Special Public Bill Committee on the Charities Bill

Further submission – Bates Wells' evidence

1. Background

1.1 This written submission is made by Bates Wells further to:

1.1.1 a written submission dated 13 September 2021 in response to the Special Public Bill Committee on the Charities Bill's Call for Evidence dated 8 September 2021; and

1.1.2 a session of the Special Public Bill Committee on the Charities Bill on Thursday 14 October 2021, at which Laura Soley and Lucy Rhodes gave oral evidence.

1.1.3 At the session on 14 October, Laura and Lucy agreed to follow up on a number of points in writing. These points are covered in this further submission.

1.1.4 For more information on any of the issues mentioned, please contact Laura Soley at l.soley@bateswells.co.uk and Lucy Rhodes at l.rhodes@bateswells.co.uk.

2. Contents

3. Social disposals of land – issues and proposed amendments

3.1 Issues

3.2 We have suggested a modest change to the Charities Bill, which is in keeping with the other provisions of the Bill, to clarify the basis on which property may be disposed of as a social investment.

3.3 Under the current Charities Act provisions, disposals of property are subject to a number of requirements under s119 Charities Act 2011, including that the trustees must obtain and consider a written report from a qualified surveyor and decide that they are satisfied that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained. Under the Charities Bill, the reference to qualified surveyor is replaced with a reference to a designated advisor.

3.4 The restrictions on disposal of property contained in Part 7 Charities Act 2011 do not currently apply to any disposal of property made by a charity to another charity otherwise than for best price – in other words, it is permissible to dispose of a property to another charity in furtherance of the transferring charity's objects for less than best price and the requirements of s119 (qualified surveyor's report) do not apply. This currently includes a social investment (what we call a social disposal) of property, which is made by one charity to another charity with the same or narrower objects and only partly for financial benefit.

3.5 However, under the amendments contained in the Charities Bill, charity to charity disposals are no longer excluded from the compliance requirements if the disposition is a social investment. The explanatory notes to the Bill provide that this will ensure that where the price is a motivating factor (even if only a partial one in the case of a social investment), charities will have to comply with Part 7 Charities Act and so obtain a report from a designated advisor.

3.6 So a social investment will now become subject to the requirements of Part 7 Charities Act including requiring a report from a designated advisor that the disposal is on best terms, as it is partly being made for financial return.

3.7 However, in our experience, as the normal advice provisions contained in s119 Charities Act relate to the "*best*" terms that can reasonably be obtained, this is often misunderstood in the context of social disposals of property and interpreted to mean the best financial terms or highest price which causes confusion and uncertainty in practice. While the Law Commission, in their response to our submission to this committee, observed, quite rightly, that social investments of property can already be made, our experience is that the compliance requirements are regularly misunderstood.

3.8 In our view, it would be far preferable to clarify the basis upon which social disposals – where the intention is to obtain a financial benefit *and* advance the objects of the disposing charity – can be made.

3.9 Under our proposed social disposal provisions, we suggest referring to a social disposal rather than a social investment. This is because, when one refers to 'investment' or 'social investment', one is naturally talking of the initial acquisition of an asset. In our view, to think of a disposal of land as a social investment is confusing, as few people would consider the sale of land to be an investment but rather the disposal of an investment.

3.10 So we think 'social disposal' or 'social disposition' is a more accurate description of what is actually going on in context where a charity wishes to dispose of land in a way which will lead to some financial benefit and advance the mission of the charity.

3.11 Under our proposed amendment:

3.11.1 trustees would still be obliged to obtain a report from a designated adviser on the disposal, which is obviously desirable given that a social disposal may, like any other disposal, involve very valuable assets;

3.11.2 in the case of a social investment or social disposal, at least part of the judgement of the trustees rests on financial value considerations, so a report would seem necessary, so our proposed amendment is in keeping with the wider spirit of this section of the Charities Act and is only a very modest refinement;

3.12 critically, our proposed amendment would **clarify the nature of the assessment** which trustees should make when reviewing the designated adviser's report on a social disposal and considering what is in the interests of the charity.

