

CHARITIES BILL: SPECIAL PUBLIC BILL COMMITTEE [HL]

FURTHER SUPPLEMENTAL WRITTEN EVIDENCE FROM PROFESSOR NICHOLAS HOPKINS, LAW COMMISISONER

Introduction

- 1.1 I have provided to the Committee:
- (1) initial written evidence, dated 10 September 2021;
 - (2) oral evidence, on 15 September 2021; and
 - (3) supplemental written evidence dated 7 October 2021, at the request of the Committee. That evidence set out my comments on other written evidence that had been submitted to the Committee.
- 1.2 The Committee has requested that I provide an additional supplemental written response, to provide my comments on the oral evidence of Bates Wells (“BW”) and the Charity Law Association (“CLA”) on 19 October. This response will necessarily be brief as I have only been given a half day to consider the materials. Where appropriate I will cross refer to responses in my previous written evidence. This additional supplemental written evidence should therefore be read alongside my previous evidence to the Committee, which I will not repeat here

Supplemental evidence from Bates Wells

Social Disposal

- 1.3 Please refer to my comments in paras [51 -54] of my written evidence of 07 October.
- 1.4 No amendment to the Bill is needed to achieve what is referred to by BW as a “social disposal”. We think that what BW is suggesting can already be achieved without further modification.
- 1.5 We previously recommended the creation of a new statutory power for charities to make social investments, which was implemented in the Charities (Protection and Social Investment) Act 2016, inserting a new section 292A-C into the Charities Act 2011. It is therefore already possible for charities to make social investments, which are defined as the application or use of funds or property with a view to directly furthering the charity’s purposes and achieving a financial return. A disposal of land would fall within the broad range of transactions that are covered by the definitions in section 292A.
- 1.6 From a purely technical perspective, I have significant concerns as to the workability of their suggested amendment. There is no concept of a “social disposal” in the Charities Act; it is a description of a type of disposal which, in the language of the Act, would be a “social investment”.
- 1.7 The amendment proposed would insert a new subsection (5) into section 119 of the Charities Act, which begins “For the purposes of subsection (1) a “social disposal” is...” I believe the intention is that a disposal within section 119(1) is considered to be

a social disposal if it meets the definition in the proposed amendment, but I do not think it achieves that result, and the proposed section 119(5) does not read logically alongside section 119(1).

- 1.8 Additionally, their amendment to clause 18 of the Bill appears to supplant the current reference to “social investments” with the definition of a social disposal. The two are not, however, synonymous, and their deletion of the reference to social investments from clause 18 seems misconceived.
- 1.9 In my view, the amendment is neither necessary nor technically workable.

Working Names

- 1.10 Bates Wells have suggested three solutions to the problems they consider the provision in the Bill in relation to working names gives rise to.
- 1.11 Their first suggestion is to modify the working name criteria so that a name must be registered at the Charity Commission *and* used before the name was treated as such. In effect, this suggestion seeks to narrow the scope of operation of the provision on working names. Our recommendation gives the Charity Commission the same jurisdiction to issue directions under section 42(2) of the Charities Act 2011 over working names as it has in respect of registered names. Once the principle of enabling the Charity Commission to regulate working names in this way is accepted, there seems no good reason for giving the Charity Commission less scope to regulate working names than it has in respect of registered names. As Bates Wells acknowledge, their suggestion would place unregistered charities at a disadvantage: I see no good reason to do so.
- 1.12 Their second suggestion is to require “goodwill” to have been accrued: introducing this requirement would change the provision so significantly that the Charity Commission’s jurisdiction over working names would, in my view, be unworkable. The Charity Commission exercises jurisdiction over charity names as a regulator, not as an intellectual property lawyer. It has jurisdiction to issue directions under section 42(2) in respect of registered names as a regulator at the moment and, under the Bill, it will have the same jurisdiction as regulator over working names. “Goodwill” is a term of art in intellectual property law, with a significant body of case law which, as Bates Wells suggests, the Charity Commission would not be well-placed to assess.
- 1.13 Thirdly Bates Wells suggest removing working names from the remit of the legislation. In that respect I refer to my comments in relation to the CLA’s opposition to the policy addressed in paras [17-19] of my Supplemental Written Evidence of 07 October.

