

Charities Bill [HL] Special Public Bill Committee

Charity Law Association Working Party and Executive Committee

Further evidence following oral evidence

1 Further evidence

Thank you for the invitation to give oral evidence to the Committee on 14 October 2021. Set out below is further evidence providing additional detail on points arising from the oral evidence session. These relate to:

- The concerns raised regarding clause 3 of the Bill;
- The definition of permanent endowment in the Bill (clause 9 of the Bill);
- The threshold for defining a larger fund for the purposes of the power in the Charities Act 2011 (the **Act**) to spend capital of permanent endowment (clause 10(3)(b) of the Bill);
- The factors to which the Charity Commission must have regard when considering whether to consent to a change of objects of charitable companies, CIOs and unincorporated charities (clauses 1(3), 2(2)(b) and s280A(10) within clause 3(2) respectively);
- The extension of the power in clause 31 of the Bill to connected persons of a charity trustee; and
- The question of an appeal of a decision of the Charity Commission under the power in clause 3 of the Bill to give or withhold consent in relation to an amendment of the constitution of an unincorporated charity (equivalent to appeals of such decisions made under s198(1) or s227 in relation to charitable companies or CIOs).

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

2.1 As noted in written and oral evidence to the Committee, concerns have been raised over whether the power in clause 3 of the Bill will be more cumbersome, and hence more costly, in particular for smaller charities to apply in contrast to existing processes under ss267-279 of the Act, and hence whether it is safe to repeal ss267-279.

2.2 The introduction of the new power in clause 3 is intended to achieve the aims of the Bill, including to reduce unnecessary regulation and bureaucracy while maintaining good regulation and oversight and to achieve clearer, consistent rules. If the impact instead were to increase administration and costs, that would be contrary to the aims.

2.3 The Law Commission has noted in its further evidence to the Committee that the new power would enable all unincorporated charities, including those which are small, to do everything

they can do under those existing mechanisms, but with a different process. We consider that that raises the question of what that different process would be and whether it may be disadvantageous to (especially smaller) charities in comparison with current processes.

2.4 We have prepared a short analysis, which we are happy to provide to the Committee, of the current mechanisms under ss267-279 and comparison with the process under the Bill, and the Working Party responses on these through the consultation process. Our conclusions are:

2.4.1 in relation to ss275-279 (changing charitable purposes), that:

- (a) we would not see merit in preserving ss275-279;
- (b) we support the changes in the Bill which require prior Charity Commission consent and (where there is a distinct membership) a members' resolution;
- (c) we accepted the changes in the Bill relating to the majorities to apply in voting on the resolutions as a policy decision, but there were different views and we recognise that there will be other views on the appropriate majorities.

2.4.2 in relation to ss267-274 (transfer of all property, including where there is permanent endowment), that:

- (a) we support the changes in the Bill which require prior Charity Commission consent (where required) and (where there is a distinct membership) a members' resolution;
- (b) we accepted the changes in the Bill relating to the majorities to apply in voting on the resolutions as a policy decision, but there were different views and we recognise that there will be other views on the appropriate majorities;
- (c) there are some aspects of the process under clause 3 which are not in the Bill and would depend upon implementation by the Charity Commission through its online processes and guidance;
- (d) we consider it is unclear at present how some of those aspects would apply - in particular, the number of steps required to adopt and use the power to transfer property and how the new process would apply where the charity has permanent endowment;
- (e) subject to clarifying (if possible) those aspects, we think there is a risk that clause 3 would be more administratively costly than using current ss267-274 and in that case would advocate consideration of an adjustment to the Bill to ameliorate such a consequence, in essence to ensure a simple process for unincorporated charities to merge or incorporate.

2.4.3 We should note, however, that requiring prior written consent of the Charity Commission, rather than a 60 day cut-off if nothing has been heard from the Charity Commission, relies upon that such consent being obtained within an equivalent 60 day period. If obtaining such consent were to take longer than the current 60 day

period, it would impact significantly on the benefits for charities arising from clause 3. As noted in oral evidence, that is a matter for the processes and resources of the Charity Commission. We consider it is essential that the Commission is resourced adequately to ensure efficient management of the new processes introduced in the Bill.

3 The definition of permanent endowment in the Bill (clause 9 of the Bill)

3.1 The Law Commission in its consultation rightly noted that “permanent endowment” can mean different things to different people. We feel that it is important that the statutory definition in the Bill/Act must be as clear and as useful as possible.

