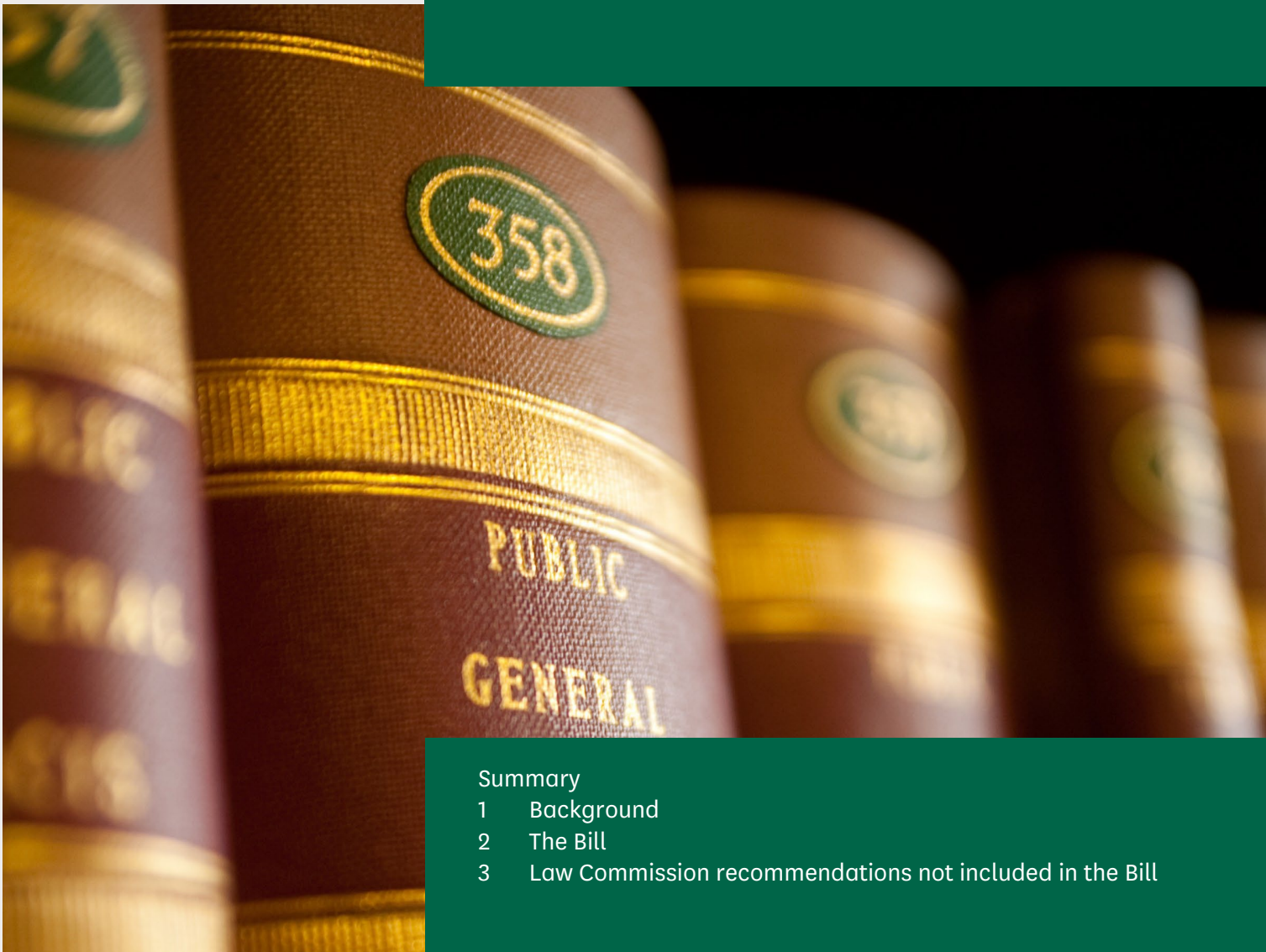


Research Briefing

By Catherine Fairbairn

21 February 2022

# Commons Library analysis of Charities Bill [HL]



## Summary

- 1 Background
- 2 The Bill
- 3 Law Commission recommendations not included in the Bill

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## Summary

On 26 May 2021, the Charities Bill [HL] was introduced in the House of Lords as [HL Bill 17 of 2021-22](#). The Government also published [Explanatory Notes](#) and a [factsheet](#).