3.13 At the moment, the reference to the "best" terms that can reasonably be obtained tends to be understood in purely financial terms or even simply in terms of highest price. In practice, this means that few people understand that social disposals can be made and the area lacks certainty, which impedes the giving of effective advice. It also dissuades a lot of charities from pursuing valuable social disposals, as they are concerned not to stray from the "best terms means highest price" mantra which influences much market practice.

3.14 We suggest, in the context of a social disposal, the best terms of the disposal should expressly involve consideration of financial benefit and mission advancement. This has the advantage of reflecting the decision-making process the existing social investment power provides for but in a way which is tailored to disposals of property.

3.15 **Proposed amendments**

3.16 We propose the following minor amendment to section 20 of the Charities Bill to clarify the basis on which a social disposal may be made as follows:

> (2) In section 119 of the Charities Act 2011 (requirements for dispositions other than certain leases)- insert a new subsection 119(5)—
>
> "(5) For the purposes of subsection (1) a 'social disposal' is any disposition of land held by or in trust for a charity which is made with a view to both (i) directly furthering the charity's purposes and (ii) achieving a financial benefit for the charity, and therefore otherwise than as a disposition made with a view solely to achieving the best financial terms that can reasonably be obtained."
>
> (3) In section 120 (requirements for leases which are for 7 years or less etc)—
>
> (a) at the end of subsection 120(2)(b) insert—
>
> "or, in the case of a social lease, that it is in the interests of the charity to make the disposition having regard to the benefit they expect it to achieve for the charity (by directly furthering the charity's purposes and achieving a financial return)."
>
> (b) insert a new subsection 120(3)—
>
> "(3) For the purposes of subsection (2) a 'social lease' is any grant of a lease within the terms of subsection (1) which is made with a view to both (i) directly furthering the charity's purposes and (ii) achieving a financial benefit for the charity, and therefore otherwise than as a disposition made with a view solely to achieving the best financial terms that can reasonably be obtained."

3.17 To ensure that these new provisions work with the proposed amendment to s117 made by section 18 of the Charities Bill, we propose the following minor amendment to section 18 of the Charities Bill as follows:

> (2) In section 117(3) (exceptions to restrictions on dispositions of charity land)—
>
> (a) after paragraph (a) insert—
>
> "(aa) any disposition by a liquidator, provisional liquidator,
>
> receiver, mortgagee or an administrator,";
>
> (b) omit paragraph (b);
>
> (c) for paragraph (c) (but not the "or" following it) substitute—
>
> "(c) any disposition of land held by or in trust for a charity
>
> which is made to another charity otherwise than as—

(i) a disposition made with a view to achieving the best price that can reasonably be obtained, or

(ii) (ii) a disposition made with a view to both (i) directly furthering the charity's purposes and (ii) achieving a financial benefit for the charity ~~that is a social investment for the purposes of Part 14A (social investments)~~,

4. Working names – issues and proposed solutions

4.1 Issues

4.2 We have some concerns relating to the proposed treatment of working names in the Charities Bill. In our oral evidence, we expressed our concerns about the detectability of working names given that there is no requirement to register working names with the Charity Commission and nor is such a requirement introduced in the Charities Bill. We also noted that the scope of the definition of 'working name' in the Charities Bill (i.e. other labels for the charity itself), while clarified in the Explanatory Notes, is inconsistent with the approach that the Charity Commission has historically taken to working names which charities have chosen to register with the Commission. In particular, the Commission has historically accepted for registration names which describe the events, campaigns and activities of charities (e.g. Sports Relief, an event run by Comic Relief) as working names and many such names are recorded on the Register of Charities. As these names are not labels for the charity itself they will not constitute working names under the definition in the Charities Bill. This inconsistency will need to be cleared up by the Charity Commission before the legislation takes effect. We also noted in our oral evidence that our trade marks team has raised a number of issues and offered to follow up with these points in writing.

