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Lord Etherton
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Dear Lord Etherton

Supplementary evidence on the role of the Attorney General in respect of different types of proceedings relating to charities

1. I am writing as the new DCMS Lords Minister and the Minister now responsible for the Charities Bill's progress through Parliament. As DCMS Whip I worked very closely with my predecessor, Baroness Barran, on this Bill and, as you know, already sit on the Special Public Bill Committee. I very much look forward to working with you in my new role to ensure the Committee continues to provide necessary scrutiny to the Bill, and to provide information about the government's views on it.
2. I write following the Special Public Bill Committee's evidence session on 15 September 2021, at which Baroness Barran committed to respond to the Committee's question about the role of the Attorney General in relation to different types of proceedings related to charities, and the consent needed to bring different types of proceedings, including why the Attorney General's consent is not required in relation to proceedings against decisions of the Charity Commission.

The Attorney General's role in respect of charities

3. The Attorney General has no day-to-day involvement in the functioning or regulation of charities but gets involved only to defend principles of charitable interests as and when cases arise.
4. The Attorney General's perspective is unique in that her wider public interest portfolio - which includes divorce, certain family law declaratory proceedings, contempt proceedings, and consent to prosecutions - spans across different areas of law. The unifying factor for the different aspects of this portfolio is the Attorney General's constitutional role as the guardian of the public interest.

Differences in proceedings

5. Various proceedings relating to charities were referred to in the Committee evidence session, discussed in the context of the Government's decision to reject recommendations 40 and 43. I will set out the differences in these proceedings and explain both the Charity Commission's and Attorney General's roles in each case.

"Charity Proceedings"

6. In England and Wales "charity proceedings" are matters which fall within the court's jurisdiction with respect to charities, or the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes (in section 115 of the Charities Act 2011). These are matters of governance or administration of a charity. In practice, cases commonly relate to an internal dispute within a charity. Unless brought by the Attorney General or the Charity Commission, or as specified in section 115(4) of the Charities Act 2011 (proceedings on a pending matter or the bringing of an appeal), "charity proceedings" require the consent of the Charity Commission in order to prevent trustees from wasting charity funds on litigation where it would be inappropriate. The Charity Commission will need to be satisfied that taking the proceedings will serve the interests of the charity. The Charity Commission can often save a charity's resources by using its regulatory powers, rather than allowing the case to go to court, which may be unnecessary, costly, and an inappropriate use of the charity's funds. The Charity Commission must not, without special reasons, authorise the taking of charity proceedings where in its opinion the case can be dealt with by the Commission under its regulatory powers.
7. There may be instances where charity proceedings involve the Charity Commission and could create a conflict of interest or perception of a conflict of interest. These instances are likely to be very rare: the Charity Commission is not aware of any recent examples of this in practice.
8. Such instances are the basis for the Law Commission's recommendation 40, which suggests that charities should be able to bypass seeking the Charity Commission's consent and instead directly ask for the court's consent to bring charity proceedings.
9. The Charity Commission has expressed concern that removing the need for Charity Commission consent to bring charity proceedings would undermine the regulator's powers to prevent charity funds from being wasted on unnecessary litigation. This is because the courts would not need to take into consideration whether the dispute could first be dealt with through the Commission's regulatory powers.
10. If a conflict of interest were to arise, the Government is confident that the Charity Commission could instigate robust information barriers within the organisation. This would ensure that the case officers and legal advisers who consider the section 115 application are not in any way involved in the substantive claim.

11. There is also an important existing safeguard which will remain in place. Where the Charity Commission refuses to give its consent for charity proceedings to be taken, the claimant can seek the leave of the court to bring the proceedings (under section 115(5) of the Charities Act 2011). Importantly, in determining whether or not to grant leave for charity proceedings to be taken, the court would be able to take into consideration the Charity Commission's reasoning for refusing to grant consent.
12. The Attorney General must be made party to all "charity proceedings", as defined by section 115 of the Charities Act 2011, except those commenced by the Charity Commission. There is no requirement that she take an active part in proceedings but this gives her the opportunity, where appropriate, to make representations on behalf of charitable interests. This can be particularly important in cases where a charitable interest would otherwise be unrepresented, such as in cases involving absent or unnamed charities. These cases can arise when private trusts have been poorly drafted and need to be rectified. For example, the Attorney General was involved in a case where a person had left money on trust for the "creation of a doctor's surgery" but the way forward in terms of how to implement this was uncertain. The protection of charitable interests here falls exclusively to the Attorney General and in cases like this there is often a strong public interest in the Attorney General's intervention.