The Bill would implement recommendations made by the Law Commission by making some technical changes to charity law affecting areas such as amending governing documents and charity land transactions.

The Bill is following the special parliamentary procedure for uncontroversial Law Commission bills. Having completed its passage through the House of Lords, the Bill was introduced in the House of Commons on 11 January 2022 as [Bill 223 of 2021-22](#) (PDF). The Bill was referred to a Second Reading Committee which met on 18 January 2022. The debate in this Committee replaced a Second Reading debate in the House.

The Bill was considered by a Public Bill Committee in one sitting on 25 January 2022. This consisted almost entirely of consideration of whether each of the clauses should form part of the Bill, none of which were opposed. The Opposition did not table any amendments. The one Government amendment which had been tabled was agreed: to remove the privilege amendment inserted by the Lords.

The Bill as amended in Public Bill Committee was republished as [Bill 237 of 2021-22](#) (PDF).

Report stage in the House of Commons is scheduled for **22 February 2022**.

## Background

### Review of Charities Act 2006

Lord Hodgson of Astley Abbotts's 2012 review of the Charities Act 2006 concluded that technical problems in various areas of charity law were [causing difficulties for charities and diverting resources away](#) from their charitable activities.

In its response, the Government said the Law Commission would consider [several of the more technical recommendations](#) (PDF) in more detail and consult on potential changes, which might result in legislation.

## Law Commission report

Following public consultation, in September 2017, the Law Commission published a report, [Technical Issues in Charity Law](#) (PDF), which included a draft bill. The report made recommendations “to maximise the efficient use of charitable funds” while ensuring proper safeguards for the public.

## Government response to Law Commission report

On 22 March 2021, the Government [responded to the Law Commission’s report](#) and confirmed its acceptance in principle of “the vast majority” of the Law Commission’s recommendations. The Government said it would bring forward legislation when parliamentary time allowed.

## The Bill

The [Explanatory Notes](#) (PDF) published with the Bill state that the Bill would:

- Give charities wider or additional powers and flexibility:
  - to amend their governing documents;
  - to decide on how they procure goods and services;
  - to make “ex gratia” payments (which charities have a moral obligation, but no legal power, to make).
- Clarify when property can be applied cy-près including the proceeds of failed fundraising appeals. [“Cy-près” means “as near as possible”. When a charitable purpose cannot be carried out, the Charity Commission can direct that the funds should be used for other similar charitable purposes.]
- Produce a clearer and less administratively burdensome legal framework for buying, selling, leasing and mortgaging charity land.
- Clarify and expand the statutory regime that applies to permanent endowment [property held by, or on behalf of, a charity that is subject to a restriction on it being spent].
- Introduce a power – with appropriate safeguards – for charities to borrow from their permanent endowment and to make certain social investments using permanent endowment.
- Facilitate, where appropriate, charity mergers and incorporations.
- Confer additional powers on the Charity Commission:
  - to authorise charities to pay an equitable allowance;
  - to require charities to change or stop using inappropriate names; and

- to ratify the appointment or election of charity trustees where there is uncertainty concerning the validity of their appointment or election.
- Improve and clarify certain powers of the Charity Tribunal.

The Government considers [the Bill would have beneficial effects](#). It said:

The impact of these changes will significantly improve the efficiency of the sector, release more funds for use on charitable purposes rather than administration, and reduce unnecessary and overly bureaucratic regulation that not only increases the sector's costs but also is a factor in discouraging people from volunteering to become trustees.

The Charity Commission and charity sector organisations have welcomed the Bill.

## Law Commission recommendations not in the Bill

Some of the Law Commission's recommendations are not in the Bill because:

- they do not require primary legislation to implement;
- they were addressed to other parties; or
- the Government did not accept them.