4.3 Our trade marks team has a broader theoretical concern about the fact that the current charity names regime in the Charities Act 2011 allows for the fairly easy creation of what could be seen as powerful quasi-IP rights, without the necessary accompanying rigour to ensure fairness and consistency of application. They consider there are some aspects of the proposed changes to extend the Charity Commission's powers to working names that could exacerbate those potential difficulties.

4.4 It is already the case that a charity's 'ownership' of a main name, in effect, confers on the charity a substantive right in that name under section 42 Charities Act 2011, which extends eg. beyond the narrow 'identical or almost-identical' test applied to company names (see, in particular, *The Charity Commission for England and Wales v 1) Cambridge Islamic College 2) Cambridge Muslim College: [2018] UKUT 0351 (TCC),* which provides that the test comprises a multi-factorial assessment). This is a *de facto* right conferred on the name 'owner' that is, first, easy to obtain – it is 'granted' upon the charity coming into existence. There are limited constraints on which kinds of names can be protected under section 42 (by comparison, IP law, by various mechanisms, makes it difficult for parties to acquire monopolies in generic or everyday phrases, particularly where there are public policy reasons to keep them free for general use.) There is also a lack of clarity as to how alike two names need to be to be considered 'too like' each other under section 42(2)(a)(ii): the abovementioned decision is helpful but is no substitute for the volumes of case law that assist in making equivalent decisions in IP matters. Further, should names still be considered 'too like' each other even if the charities operated in different fields, or different territories? If so, then the protection granted is potentially broader than the equivalent registered or unregistered trade mark right. What about a situation in which a name is adopted in bad faith in order to deliberately block a 'competitor' (something of which we have experience in practice)? These are all questions that could realistically arise (and do, frequently, in the IP world) but they are not provided for by the existing charity names regime in section 42 Charities Act 2011.

4.5 The inclusion of a formal provision around working names could be seen as multiplying an existing problem, as there will simply be more names to consider (both in terms of new names to which

the criteria need to be applied, and, over time, existing names against which they must be tested). We have a particular concern around the proposed definition of a working name:

> *… a name that is not the name of the charity but which is used to designate the charity and under which activities of the charity are carried out.*

4.6 The explanatory note that *a* working name is '*a name which is used to label the charity itself and not the name of specific projects, events and campaigns carried out by the charity*' adds helpful clarity but, in particular, leaves unanswered questions around the point at which the 'working name' comes into existence. Will even very small-scale use of the name do (eg. even a single usage, or the simple setting up of a social media page)? At what point following cessation of use does the protection fall away? What about very sporadic or intermittent use? What about if the use is solely outside the UK (eg. a local translation adopted overseas by an NGO)? Again these are real-world questions that arise in IP cases and until they are answered in the present context, there will be considerable uncertainty for existing and new charities. Also, if the bar were to be set as low as a simple reading of the proposed revisions would suggest, this would obviously speak to our concerns about the ease with which potentially powerful monopolies could be created.

4.7 This leads into concerns around the *detectability* of working names under the proposed new approach. At present, a new charity, or a charity looking to change its name, can look at the Register of Charities and see much of the picture around existing charity names – both main names and working names (the latter are of course routinely recorded on the Register in the case of registered charities, even though there is no statutory provision for this). The obvious 'blind spot' as things stand is that the main names of unregistered charities cannot be so identified, but in our experience this rarely gives rise to real-world problems. The coming into existence of working names through potentially very minor usages could lead to a much larger 'gap' in the Charity Commission's searchable record being created over time. It could be difficult even for experienced practitioners to conduct an effective and reliable search of earlier names, if the bar is set as low as we are concerned it may be. There would, inevitably, be a significant number of 'working names' that would not be capable of easy identification.