Tribunal Appeals and Reviews

13. Charities may approach the Charity Tribunal to seek an appeal or a review of certain decisions made *by* the Charity Commission. In such cases the Charity Commission is the respondent. The Charity Tribunal and the specific rights of appeal and review were established under the Charities Act 2006 (now consolidated into the Charities Act 2011). These proceedings are not "charity proceedings" and it is not necessary for the trustees to obtain Charity Commission consent to bring them. As far as the Charity Commission is concerned, it would face a conflict if its permission was required. Moreover, any requirement for consent would fetter charities' access to justice if they had to seek permission to appeal or seek a review against a decision the Charity Commission has taken in respect to them. Therefore, there is no consent required from the Charity Commission in respect of bringing these proceedings. The Attorney General may herself make an application for an appeal or review in relation to such Charity Commission decisions, or may decide to intervene in such proceedings as a party either at her own instigation, or at the invitation of the Tribunal or court (under section 318 of the Charities Act 2011).

References to the Tribunal

14. The Charities Act 2006 (now consolidated into the Charities Act 2011) introduced a new type of case which could be brought before the Charity Tribunal. A reference can be made by the Attorney General, or by the Charity Commission with the consent of the Attorney General, for the Charity Tribunal to clarify the operation of charity law or the application of charity law to a particular state of affairs (Chapter 3 of Part 17 of the Charities Act 2011).

15. References can be made by the Commission on a question which has arisen in connection with the exercise of its functions and which involves either the operation of charity law or its application to a particular state of affairs, and which the Commission considers it desirable to refer to the Charity Tribunal. The Attorney General is entitled to be party to the proceedings. Charity trustees and other persons likely to be affected by the Tribunal's decision on the reference are also entitled to be party to proceedings with the Tribunal's permission.
16. The reference procedure is a unique declaratory power which enables the Charity Commission and the Attorney General to seek rulings on potentially hypothetical questions. Outside this procedure, hypothetical questions are rarely entertained by the courts. Moreover, these proceedings can be costly, absorbing significant funds from the public purse via the Charity Commission and/or the Attorney General, as well as draining the charitable resources of the charities involved. It is therefore right and proper that a public interest consideration is applied in the exercise of this unusual procedure.
17. In this context, the view of the Attorney General is that the power to make references to the Charity Tribunal should be exercised particularly judiciously and as a matter of last resort. The Attorney General's role here is to function as part of the architecture of checks and balances, drawing on the unique experience of her office in defending the public interest. For these reasons, the Government remains of the view that it is right to reject the Law Commission's recommendation 43.
18. There have been two references to the Charity Tribunal since the Charity Commission was established in its current form in 2006. In the case of the 'Independent Schools reference' in 2011 and the 'Relief of Poverty reference' in 2011/2012, the Attorney General actively took the references forward in collaboration with the Commission. Recently, a decision was made on a third case: the Royal Albert Hall. This is the only time the Attorney General has refused a request from the Charity Commission to make a reference to the Charity Tribunal.
19. The Reference procedure can only be instigated by the Attorney General or Charity Commission with the Attorney General's consent. There is no equivalent of a charity instigating reference proceedings 'against' the Charity Commission, so the question of Attorney General consent to defending such proceedings does not arise.
20. Taking into account these differences in proceedings which can be brought under charity law, it is understandable why the Attorney General does not have the same role in each case. To answer the Committee's point directly, the differences in the Attorney General's intervention powers in relation to different types of proceedings are intended, and allow for the Attorney General's role as the protector of charitable interests in England and Wales to be fulfilled. We consider that it would not be appropriate for the Attorney General to be required to consent to the Charity Commission defending proceedings, noting that the Attorney General can join (or bring) such proceedings if she considers it necessary to protect the public interest.

The interaction of the Attorney General and the Charity Commission

21. The predecessor to the Charity Commission, the Charity Commissioners - first established by the Charitable Trusts Act 1858 - were commonly known as the Charity Commission, but they did not have explicit statutory corporate status and they had fewer express objectives, functions, and powers compared to the modern Charity Commission. When the Charity Commission was established in its current form, via the Charities Act 2006, Parliament made the conscious decision for the Attorney General to play an important role to complement the Charity Commission's work. In particular, Parliament chose to require the Commission to seek the consent of the Attorney General before making references to the Charity Tribunal, which was established by the Charities Act 2006.
22. In practice, while operating entirely independently, the Charity Commission and the Attorney General's Office work closely and constructively on charity matters as appropriate.

With best wishes,

Parkinson of Whitley Bay



Lord Parkinson of Whitley Bay
Minister for Arts