The Government did not accept recommendations relating to:

- wholly-owned subsidiaries being excluded from the definition of '[connected persons](#)';
- abolishing the requirement for charities to advertise proposed disposals of designated land and to consider any responses received;
- challenging Charity Commission decisions;
- authorisation to pursue charity proceedings (in general, disputes within a charity, such as claims about the way it is being run);
- removing the requirement for the Charity Commission to obtain the Attorney General's consent before making a reference on questions of charity law to the Charity Tribunal.

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# 1 Background

## 1.1 The charity sector in England and Wales

### Charity Commission

The Charity Commission is the registrar and regulator of charities in England and Wales. It is an independent, non-ministerial Government department accountable to Parliament. It is also accountable for the exercise of its powers to the First-tier Tribunal and the High Court.<sup>1</sup>

### Number of charities

At 31 March 2021, there were more than 169,000 charities on the Charity Commission's register,<sup>2</sup> and many more charities which are unregistered.<sup>3</sup>

## 1.2 Review of Charities Act 2006

### Charities Act 2006

The Charities Act 2006 overhauled previous charity law and, among other things, it restructured the Charity Commission and set out a new framework for the regulation of charities.

The [Charities Act 2011](#), which came into effect on 14 March 2012, is a consolidation act which has replaced much (but not all) of the earlier charities legislation, including much of the Charities Act 2006.

### Statutory review

Section 73 of the Charities Act 2006 required the Minister for the Cabinet Office to institute a review of the operation of that Act within five years after Royal Assent. The review was conducted by Lord Hodgson of Astley Abbotts (Conservative). He was asked to investigate whether the Act

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<sup>1</sup> [Charity Commission annual report and accounts 2020 to 2021](#), 15 July 2021, Overview

<sup>2</sup> Ibid

<sup>3</sup> Baroness Barran, Minister for Civil Society, [Charities Bill \[HL\] Special Public Bill Committee, Oral evidence 15 September 2021, Q1](#) (PDF). A charity may be unregistered because it is not a charitable incorporated organisation and has annual income of less than £5,000, or because it is excepted or exempt. Charity Commission guidance provides further information, Gov.UK, [How to register a charity \(CC21b\)](#), last updated 2 February 2015

was fit for purpose and to consider if better regulation was needed and whether the existing rules enabled charities to operate easily.<sup>4</sup>

Lord Hodgson's report was published and laid before Parliament in July 2012, [Trusted and Independent: Giving charity back to charities Review of the Charities Act 2006](#) (PDF). It covered wide-ranging issues, and made 113 recommendations, some of which required primary legislation to be implemented.

The Review concluded that technical problems in various areas of charity law were causing difficulties for charities and diverting resources away from their charitable activities.<sup>5</sup> Following the existing rules could be costly in terms of both money and time and could prevent trustees from making the best use of charity funds.

[Appendix A](#) (PDF) to the report set out technical issues, some for the Law Commission and some for other bodies.

## Public Administration Select Committee report

On 6 June 2013, the House of Commons Public Administration Select Committee<sup>6</sup> published its report, [The role of the Charity Commission and "public benefit": Post legislative scrutiny of the Charities Act 2006](#) (PDF).<sup>7</sup> The Committee also made recommendations about the rules and regulations charities in England and Wales must follow, and the way in which they are regulated by the Charity Commission.<sup>8</sup>

## Government response

The Coalition Government published its [response](#) to both reports in one document.<sup>9</sup> It said the Law Commission would consider several of the more technical recommendations in more detail and consult on potential changes, and that ultimately this might result in legislation.<sup>10</sup>

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<sup>4</sup> Gov.UK, [Charities Act 2006 review](#), 9 February 2012 [accessed 18 February 2022]

<sup>5</sup> As summarised by the Law Commission, [Supporting charities with better law](#), 20 March 2015 [accessed 18 February 2022]

<sup>6</sup> As it was then, now Public Administration and Constitutional Affairs Committee (PACAC)