4.8 From one perspective, the proposed new conception could be an improvement on the current one, according to which, to the extent that a *de facto* right in a working name is available at all, it could, on the face of it, be obtained simply by informing the Charity Commission via completion of an online form. A review of the register will show that some charities have multiple working names registered, many of which are not, and perhaps never have been, used. At least, with these changes, the charity would have to carry out 'activities' under the working name for it to be effective. However, as stated, the existing light-touch approach together with the lack of direct statutory backing (ie. no clear power to force a change of name based on an existing working name) means that serious difficulties and unjust outcomes appear rare. It is not clear that this would remain the case under the proposed remodelled approach. We would also say that, if the new provisions can only be made to function satisfactorily by the Charity Commission taking a deliberate decision to apply the law in a light-touch fashion, then this suggests that some kind of adjustment is necessary

4.9 **Possible solutions**

4.10 We see a number of ways in which the above issues could potentially be addressed, though none appears ideal. We outline below in brief a number of possibilities, though each either adds complexity or creates other difficulties, and of course each would require further examination:

4.10.1 The working name criteria could be modified so that a name must be registered at the Charity Commission *and* used before the name was treated as such. This would raise the bar slightly and

address the 'detectability' problem as far as registered charities are concerned. There could still be scope for a broad monopoly relatively easily to be achieved, and it would also place unregistered charities at a disadvantage. The latter could be resolved by creating a separate register of working names but this would make things more complicated for all parties concerned.

4.10.2 To configure things so that the 'working name' only comes into existence at a point where its user can show *goodwill* has been accrued in the name. The existence of goodwill or otherwise is, in brief, the test for whether an unregistered trade mark right exists under the law of passing off. It is a substantive bar that can often only be cleared by claimants after a significant period of use; and the test also acknowledges that the public recognition necessary for goodwill to exist can be harder to demonstrate in generic/descriptive names. However there would be significant concerns as to how the Charity Commission could make these kinds of assessments. One possibility would be to set up some kind of tribunal for complaints, drafting in expertise as necessary (and which, on the uncommon occasions on which it would sit, could act as a useful forum for resolving these kinds of dispute as an alternative to litigation). But this would lead to added cost and complexity and would leave difficult questions as to how the Charity Commission would deal with potential issues it wished to address without the intervention of the 'owner' of the earlier name.

4.10.3 To remove working names from the remit of the legislation altogether, and, where a potential conflict occurred that was not exclusively concerned with main names, to leave that to be resolved solely by the 'usual' operations of the laws of registered trade marks and passing off. However we think this could be unsatisfactory as we believe there will be situations in which it may be obviously apposite for the Charity Commission to intervene, but it would then have no clear power to do so. Take, for example, a situation where a charity tries to register 'Comic Relief' as a main name; the Charity Commission would then have no obvious mechanism for blocking that (given the charity's main name is 'Charity Projects Limited'). Also, this approach could see more charitable funds spent on litigation or its threat, and would put larger charities in a stronger position than smaller ones

5. <u>Power to release permanent endowment restrictions – issues with financial thresholds and proposed solutions</u>

5.1 In our oral representations, we highlighted issues with the proposed new financial thresholds for the amended powers to release permanent endowment restrictions which is likely to mean that more permanent endowment funds are brought within the more onerous provisions requirements of section 282 Charities Act 2011, so increasing red tape. We set out below proposed amendments to resolve this issue.

5.2 As explained in our original submission to the Committee, under the current law there are two statutory powers which enable trustees to decide to spend the capital of an investment permanent endowment fund:

5.2.1 **Section 281 Charities Act 2011** – this power allows the trustee(s) of a smaller permanent endowment fund (where the charity's income is £1,000 or less **or** the market value of the endowment fund is £10,000 or less) to resolve to release the capital or a portion of it from the endowment restrictions without the need to involve the Charity Commission.

5.2.2 **Section 282 Charities Act 2011** – where the section 281 power is not available (because the income of the charity is more than £1,000 **and** the market value of the endowment fund is more than £10,000), this power allows the trustee(s) of a larger permanent endowment fund to resolve to release the capital or a portion of it from the endowment restrictions, subject to Charity Commission consent.