3.2 Working Party members had differing views as to what the definition should be but a consensus developed that the proposed definition was unhelpful and a better definition was required to ensure:

3.2.1 clarity as to the treatment of expendable endowment;

3.2.2 due recognition of the distinction between functional permanent endowment and investment permanent endowment (if the definition references income); and

3.2.3 if the term “restriction” is to be used in the new statutory definition then what is, or is not, a “restriction” for the purposes of that definition. (This is also relevant for understanding s280A(8)(d), within clause 3 of the Bill, for which it is necessary to understand what is a “restriction making property permanent endowment”).

3.3 We recognise the definition of “permanent endowment” in the Act only applies for the purposes of the Act and so does not affect the meaning of permanent endowment under charity law. However, we consider it unnecessarily confusing if the definition in the Act does not correlate with the generally accepted view of what permanent endowment is.

3.3.1 For example, at present different meanings appear in Charity Commission guidance/operational guidance according to whether that guidance is referring to permanent endowment as a charity law concept, or permanent endowment as it is defined in the Act.

3.3.2 We do not consider the definition in the Bill will alleviate the current confusion and there is a risk it may exacerbate it.

3.4 Wording which we would propose which we consider aligns with the generally accepted view of what permanent endowment means in a charity context would be along the lines of:

“For the purposes of this Act, property is “permanent endowment” if it is held in a way which does not permit its capital to be expended.”

4 The power to spend capital of permanent endowment – larger fund (clause 10(3)(b))

- 4.1 Currently, under s281 of the Act, charity trustees can relatively easily lift an unhelpful permanent endowment restriction enabling funds to be applied for charitable purposes where (broadly) the endowment fund has income not exceeding £1,000 or the fund itself does not exceed £10,000. Otherwise, the fund is a “larger fund” under s282 for which Charity Commission consent is required (or a period of 3 months elapses without the Commission raising objections).
- 4.2 The Bill alters that position to remove the income test, but enable funds not exceeding £25,000 to be spent without going to the Commission.
- 4.3 The change simplifies the current test for whether Charity Commission consent is required but we would question whether the new test in the Bill sets the right level for a “larger fund” requiring Commission oversight. As it stands, the new test in the Bill would bring charities into the oversight net which are not currently within it, because funds well in excess of £25,000 are still likely to have income of £1,000 or less. It is not clear to us that that was intended or that it would achieve the right balance between easier administration and appropriate oversight.
- 4.4 We would suggest either increasing the market value threshold in the Bill or reintroducing an income threshold (although we appreciate the latter may sacrifice some of the simplification).

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

- 5.1 The Bill proposes three factors to which the Charity Commission must have regard when considering whether to consent to a change of objects of a charitable company (under s198), a CIO (under s226) or an unincorporated charity using the new power in new s280A (clause 3 of the Bill).
- 5.2 We appreciate that the factors result from a further Law Commission consultation (held in 2016) and understand that they result from consultation responses which supported aligning the factors, as far as possible, between charitable companies, CIOs and unincorporated charities and that the appropriate factors should be based on those applied by the Charity Commission when considering a cy-près scheme which, broadly, seek to balance the aims of donor(s) with what is expedient in the interests of the charity. Those cy-près scheme factors are set out in s67(3) of the Act (as amended by s67(7)):
- the spirit of the original gift,
 - the desirability of securing that the property is applied for charitable purposes which are close to the original purposes (or, where the application of property has been altered or regulated by a scheme or otherwise, close to the purposes for the time being applicable), and
 - the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.
- 5.3 The factors in the Bill are adjusted to apply them to a situation of a charity changing its purposes. In particular, the “spirit of the original gift” is translated to become (in the respective

factors (a) “the purposes of the [company][CIO][charity] when it was established, if and so far as they are reasonably ascertainable”.

5.4 We question, however, whether this aspect of the test is correct.

5.4.1 The purposes of a charity may have been changed several times over the years (bearing in mind how long a charity may be established), so it is not clear why purposes which have long been irrelevant to the charity’s operations should be relevant to a proposal to amend the charity’s current purposes;

5.4.2 Where purposes have been changed before, the original purposes will have been considered when they were first amended;

5.4.3 On applications *cy-près*, there is debate as to whether the “spirit of the original gift” in s67(3)(a) should be read as referring to the gift before any prior alterations to the purposes or to the gift as altered. For example, *Tudor on Charities* (10th edition), sets out opposing arguments (at paragraph 11-006) but the authors suggest that the preferred construction should be to the gift as altered. It is not clear, therefore, that the factor upon which this aspect of the test is based requires reference back to the “original” gift where the purposes have been altered.