<sup>7</sup> House of Commons Public Administration Select Committee, [The role of the Charity Commission and "public benefit": Post legislative scrutiny of the Charities Act 2006](#), 6 June 2013, HC 76 2013-14 [incorporating HC 574-i-vi, 2012-13]

<sup>8</sup> Gov.UK, [Government response to recommendations on the legal framework for charities](#), 5 September 2013 [accessed 18 February 2022]

<sup>9</sup> GOV.UK, [Government response to recommendation on the legal framework of charities](#), 5 September 2013 [accessed 18 February 2022]

<sup>10</sup> [Government Responses to 1\) The Public Administration Select Committee's Third Report of 2013-14 and 2\) Lord Hodgson's statutory review of the Charities Act 2006: Trusted and Independent, Giving charity back to charities](#) (PDF), Cm 8700, September 2013, paragraph 5, p5



## 1.3

### Law Commission project

The Law Commission's [Eleventh Programme of Law Reform](#) (PDF), published in July 2011, included a project on selected issues in charity law.<sup>11</sup> The project was split into two parts, one of which was technical issues in charity law. The Law Commission's [website](#) has information about the project with links to related documents.<sup>12</sup>

Following public consultation, in September 2017, the Law Commission published a report, [Technical Issues in Charity Law](#) (PDF), which included a draft bill.<sup>13</sup> The Report includes a glossary of the terms it uses,<sup>14</sup> and recommendations “to maximise the efficient use of charitable funds whilst ensuring proper safeguards for the public”.<sup>15</sup>

The Law Commission summarised its recommendations:

For charities, recommendations include:

- giving charities more flexibility to obtain tailored advice when they sell land, and removing unnecessary administrative burdens
- changes to the law to help charities amend their governing documents more easily with Charity Commission oversight where appropriate
- increased flexibility to use their permanent endowment,<sup>16</sup> with checks in place to ensure its protection in the long term
- removing legal barriers to charities merging, when a merger is in their best interests
- giving trustees advance assurance that litigation costs in the Charity Tribunal can be paid from the charity's funds

For the Charity Commission recommendations include:

- bringing in a single set of criteria to decide changes to a charity's purposes
- increased powers to prevent charities using misleading names

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<sup>11</sup> Law Commission, [Eleventh Programme of Law Reform](#) (PDF), Law Com No 330, July 2011, p9

<sup>12</sup> Law Commission, [Charity Law: Technical Issues in Charity Law](#) [accessed 18 February 2022]

<sup>13</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017

<sup>14</sup> Ibid, pp1-3

<sup>15</sup> Law Commission, [Charity Law: Technical Issues in Charity Law](#) [accessed 18 February 2022]

<sup>16</sup> That is, property that is held by, or on behalf of, a charity subject to a restriction on being spent: section 353(3) of the Charities Act 2011. See also Law Commission, [Technical Issues in Charity Law](#), Law Com No 375, September 2017, Glossary, p2

- the ability to confirm that trustees were properly appointed.<sup>17</sup>

The Law Commission said the reforms would not only save charities a large amount of time, but estimated cost savings of £2.8m per year from increased flexibility concerning sales of land. They added:

Alongside this the added clarity of issues with the law that are causing uncertainty will allow charities to get on with the job of helping people.<sup>18</sup>

Detailed information about the Law Commission’s recommendations, and the background to them, is set out in the [Report](#) (PDF). The Law Commission also published a [summary](#) (PDF) of the Report.<sup>19</sup>

Lord Hodgson of Astley Abbotts welcomed the Law Commission’s report. He said he believed the Law Commission’s recommendations, although “highly technical”, would cumulatively “have a huge impact on the sector, helping trustees to work effectively in modern-day conditions”.<sup>20</sup>

## 1.4 Government response to Law Commission report

On 22 March 2021, the Government responded to the Law Commission’s report and confirmed its acceptance of “the vast majority” of the Law Commission’s recommendations.<sup>21</sup> It said it would bring forward legislation when parliamentary time allowed.<sup>22</sup> The Government asked the Law Commission to assist with updating their draft Bill.<sup>23</sup>