5.3 The difficulty with the current financial thresholds (which the Charities Bill seeks to resolve) is that they produce different results depending on whether the charity is corporate or unincorporated. If the charity is unincorporated, the current income test looks at the charity's income as a whole. In other words, the other sources of income are added to the income generated by the permanent endowment when determining the charity's total income for the purposes of the income test. If the charity is corporate, the permanent endowment fund is widely perceived to constitute a separate charity in its own right and so the income generated by the permanent endowment fund is the only income that is taken into account in relation to the current income test. The illogical result is that the availability of the section 281 power (which does not require Charity Commission consent) can depend on the charity's legal form and, if the charity is unincorporated, on whether it has other sources of income.

5.4 The Charities Bill amends section 282 Charities Act 2011 to raise the market value of the funds to which the section applies to funds exceeding £25,000 and to remove the income test, so that the income of the charity will no longer be relevant to determining whether the s281 or s282 power can be exercised. In other words, the test for determining whether s282 is triggered (and so Charity Commission consent is required) considers only on the market value of the fund in question. This removes the inconsistency arising from the legal form of the charity concerned.

5.5 However, as explained in our oral evidence, the unintended consequence of this change is that more endowment funds will be brought within the scope of s282 (and so subject to Charity Commission consent) than is currently the case. For example, while interest rates are low, a fund of £50,000 might only produce income of £1000 per annum. Under the current rules, such a fund would fall within the scope of s281 on the basis that the income is within the £1,000 or below threshold. Under the proposed new rules, the fund would fall within s282 on the basis that the market value is above £25,000. This will increase the level of bureaucracy and cost faced by charities seeking to release permanent endowment restrictions from their funds.

5.6 In our oral evidence we proposed two alternative solutions and agreed to suggest an amendment for the first:

5.6.1 Option 1: the income of the permanent endowment fund only is taken into account in determining whether the s281 or s282 power can be exercised; **or**

5.6.2 Option 2: increase the market value threshold to £50,000.

5.7 Option 1 can be achieved by a minor amendment to section 282 Charities Act 2011 as shown in red below:

> **282 Resolution to spend larger fund given for particular purpose**
>
> (1) This section applies to any available endowment fund of a charity ~~which is not a company or other body corporate if—~~
>
> ~~(a) the capital of the fund consists entirely of property given—~~
>
> ~~(i) by a particular individual,~~
>
> ~~(ii) by a particular institution (by way of grant or otherwise), or~~
>
> ~~(iii) by two or more individuals or institutions in pursuit of a common purpose, and~~

(b) the ~~charity's~~ gross income of the endowment fund in its last financial year exceeded £1,000 and the market value of the endowment fund exceeds £10,000.

5.8 This would achieve the same result of removing the inconsistency arising from the legal form of the charity in that the availability of the power would not depend on whether the charity is a corporate or unincorporated charity and whether the charity has other sources of income.

5.9 As regards Option 2, the Law Commission considered the arguments for and against increasing the threshold at paragraph 8.85 of its "Technical Issues in Charity Law" report and concluded that it was appropriate to increase the threshold[1]. It noted that increasing the threshold "*so that more permanent endowment funds could be released under section 281 rather than section 282 would reduce bureaucracy and costs for charities and the Charity Commission, and it would provide greater flexibility for trustees*". However, as noted above at paragraph 2.1.4, the consequence of removing the income threshold will be, contrary to this aim, that more endowment funds will be brought within the scope of section 282 and Charity Commission oversight.

5.10 The disadvantage caused by the removal of the income test can, to a large extent, be mitigated by increasing the market value threshold. In the "Technical Issues in Charity Law" report, the Law Commission noted that Lord Hodgson's report[2] suggested that the threshold should be increased to £100,000 and this was the threshold adopted by many consultees.

5.11 The threshold can be increased by secondary legislation and so it may be considered appropriate to further extend the threshold in future. In the meantime, our view is that it would not be appropriate to set the threshold at a level which would significantly reduce the current availability of the section 281 power and, in doing so, increase the level of bureaucracy and cost for charities seeking to release permanent endowment restrictions. Our view is that a more modest increase in the market value threshold to £50,000 in place of the £25,000 threshold which is currently in the Charities Bill would resolve this issue for many charities.