Power to release permanent endowment restrictions

- 1.14 Bates Wells questions the financial thresholds for the amended powers to release permanent endowment. I refer to para 48 of my Supplemental Written Evidence of 7 October, and the references to the TICL Report therein.

Rights of appeal against Charity Commission decisions in relation to new powers in section 280A and section 67A

- 1.15 The Law Commission did not expressly consider whether there should be a Schedule 6 appeal right in respect of these two provisions.

- 1.16 As regards section 280A, the section replaces (but also expands) existing powers in sections 268 and 275. Appeal rights currently exist under those sections. While providing appeal rights would therefore be consistent with the current position, it would also expand the scope of current appeal rights as section 280A is broader than the current provisions.
- 1.17 The list of regulated alterations for unincorporated charities under section 280A(7) is equivalent (with modification) to the list of regulated alterations for companies in section 198(2) and the list of regulated alterations for CIOs in section 226(2). Charity Commission decisions under sections 198 and 226 do have appeal rights. The provision of an appeal right under section 280A(7) would therefore be consistent with the policy of treating unincorporated charities the same way as companies and CIOs.
- 1.18 As regards section 67A, a Charity Commission decision under that provision is essentially a specific type of section 280A resolution. Therefore, if an appeal is provided for a decision under section 280A, it would be logical also to provide an appeal from a decision under section 67A.
- 1.19 While the Law Commission has no formal policy on the provision of appeal rights under these two sections, there are good arguments in favour of appeal rights being provided.

Supplemental evidence from the CLA

The potential impact of clause 3 of the Bill on smaller charities

- 1.20 I note the CLA does not see merit in preserving sections 275-279, though retains some concerns that clause 3 would be more administratively costly than using the current sections 267-274. Whether these risks will materialise appears to depend on the implementation of clause 3.
- 1.21 I welcome the CLA's comments. I refer to the points made in favour of repeal in paras 22 and 23 of my Supplemental Written Evidence of 7 October.

The definition of permanent endowment in the Bill

- 1.22 The CLA suggest an alternative formulation for the statutory definition of permanent endowment.
- 1.23 As explained in para 28 of my Supplemental Written Evidence of 7 October, we have had extensive discussions with the CLA about the best way to define "permanent endowment". We have considered various different approaches to the definition and our conclusion is that the definition, as amended by clause 9 of the Bill, is the right one.

The power to spend capital of permanent endowment – larger fund

- 1.24 I refer to my response to Bates Wells' evidence in para 1.14 of this supplemental evidence above as regards thresholds generally.

1.25 In response to the CLA's suggestion of reintroducing an income threshold, I refer to the difficulties given rise by an income threshold explained in paras 8.66-8.80 of the TICL Report.

Factors to which the Charity Commission must have regard on a change of objects

1.26 I refer to paras 20 and 21 of my Supplemental Written Evidence of 7 October. As regards the CLA's concerns over the first factor – "the purposes of the [company][CIO][charity] when it was established" I note that this factor is only one of three that will be considered by the Charity Commission. The Charity Commission is also required to consider "the desirability of securing that the purposes of the charity are, so far as reasonably practicable, similar to the purposes being altered". Therefore, if a charitable company or CIO has changed its purposes frequently over time, the most recent purposes will be taken into consideration. See further para 37 of my Supplemental Written Evidence of 7 October responding to a similar point raised by Bates Wells.

Connected persons

1.27 There may be an argument for giving further consideration to the drafting of section 186A for consistency with section 185 as regards references to a connected person. It has not been possible to undertake that exercise in the time available and I would be happy to offer a further written comment to the Committee if requested.

Appeals from a decision of the Charity Commission to give or without consent

1.28 Please see paras 1.15-1.19 of this Supplemental Written Evidence above.

Professor Nicholas Hopkins
Law Commission
25 October 2021