Announcing the Government’s response in a written Ministerial statement, Baroness Barran, who was then Parliamentary Under-Secretary at the Department for Digital, Culture, Media and Sport, said the recommendations the Government was accepting included measures to improve:

- Simplifying the processes by which charities can amend their governing documents
- Reducing the costs and simplifying the rules governing disposals of land by charities

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<sup>17</sup> Law Commission, [Charity Law: Technical Issues in Charity Law](#) [accessed 18 February 2022]

<sup>18</sup> Ibid

<sup>19</sup> Law Commission, [Technical Issues in Charity Law Summary](#) (PDF), Consultation Paper No 220 (Summary), 20 March 2015

<sup>20</sup> Law Commission, [Charity Law: Technical Issues in Charity Law](#) [accessed 18 February 2022]

<sup>21</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021

<sup>22</sup> Gov.UK, [Government response to Law Commission report on Technical Issues in Charity Law](#), 22 March 2021 [accessed 18 February 2022]

<sup>23</sup> Law Commission, [Charity Law: Technical Issues in Charity Law](#) [accessed 18 February 2022]

- Enabling charities to use their permanent endowment for social investments
- Helping charity incorporations and mergers
- Providing trustees with certainty about costs before the Charity Tribunal.<sup>24</sup>

Baroness Barran said she was pleased the Law Commission's recommendations also had support within the sector and from the Charity Commission.

The Government's [response document](#) sets out its detailed reasons for accepting or not accepting each of the Law Commission's recommendations.<sup>25</sup>

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<sup>24</sup> [HLWS858 \[on Publication of the Government response to the Law Commission report on Technical Issues in Charity Law\], 22 March 2021](#)

<sup>25</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

## 2 The Bill

### 2.1 Progress of the Bill

On 26 May 2021, the Charities Bill [HL] (the Bill) was introduced in the House of Lords as [HL Bill 17 of 2021-22](#). The Government also published [Explanatory Notes](#)<sup>26</sup> and a [factsheet](#).<sup>27</sup> Information about the Bill is provided on the [Bill page](#) on the Parliament website.<sup>28</sup>

The Bill is following the special parliamentary procedure for uncontroversial Law Commission bills.<sup>29</sup> In Second Reading Committee, Baroness Barran set out a consequence this would have:

Amendments can therefore be proposed but the Government would resist any amendment that is not directly related to implementing the Law Commission’s recommendations. I genuinely welcome debate on issues covered in the Bill and any other issues that noble Lords wish to raise, and I would be delighted to meet any noble Lord separately to discuss issues which are outside the scope of the Law Commission’s recommendations.<sup>30</sup>

#### House of Lords Second Reading Committee

The Bill was considered by a Second Reading Committee on 7 July 2021.<sup>31</sup> Baroness Barran noted the Bill was “highly technical” but said the changes it proposed would give charities “more flexibility, time and resources to fulfil their charitable purposes”, adding:

I believe that the Bill strikes a sensible balance between protecting charities’ assets and avoiding unnecessary expense and bureaucracy.<sup>32</sup>

Baroness Barran said the Bill would have beneficial effects:

The Bill will have a positive impact on all charities, large and small, with the greatest benefits felt by small charities, for which administrative burdens and legal and professional costs are likely to be most prohibitive and

<sup>26</sup> [Explanatory Notes to the Charities Bill \[HL\]](#)

<sup>27</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

<sup>28</sup> [UK Parliament, Charities Bill \[HL\]](#)

<sup>29</sup> A Commons Library briefing paper provides information about the parliamentary procedures used to implement Law Commission recommendations, [The Law Commission and Law Commission Bill Procedures](#), 27 March 2015

<sup>30</sup> [HL Deb 7 July 2021 c374GC](#)

<sup>31</sup> [HL Deb 7 July 2021 cc341-374GC](#)

<sup>32</sup> [HL Deb 7 July 2021 c342GC](#)

disproportionate. Other than financial savings, clarity in the law will help trustees to act with confidence in their charity's interests. Removing unnecessary layers of regulation and administrative burdens enables charities to function more effectively. In turn, we anticipate public trust to flow from charities working unhindered and able to focus fully on their charitable mission.<sup>33</sup>