6. Rights of appeal against Charity Commission decisions in relation to new powers in s280A (and s67A)– issues and proposed amendment

6.1 Appeal against a decision under s280A

6.2 Issue

6.3 In our oral representations, we noted that the Charities Bill contained a significant omission, perhaps as a result of oversight, as it does not appear to include a right of appeal to the Charity Tribunal against a decision of the Charity Commission to give or refuse consent to a change of objects or other regulated alteration under the new s280A power. This is inconsistent with the rights of appeal against equivalent Charity Commission decisions which are available to corporate charities and which currently apply to unincorporated charities when a scheme is made to change objects.

6.4 The Charity Commission decisions which may be appealed to the Tribunal are set out in Schedule 6 to the Charities Act 2011.

6.5 As noted above, if an unincorporated charity wishes to change its objects and does not have an express power of amendment (and cannot use s275), it is currently necessary to seek a scheme.

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[1] Pages 221-222, "Technical Issues in Charity Law" (Law Com No 375)

[2] Lord Hodgson of Astley Abbotts, Trusted and Independent: Giving charity back to charities – Review of the Charities Act 2006 (July 2012)

Where the Charity Commission makes a scheme to amend the objects of a charity, under Schedule 6, that scheme may be appealed to the Charity Tribunal by the (a) trustees and (b) any other person who would be affected by it. This includes the charity's beneficiaries. A number of the appeals which have been made to the Charity Tribunal have related to appeals against schemes allowing charities to change the purposes of and/or dispose of designated land such as recreation grounds, which is an area which often generates a lot of local feeling.

6.6 As noted, the s280A power will now be available to trustees of unincorporated charities to amend the objects of their charity, subject to Charity Commission consent, instead of having to seek a scheme (and the Charity Commission's practice is not to make a scheme where trustees have other powers available). However, no provision for appeal to be made against the Charity Commission's consent (or refusal of consent) to such a change of objects under new s280A is included in the Bill.

6.7 While the equivalent provisions in relation to the Charity Commission's decision to give or refusal of consent to a change of objects (or other regulated alteration) for a corporate charity are appeal-able to the Charity Tribunal, the Charities Bill omits to add a provision in respect of s280A for unincorporated charities.

6.8 In particular:

6.8.1 Schedule 6 to the Charities Act currently contains provision for trustees and anyone affected to appeal a decision of the Charity Commission to give or withhold consent to a change of objects or other regulated alteration of a company under s198 Charities Act. This would, for example, enable beneficiaries to challenge the Charity Commission's decision to consent to amendment of the purposes of a charitable company.

6.8.2 The Charities Bill amends the equivalent provision for CIOs to bring it into line with this provision for companies (see Schedule 2 Part 1 para 2 to the Charities Bill).

6.9 However, we could not see that any provision has been included in the Charities Bill to enable the trustees or beneficiaries of unincorporated charities to appeal to the Charity Tribunal a decision of the Charity Commission to give or refuse consent to a change of objects or other regulated alterations under the new s280A power.

6.10 Given that s280A will replace the need for schemes – which can currently be appealed – and that s280A is intended to give unincorporated charities an equivalent power to amend their governing documents as corporate charities to which a right of appeal attaches – it is essential that decisions by the Charity Commission to give or refuse consent to a change of objects or other regulated alteration under s280A is subject to a right of appeal by charities and their beneficiaries. This allows beneficiaries to take action where they feel that the new objects are not appropriate as they can currently in relation to schemes and to allow trustees to appeal where the Charity Commission withholds consent. If such a provision is not included, this would effectively remove rights which currently exist for trustees and beneficiaries (as s280A will be used instead of a scheme and no right of appeal attaches) and would put trustees and beneficiaries of unincorporated charities in a worse position that that of trustees and beneficiaries of corporate charities, which we assume cannot be intended.

