



# Charities Bill – Lords Second Reading, 7 July 2021

## About us

**ACEVO** is a network of over 1,500 civil society CEOs and senior leaders. Together with its network ACEVO inspires and support civil society leaders by providing connections, advocacy and skills.

**ACF** is the membership body for UK foundations and grant-making charities. Its 400 members give over £2.5bn annually.

**Charity Finance Group** exists to develop a financially-confident, dynamic and trustworthy charity sector. Our 1,400 organisational members include charity finance professionals, who between them manage £21bn of funds. We work with our members to: inspire and nurture leadership; drive up standards; create a better and fairer operating environment; identify best practice and share knowledge.

**The Charity Retail Association** represents the interests of charity retailers with around 450 members, who together run 80 per cent of all charity shops in the UK.

**The Chartered Institute of Fundraising** is the professional membership body for UK fundraising. We champion our members' excellence in fundraising. We support fundraisers through professional development and education. We connect fundraisers across all sectors and skill sets to share and learn with each other. So that together we can best serve our causes and communities both now and in the future.

**NCVO** is a membership body for charities and voluntary organisations in England. We have over 16,000 members, ranging from community groups to household name charities.

## Summary

This Bill implements a series of recommendations made by the Law Commission's report on technical issues in charity law, building on the review of the Charities Act 2006 carried out by Lord Hodgson.

The Bill seeks to make a series of changes that will make it easier for charities to navigate the law and carry out their functions effectively, while retaining important safeguards.

We support this Bill, which makes a number of significant changes for charities, including making it easier for charities to amend their governing documents, to dispose of land efficiently and use the resources of the charity more effectively, and to avoid disputes over whether a trustee has been correctly appointed or elected.

## **Amending governing documents**

Clauses 1 to 3 set out changes in the way that different legal forms of charity will be able to amend their governing documents, and broadly brings into line the way the Charity Commission will consider amendments to the charitable purposes of charitable companies, charitable incorporated organisations (CIOs) and unincorporated charities.

Under the changes made in the bill, alterations to governing documents will only be considered as regulated alterations, and as such subject to Charity Commission approval, where they alter the substance of charitable purposes.

Clause 3 also increases the threshold for unincorporated charities to pass a resolution making a change to their governing document from two thirds of trustees to three quarters, or the same proportion of members if they have members who are entitled to vote. This will bring unincorporated charities broadly into line with the requirements of charitable companies and CIOs, though in different contexts.

Many charities are looking at whether their governing documents need to be updated, particularly in light of the pandemic, so it is welcome that the bill will make it easier for charities to do so, while maintaining the important oversight of the Charity Commission for when a charity seeks to change its purpose.

While we acknowledge that the proposal to increase the proportion of trustees required to approve a resolution to change governing documents was part of the recommendations made by the Law Commission, we are concerned about the potential uncertainty for charities with long-established procedures, given the relatively minor difference between a requirement for approval by two thirds and three quarters. We would encourage the government to think carefully about this provision and its desirability, particularly given the overall deregulatory approach of the Bill.

## **Royal Charters**

The bill will also allow charities established or regulated by Royal Charter to more easily amend provisions within the Charter. Clause 4 provides for charities to make amendments to the Charter where no express power to do so exists, subject to the approval of the Queen by Order in Council.

We support this clause, which will make the lengthy processes which Royal Charter charities currently have to go through to make amendments much more straightforward, while retaining the oversight of the Privy Council.

## Fundraising appeals

The bill introduces greater flexibility for charities with regard to fundraising appeals, and to put the proceeds of failed fundraising appeals towards a cy prés scheme. The cy prés doctrine allows for charitable money to be spent on the closest possible alternative, when the donor's intentions are unable to be fulfilled.

When a fundraising appeal fails, Clause 6 will allow charities to keep donations towards that appeal to a total of £120, and Clause 7 allows them to proceed with a cy prés scheme, without requiring them to seek the permission of the Charity Commission, as long as the proceeds do not exceed £1000, though they may apply the funds to a more valuable scheme if the Charity Commission consents.