Lord Ponsonby of Shulbrede, Shadow Spokesperson for Home Affairs and Justice, said the Labour Party support the Bill.<sup>34</sup>

Lord Hodgson of Astley Abbotts supported the Bill except in one matter. He considered the Charity Commission should be free to appeal to the Tribunal on a question which involves the operation of charity law without having first to seek the consent of the Attorney General.<sup>35</sup>

In response to points made in debate, Baroness Barran said (among other things):

- the Government would publish an implementation plan before the Bill completed its passage and would aim to prioritise the implementation of provisions that would most benefit the sector;<sup>36</sup>
- new or updated guidance would be needed from the Charity Commission, which would also need to change some of its systems and processes to support the new measures;<sup>37</sup>
- in 2022, DCMS would take forward related secondary legislation;
- the requirement (not in the Bill) to review various financial thresholds in the Charities Act 2011, with the view to increasing them in line with inflation, would also be taken forward by the department in 2022, also by way of regulations subject to the negative procedure;<sup>38</sup>
- in connection with responsible investing, the Bill would have no impact on the Charity Commission's guidance:

The commission is clear that trustees of all charities are free to decide whether to adopt responsible investment practices and trustees should have confidence that they can, under the current law, invest in a particular manner where they choose to do so".<sup>39</sup>

The Bill had a formal Second Reading in the House of Lords on 14 July 2021 and was committed to a Special Public Bill Committee.<sup>40</sup>

## Special Public Bill Committee

The [Charities Bill \[HL\] Special Public Bill Committee](#) took oral and written evidence from a range of witnesses, including Professor Nicholas Hopkins,

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<sup>33</sup> [HL Deb 7 July 2021 c343GC](#)

<sup>34</sup> [HL Deb 7 July 2021 c367GC](#)

<sup>35</sup> [HL Deb 7 July 2021 c347GC](#). See section 3.5 of this briefing paper for further information on this issue

<sup>36</sup> [HL Deb 7 July 2021 c369GC](#)

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> [HL Deb 7 July 2021 c371GC](#)

<sup>40</sup> [HL Deb 14 July 2021 c1849](#)

Law Commissioner for Property, Family and Trust Law; Baroness Barran, the then Minister for Civil Society; and Aarti Thakor, Director of Legal Services at the Charity Commission. Oral evidence transcripts and written evidence are available on the [Special Public Bill Committee's website](#).<sup>41</sup>

The Special Bill Committee considered the Bill clause by clause, and amendments, on 18 November 2021.<sup>42</sup>

The Bill as amended in Special Public Bill Committee was republished as [HL Bill 68](#) of 2021-22. Information about how the Bill was amended at all Lords stages is included in section 2.4 of this briefing paper.

## House of Lords remaining stages

[House of Lords Report stage](#) took place on 14 December 2021 when the Bill was amended again.<sup>43</sup> The Bill as amended on Report was republished as [HL Bill 86 of 2021-22](#).

Third reading of the Bill took place on 10 January 2022.<sup>44</sup> No further amendments were proposed at this stage.

## House of Commons stages

The Bill was introduced in the House of Commons on 11 January 2022 as [Bill 223 of 2021-22](#) (PDF). The Government also published [Explanatory Notes](#) (PDF)<sup>45</sup>

### Second Reading Committee

The Bill was referred to a Second Reading Committee which met on 18 January 2022.<sup>46</sup> This Committee was charged with recommending to the House whether the Bill ought, or ought not, to be read a second time. The debate in this Committee replaced a Second Reading debate in the House.