6.11 **Proposed amendment**

6.12 To reflect the equivalent provisions for corporate charities, this should be added to Schedule 6 along the lines of the following:

Decision of the Commission under section 280A to give, or withhold consent under section 280A(7) in relation to an unincorporated charity	*The persons are:* (a) *The charity trustees of the unincorporated charity, and* (b) *Any other person who is or may be affected by the decision.*	*Power to quash the decision and (if appropriate) remit the matter to the Commission*

6.13 **Appeal against a decision under s67A**

6.14 **Issue**

6.15 We also note that the Charities Bill does not contain power for charities to appeal against a decision of the Charity Commission to refuse consent to a resolution to amend purposes on a failed appeal under new s67A which again appears to be inconsistent with other similar provisions. For example, the Charities Bill ((see Schedule 2 Part 1 para 26) adds a right of appeal against a decision by the Commission not to make an order under section 106 (ex gratia payments) and see existing rights of appeal in relation to decisions of the Charity Commission to object to resolutions under s268 and s275.

6.15.1 Proposed amendment

6.16 We suggest that the following provision should be added to Schedule 6:

Decision of the Commission not to concur under section 67A(4) with a resolution of charity trustees under section 67A(2)	*The persons are:* (a) *The charity trustees of the charity, and* (b) If a body corporate) the charity itself	*Power to quash the decision and (if appropriate) remit the matter to the Commission*	

7. **<u>Other miscellaneous drafting issues</u>**

7.1 We agreed with the Committee to follow up on some other specific drafting issues that we have noted, which are set out below:

7.2 **New s337(3A) inserted by clause 37 Charities Bill – public notice of Commission consent**

7.3 We understand that the Charity Commission sought power to enable it to require charities to give public notice of a proposed regulated alteration (including a change of objects) or to give public notice itself prior to granting consent.

7.4 The Explanatory Notes to the Charities Bill provide that the amendment to section 337 confers on the Charity Commission a discretionary power to give notice of a proposed amendment or to require the charity to give such notice <u>before consenting</u> to a regulated alteration.

7.5 However, this is not reflected in the current drafting which provides as follows:

> *337(3A) Where the Commission gives written consent under section 67A, 198, 226 or 280A in relation to a charity, the Commission— (a) may itself give such public notice as it thinks fit of the giving or contents of the consent, or (b) may require it to be given by the charity.* ***[our emphasis added]***

7.6 We suggest that this clause is amended as follows:

> 337(3A) Before ~~Where~~ the Commission gives written consent under section 67A, 198, 226 or 280A in relation to a charity, the Commission— (a) may itself give such public notice as it thinks fit of the ~~giving or contents of the~~ proposed alteration or amendment (in the case of section 198, 226 or 280A) or the proposed new purposes (in the case of s67A) ~~consent~~, or (b) may require it to be given by the charity.

7.7 **S280A – amendment of the trusts of an unincorporated charity**

7.8 Under the new power for unincorporated charities to amend their governing documents (s280A), certain matters require prior Charity Commission consent including:

7.8.1 **Amending permanent endowment restrictions**

7.8.2 s280A(8)(d) provides that Charity Commission consent must be sought to an amendment *which would alter a restriction making property permanent endowment*.

7.8.3 It is not clear whether this includes an amendment which would allow for the transfer of permanent endowment, which does not *alter* the permanent endowment restriction as such. As things stand, the transfer of permanent endowment would usually require a Charity Commission Order (or, as permanent endowment is usually held on trust, for the transfer to be carried out by way of a change of trustee).

7.8.4 **Amending third party rights**

7.8.5 Under s280A(8)(e), an amendment *which would require the consent of a person other than* (i) *a charity trustee* or (ii) a *member* of the charity requires Charity Commission consent, unless the person concerned consents to the amendment or is no longer in existence (s280A(9)).