Ensuring that donations go towards the purpose intended, or as close as possible, is an important aspect of charity law, and is vital to ensuring trust between charities and donors. We think this proposal is however a sensible update to the law, and strikes the right balance between respecting the donor's wishes and providing charities with more flexibility. We would encourage the use of this power to be monitored, including seeking donor opinion, with a view to potentially raising the limits in this bill.

## Permanent endowment

The bill makes several changes to provide additional clarity on the law around permanent endowment. Clause 9 creates a new simplified definition of permanent endowment. Clause 10 amends sections 281 and 282 of the Charities Act 2011 to make clear that the powers in those sections to release restrictions on spending permanent endowment capital are available to corporate charities. Clause 10 also amends section 282 so that the sole factor in deciding whether or not Charity Commission oversight is required is the value of the permanent endowment fund, where that exceeds £25,000, increased from £10,000.

Clause 12 creates a new power for charities to borrow from permanent endowment without seeking the permission of the Charity Commission. This power is more restrictive than the powers amended by Clause 10, so may be used by trustees where they do not think it would be appropriate to fully release restrictions.

Clause 13 creates a new power to use permanent endowment to make social investments that trustees could not otherwise make. The new power is limited to charities that have already opted in to investing on a total return basis and would allow them to make social investments which they would not otherwise be able to make because they are expected to produce a loss but which will further the charity's purposes and make some financial return. Taking a total return approach to investments means that both any increase in the capital value of permanent endowment investments as well as the income are available for expenditure. This will help those charitable foundations and others who use social investments and has been welcomed by the Association of Charitable Foundations. Under the current regime, investments which are expected to produce a loss are prohibited.

The expansion of the toolbox available to trustees in seeking to further their charities' purposes, represented by the new additional powers to borrow and (where taking a total return approach to investment) make social investments with a potentially negative or uncertain financial return are very welcome. We agree that the safeguards remaining in place are appropriate.

## **Ex gratia payments**

Clause 15 allows boards to make small ex gratia payments without authorisation from the Charity Commission. These can be made where trustees feel there is a moral obligation to make a payment, but no legal requirement to do so. The level of payment that can be made without Charity Commission approval will depend on the income of the charity, as set out in subsection (6) ranging from £1,000 for charities with an income under £25,000 to £20,000 if a charity's income is over £1million.

We welcome this update to the law which will allow charity boards to more easily honour moral obligations.

## **Charity land**

Clauses 17 to 23 set out a number of reforms that will make it easier for charities to make disposals of charity land.

In particular Clause 20 expands the range of professionals who a charity can seek advice from in meeting its statutory obligations to include fellows of the National Association of Estate Agents and fellows of the Central Association of Agricultural Valuers.

Disposal of land can present a particularly challenging and time-consuming legal process, so this package of measures is welcome.

The government rejected an additional recommendation to repeal section 121 of the Charities Act 2011, which would have removed the statutory requirement to give public notice of the disposal of designated land, and consider responses.

While we recognise that requirements to give public notice of the intention to designate land can be burdensome, we acknowledge that it is a useful process to follow on what can become contentious issues where trustees may not always fully understand the implications, and understand why the government chose to reject the Law Commission's recommendation 18 to repeal section 121 of the Charities Act 2011. However, as the Charity Commission is able to exempt charities from this requirement, we think it could be helpful to develop a statutory framework that would set out where charities may set aside these requirements for low risk disposals, without requiring the permission of the Charity Commission.

## **Power to direct a change of name**

Clauses 25 to 28 extend the Charity Commission's powers to direct a change of name if it is too similar to an existing charity. The bill extends this power to include the working names of charities. It will also allow the Charity Commission to delay the registration of a charity until the name has been changed.

This power is welcome, and if used appropriately, will help ensure new charities that have inadvertently used a name that is too similar to an existing charity will be able to address this issue prior to registration, as well as reducing the possibility that there is confusion between an established charity and a newly registered charity with a similar name.