5.5 We consider factor (a) in the tests in the Bill to be problematic – we think it will be confusing for charities (who will wonder why they are suddenly being asked to locate an old version of their purposes which may be many iterations and years out of date) and cause unnecessary expense for no clear benefit.

5.6 We suggest that factor (a) in each case should refer to the purposes being altered.

6 The power in clause 31 of the Bill and connected persons

6.1 In the Annex to our written response to the Committee’s Call for Evidence, we raised a point (at 8.2 in the table) on new s186A, the new power in the Bill for the Charity Commission to authorise remuneration/benefit for a charity trustee who has carried out work for or on behalf of a charity (clause 31 of the Bill). Our concern was whether the power should be extended to connected persons of a charity trustee (as s185 of the Act does in relation to payment for services).

6.2 In response, the Law Commission view was that such an extension was not necessary on the basis that the cause of action for retaining a benefit would only arise against a charity trustee, not a connected person – a connected person would not be acting in breach of fiduciary duty by profiting from their position as a connected person to a charity trustee. This was illustrated with an example:

If a trustee’s wife has helped the charity to obtain planning permission to develop 1-2 High Street where the charity owns 1 High Street, and the trustee owns 2 High Street and as a result, the land is sold for a profit, the trustee clearly has received a benefit as a result. That benefit could not be authorised under s185 nor s186A as currently drafted.

The question is whether it would need to be. This is not a situation where the trustee has profited from their position as a trustee and thus no breach of fiduciary duty has arisen.

The response also noted that the policy here is to enable the Commission to authorise remuneration of trustees/retention of benefit that was connected to work “carried out by the trustee”, which would not apply in the above example.

6.3 Having reviewed the point further, we consider that there is a lacuna here relating to connected persons.

6.3.1 Suppose in the example above, the trustee’s wife was paid by the charity for her work in relation to 1 High Street but that payment was not authorised in advance (either under s185 or pursuant to the charity’s constitution).

6.3.2 In that case, there would be a benefit to the trustee (because his wife, a connected person, has received remuneration from the charity) which cannot be authorised retrospectively under s185 and does not fall within s186A (because it was not the trustee who carried out the work, as required by s198A(1) as currently drafted).

6.3.3 We consider that such remuneration/benefit should be as capable of authorisation as if the trustee had carried it out – we do not think the distinguishing feature between the Commission being able to authorise or not should be whether it was the trustee themselves who carried out the work, rather than someone connected to them.

6.4 We suggest that the point may be corrected by providing that reference in s186A(1)(b) to a charity trustee or trustee of a charity includes a connected person of them (with cross-reference to the definition of connected person).

7 Appeals from a decision of the Charity Commission to give or withhold consent on an amendment of the constitution of an unincorporated charity

7.1 In oral evidence, a query was raised as to whether there is a lacuna in Schedule 6 of the Act in respect of appeals of decisions of the Charity Commission in giving or withholding consent under new s280A(7) (clause 3 of the Bill).

7.2 The point arises because s280A implements a statutory regime similar in form to existing regimes for charitable companies (under s198 of the Act) and CIOs (under s227 of the Act). In both of those cases, Schedule 6 provides that a decision of the Commission to give or withhold consent gives rise to a right of appeal to the Tribunal by:

- the charity trustees of the charitable company/CIO
- the charity company/CIO itself, and
- any other person who is or may be affected by the decision.

In each case (as amended by the Bill), the Tribunal has power, if the appeal is allowed, to quash the decision and (if appropriate) to remit the matter to the Commission.

- 7.3 We agree that, on the face of it, it is not clear why an equivalent appeal should not arise in respect of Commission decisions made under new s280A(7). We recommend that the Bill should amend Schedule 6 accordingly.

We hope you find this further evidence helpful. We should be pleased to offer further assistance as may be required.

We should also like to take this opportunity to repeat our overall support for the Bill and to thank the Law Commission team for their extensive work and expertise on this project.

25 October 2021