7.8.6 Under s280A(8)(f)), an amendment which *would affect any right directly conferred by the trusts of the charity on a person who* (i) *is named in the trusts of the charity*, or (ii) *holds an office or other position specified in the trusts of the charity* (*other than that of charity trustee or member of* the charity) (s280A(8)(f)), again unless the person concerned consents to the amendment or is no longer in existence (s280A(9)).

7.9 The Law Commission explains, in their report on Technical Issues in Charity Law, that the s280A power should not be used to override third party rights and that trustees and members are excluded from the provisions on the basis that their rights are adequately protected by the requirement that they pass the resolution to exercise the amendment power.

7.10 However, it is not clear how these provisions apply where the person named or the holder of the office or position is also a trustee.

7.11 In our experience, it is common for a founder of a charitable trust to preserve certain rights (such as to consent to a change of name or objects of the charity) and to be a trustee. It is therefore not clear whether the founder's consent is required to change those provisions in relation to which his or her consent is expressly required or whether s280A could be used by the trustees to remove those provisions without his or her consent. We do not think the latter is intended.

7.12 Likewise, it is not clear how these provisions apply where someone holds the office of ex officio trustee. For example, the governing document of the charity may provide that say, the Vicar for the time being or the person holding the position of Chief Executive of a particular company is a trustee of the charity. It is not clear whether the Vicar's or Chief Executive's (or indeed his or her company's) consent is required to remove his or her ex officio trusteeship or whether the trustees could use s280A to remove those provisions without his or her consent. This is because s280(8)(f) expressly excludes the rights of any person holding office as trustee and an ex officio trustee is, by its nature, an office of trustee. Secondly, the removal of his or her ex officio trusteeship arguably would not affect *any rights directly conferred by the trusts* of the charity on the Vicar or Chief Executive – as they have the same rights, as trustee, as the other trustees and they hold an office as trustee which is expressly excluded from the provision. We believe it is intended that, in this circumstance, the consent of the holder of the ex officio office is intended to be required, but this is not clear. This would reflect the current practice under the existing s280 Charities Act 2011 power; where trustees seek to use the current power in s280 Charities Act 2011 to remove or amend a provision providing for appointment of ex officio trustee(s), the Charity Commission's view is that the consent of the current office-holder must be sought.

7.13 It is also not clear how these provisions apply where someone holds an office within the charity itself. For example, consent requirements or rights might be conferred on, say, the Treasurer or President of the charity. Whilst this is an *office specified in the trusts*, the reference to "*consent of a person…other than a charity trustee*" in (e) and "*an office or other position specified in the trusts*" "*other than that of charity trustee"* in (f) would appear to exclude them. So, the rights of an office holder within the charity would appear to be capable of being removed by the trustees without his or her consent, as he or she is also a trustee and holds the office of Treasurer or President as trustee, which is expressly excluded from the provision. It is not clear whether his or her consent is intended to be required in this situation.

7.14 It is also not clear what is meant by an *office* or *position*, which is not defined. Trusteeship itself is an office.

7.15 We believe that the intention of the express exclusion of trustees and members from s280A(8)(e) and (f) is to exclude powers and rights which are conferred on trustees and members as a whole – as these are the same people who are involved in passing the necessary resolution to effect the amendment under s280A. Our view is that the examples given above would be clarified if the provisions are amended to exclude trustees and members only when the powers and rights are conferred on the trustees and members as a whole.

7.16 We would therefore suggest amendment of s280A(e) and (f) to make clear that the exclusion of trustees and members only applies where the consent or right is conferred on the trustees or members as a whole.

7.17 **S117 and s119 - Restrictions on disposals of charity land**

7.18 We consider that the series of negatives in s117 ((1) "No land"… (2) "Subsection (1) does not apply… if" … (a) the disposition is made to a person who is not…") makes this section hard to read. In our view, there is scope to improve the language so that it is easier to understand and apply.

7.19 At s119(1)(c) there is a reference to an ‘advisor’ which is not a defined term with a specified meaning. This should be replaced with a reference to ‘designated advisor’ which is used at s119(1)(a) and is a defined term.

Bates Wells

25 October 2021