## **Powers relating to appointment of trustees**

Issues can arise in charities where it is not clear whether the procedure to appoint or elect a trustee has been followed correctly, and as such a trustee may not be able to discharge functions legally. Clause 29 will allow the Charity Commission to determine that a person can act as a trustee, without a need to consider whether there is a potential defect in their appointment or election.

This is a welcome power that will help to ensure that there is clarity over whether trustees can carry out their functions, and reflects the existing powers that the Commission has to determine a charity's members. However, it is not apparent that the Charity Commission has used this power in relation to members as regularly as it could have done, and so for the new power to be effective the Commission must be prepared to use it.

## **Payment of trustees for goods provided**

Clause 30 allows charities to pay trustees for goods provided, to bring the law into line with the ability for trustees to be remunerated for services, without the permission of the Charity Commission. This power will be able to be used even where there is an express provision in the charity's governing documents that allow such a payment to be made – currently charities would be prevented from using the statutory power, if such an express provision was in their governing documents, meaning that charities will be able to use the power without checking whether it could be otherwise authorised by a provision in their governing documents.

Clause 31 will allow the Charity Commission to order a charity to remunerate a trustee for work done. Previously, a trustee would have had to be authorised by the court.

For many charities, there will be occasions when it is more cost effective for a trustee to supply goods to the charity, so it is welcome that the law is being aligned with payment for services.

## **Trust corporation status**

In some circumstances a trustee will require trust corporation status, for example where land or property is to be held on charitable trust by a sole trustee. However the current routes to securing trust corporation status are time-consuming, so Clause 32 will automatically confer trust corporation status where they meet the criteria in section 334A(1).

This is a helpful measure that will reduce the bureaucracy associated with securing trust corporation status.

## **Mergers**

Clause 33 will allow for gifts to be transferred from a charity which has since merged to the new merged charity. This will provide clarity over whether a gift can be transferred, and should mean that in such cases shell charities will not need to be preserved for the purpose of ensuring a gift can be received.

# Rejected recommendations

## Charity tribunal

Recommendation 40 of the Law Commission review argued that it should be possible for authorisation for charity proceedings under section 115 of the Charities Act 2011 to be sought from either the court or the Charity Commission where the Commission had an apparent or actual conflict of interest.

The sector was supportive of this suggestion, which would provide reassurance for those seeking authorisation, and ensure the Charity Commission is not suspected of refusing authorisation for reasons not to do with the merits of the proceedings.

The government has rejected this recommendation, citing concern that this would lead to more proceedings being taken to the court which could be resolved by a non-legal remedy. While we appreciate this concern, and do not wish to see more of these cases pursued through the court, we think this could be addressed by ensuring that the court takes into account the likelihood of resolution before granting authorisation.

It remains a concern that there could be questions about the role of the Charity Commission in certain cases, and we would encourage the government to reconsider the rejection of this recommendation.

## Permission of the Attorney General

The Law Commission also recommended removing the requirement for the Charity Commission to obtain the consent of the Attorney General before making a reference to the Charity Tribunal on a question concerning charity law or its application to a particular case. To avoid duplication, the Commission and Attorney General would instead provide notice when a reference was being sought.

The Charity Commission is well-placed to highlight potential challenging issues within charity law, and the current requirement for consent presents an unnecessary barrier to ensuring issues with charity law can be considered and addressed by the Tribunal.

In response to the Law Commission's consultation, the Attorney General at the time stated that removing the consent requirement "would enable the Charity Commission to contribute constructively towards the development of charity law...without the need for the duplication of functions in requesting the consent of the Attorney General[1]."

We agree with the Law Commission's original recommendation, and would encourage the government to reconsider its rejection. While the government is entitled to change its mind, given the support of the previous Attorney General for this proposal, at the very least the government should set out clearer reasoning for why it has chosen to reject this recommendation.

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[1] Law Commission, Technical Issues in Charity Law – Analysis of Responses, 2017, p364