 years of legal and political history. As a result of that evolution, my office sits at a unique crossroads between the political and legal worlds. While being a Cabinet Minister involved in the furtherance of the Government's agenda, I am simultaneously the chief legal adviser to the Government and am charged with upholding the rule of law. As a key component of upholding the rule of law, the Attorney General is the constitutional guardian of the public interest.
4. As Attorney General, my public interest portfolio is broad. It includes:
 - 4.1. Consenting to certain prosecutions. This function is analogous to the Attorney General's consent function under s.325 of the Charities Act 2011: in prosecutorial consent cases the Attorney General acts as a gatekeeper to the courts on applications from the Crown Prosecution Service (and other prosecutors) to ensure that the wider public interest is protected;

- 4.2. Instituting contempt proceedings where I consider there is a public interest in doing so;
- 4.3. Intervening in family law declaratory proceedings, including those relating to parental or marital status. These interventions are made in the public interest to ensure all the evidence is thoroughly tested, all the relevant arguments are put before the court and any issues of public policy can be raised;
- 4.4. Directing the Queen's Proctor in divorce proceedings, usually at the request of the court.
5. The uniting principle is being a check in the system – whichever system that may be – to ensure that the 'public interest' is protected. The concept of 'the public interest' is not easy to pin down. Reasonable individuals may legitimately disagree on what it requires. Nevertheless, it is vitally important in a democratic society for there to be a senior person in Government whose role it is to stand apart from party politics in order to defend the public good. The quasi-legal-quasi-political nature of the concept of the public interest is precisely why the Attorney General – an office equally of those two worlds – is its guardian. It is also why the person who holds the role of Attorney General is a member of either House of Parliament, and directly accountable to the public via Parliament. The public interest functions of my office vis-à-vis charities must be seen within the wider context of the Attorney General's public interest portfolio.
6. When acting on issues within the public interest portfolio, Attorneys General act independently of Government. In that sense, the post of Attorney General is unique: it is a requirement of the office that we are able to discharge a number of our duties without regard to party politics. I strenuously reject any assertion, including Dr Synge's speculative assertion, that political considerations would improperly influence any of my public interest decisions.

The role of the Attorney General as regards charities

7. The Attorney General acts as *parens patriae* on behalf of the Crown. As such, I have a constitutional role as defender of charity and charitable interests. There is a clear public interest in charity generally as, at its core, charity means giving (in one way or another) to someone in need (in one way or another). By extension, there is an equally clear public interest in the public having trust and confidence in charities and charitable endeavours. I have a duty to intervene to protect these principles.
8. My duty as *parens patriae* is manifested through a broad spectrum of duties. On behalf of the Crown, I can represent the objects of individual charities, intervene in court proceedings to protect charities and assist the courts on principles of charity law, represent absent charities and otherwise ensure that charitable interests are upheld. I also regularly act under the Royal Sign Manual to 'correct' errors in

wills so that money can go to charities in accordance with the testator's intentions. I operate these functions entirely independently from any other body or person as they are public interest functions which I have the privilege to be uniquely positioned to carry out. The courts have repeatedly recognised the importance of the unique perspective of Attorneys General in the context of charity law. Recently, the Supreme Court stated in Lehtimäki and others v Cooper¹ that the Attorney General's role as *parens patriae* or protector of charities was "an important and very long-established role".

9. The Government has declined to accept Recommendation 43 because it would remove one of the mechanisms by which Attorneys General carry out their constitutional duty to protect charity. It must be recalled that the ability to refer questions under section 325 of the Charities Act 2011 to the Charity Tribunal is an unusual declaratory jurisdiction, even for other regulators. Outside this procedure, hypothetical questions are rarely entertained by the courts, for good reason. It is also worth noting that a reference to the Tribunal draws heavily on the public purse, both directly from the Attorney General's Office and indirectly through the Charity Commission. It also drains charitable resources where the proposed reference concerns the application of charity law to a particular charity as that charity will also have to make representations in those proceedings, not to mention any longer term implications for that charity of those proceedings (it is for this reason that I must respectfully disagree with Dr Mary Syngé's argument that the reference procedure can never put charitable interests at risk). In these circumstances, it is therefore right and proper that a public interest consideration is applied in the exercise of this unusual procedure. As set out above, public interest considerations of this sort fall squarely within the purview of the Attorney General's Office, so my office acts as an important check in the system.

The complementary roles of the Attorney General and the Charity Commission

10. The Charity Commission and the Attorney General perform distinct but complementary roles in relation to charity. As set out above, the Attorney General acts as *parens patriae*. In contrast, the Charity Commission is the regulator of charities and carries out principally operational functions, including the maintenance of the Charity Register, deciding whether organisations are charitable and therefore whether they should be registered, taking enforcement action where there has been malpractice or misconduct in a charity context, and providing guidance to help charities run as effectively as possible.
11. Ultimately, when considering the future regulation of charities, Parliament has consistently agreed that the Attorney General's role as protector of the public interest in charity on behalf of the Crown should be maintained notwithstanding the creation of a statutory regulator. Indeed, Parliament clearly did not intend to delegate to the Charity Commission the historical power of my office as *parens patriae* on

¹ [2020] UKSC 33 at §4.

behalf of the Crown, or it would have made that intention clear. I submit that Parliament agreed that matters of the public interest should continue to rest with the Attorney General, who is uniquely placed to deal with this nebulous concept at the intersection of politics and law. That role is as important today as it was when the 2006 and 2011 Charities Acts were passed. There is no more reason to tamper with this constitutional arrangement of checks and balances now than there was then.

12. Today, the Attorney General has no day-to-day involvement in the regulation or functioning of charities – that is rightly the purview of the Charity Commission as regulator of charities and the expert body in the field. Instead, I as Attorney General maintain a complementary, higher-level role in defending principles of charitable interests as and when cases arise, having an overview of public interest factors within the charity sector and in wider society.
13. There have been only three occasions on which the Commission has brought an issue concerning the charity sector to the Attorney General's attention in the context of this reference procedure. In two of those cases, the Attorney General agreed with the Commission and, indeed, took the proceedings forward. There has only ever been one case in which an Attorney General has felt it necessary to refuse consent to the Commission. In the latter case, the Attorney General at the time decided that it was not in the public interest for some of the Charity Commission's proposed questions to be referred whereas others were determined not to be in scope of the section 325 referral power. It is the Attorney General, rather than the Charity Commission, who is best placed to make this public interest assessment for the constitutional and historical reasons I have explained above. The fact that the Attorney General reached a different conclusion on the public interest to the Charity Commission demonstrates the value of this check in the system. I, as Attorney General, am directly accountable to Parliament and the electorate for that decision.

Conclusion

14. In conclusion, while I understand the motivation behind Recommendation 43, the Government continues to believe that it was correct and in the interests of a thriving charity sector for that recommendation not to be accepted.

*Yours sincerely
Jill Braverman*

**RT HON SUELLA BRAVERMAN QC MP
ATTORNEY GENERAL**