Nigel Huddleston, Parliamentary Under-Secretary of State for Digital, Culture, Media and Sport, reminded the Committee that the Bill was following the special procedure for non-controversial Law Commission bills:

This means that the Bill is limited to implementing those recommendations from the Law Commission's report. Under this special procedure, the Bill was introduced into the other place, where it was subject to considerable scrutiny, and the Government made some necessary amendments to the Bill. I am

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<sup>41</sup> [Charities Bill \[HL\] Special Public Bill Committee, Publications](#)

<sup>42</sup> [HL SPBC Deb 18 November 2021 cc1-30](#)

<sup>43</sup> [HL Deb 14 December 2021 cc239-254](#)

<sup>44</sup> [HL Deb 10 January 2022 cc815-818](#)

<sup>45</sup> [Explanatory Notes to the Charities Bill \[HL\]](#) (PDF)

<sup>46</sup> [Charities Bill \[HL\] Second Reading Committee Deb cc1-10](#). The Bill was referred under Standing Order No.59.

grateful to all those involved in making these changes as they will help fulfil the Bill's aims more efficiently.<sup>47</sup>

Nigel Huddleston said, “there is no doubt that we owe both our charity sector and our regulator a clear and simple legal framework”. He hoped Members would agree “that the Bill strikes a sensible balance between protecting charities’ assets and avoiding unnecessary expense and regulation”.<sup>48</sup>

Nigel Huddleston reiterated:

this Bill brings in welcome reform to charity law. It has widespread support and, as I have outlined, it is the product of extensive consultation and has been subject to rigorous scrutiny.<sup>49</sup>

Jeff Smith, Shadow Minister (Digital, Culture, Media and Sport), confirmed the Opposition’s support for the Bill:

the Labour party supported the Bill’s passage in the Lords and will of course be doing the same in the Commons. We do so because the recommendations will fundamentally make running a charity easier and more efficient.<sup>50</sup>

The Second Reading Committee recommended the Bill should be read a second time. The Bill had its Second Reading in the House without further debate on 19 January 2022.<sup>51</sup>

### Public Bill Committee

The Bill was considered by a Public Bill Committee in one sitting on 25 January 2022.<sup>52</sup> This consisted almost entirely of consideration of whether each of the clauses should form part of the Bill, none of which were opposed. Jeff Smith said, “Generally speaking, the Opposition are content with all the clauses”.<sup>53</sup>

The Opposition did not table any amendments.

Nigel Huddleston moved the one Government amendment which had been tabled: to remove the privilege amendment inserted by the Lords:

For Bills starting in the House of Lords, a privilege amendment is included to recognise the right of this place to control any charges on the people and on public funds. It is standard practice to remove such amendments at this stage of the Bill’s passage through the House of Commons.<sup>54</sup>

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<sup>47</sup> [Charities Bill \[HL\] Second Reading Committee Deb c4](#)

<sup>48</sup> Ibid

<sup>49</sup> [Charities Bill \[HL\] Second Reading Committee Deb c6](#)

<sup>50</sup> [Charities Bill \[HL\] Second Reading Committee Deb c7](#)

<sup>51</sup> [HC Deb 19 January 2022 c359](#)

<sup>52</sup> [PBC Deb 25 January 2022 cc1-16](#). The Members of the Public Bill Committee are set out at [PBC Deb 25 January 2022 c1](#).

<sup>53</sup> [PBC Deb 25 January 2022 c4](#)

<sup>54</sup> [PBC Deb 25 January 2022 c15](#). The Cabinet Office publication, [Guide to Making Legislation 2022](#) (PDF) explains the usual way of dealing with privilege amendments:

The amendment was agreed without a vote.

Nigel Huddleston said the Department for Digital, Culture, Media and Sport would work with the Charity Commission on an implementation plan to bring the provisions into effect in stages after Royal Assent.<sup>55</sup>

Jeff Smith referred to Baroness Barran saying at Committee stage in the Lords that the Government would publish an implementation plan before the Bill completes its passage through the House and asked for an update.<sup>56</sup>

Nigel Huddleston said the Government would announce further information “in due course”.<sup>57</sup>

The Bill as amended in Public Bill Committee was republished as [Bill 237 of 2021-22](#) (PDF).

## 2.2

## Overview of the purpose of the Bill

The Bill would implement recommendations in the Law Commission’s 2017 report, [Technical Issues in Charity Law](#) (PDF)<sup>58</sup> by making a number of technical changes to charity law. Among other things, it would amend the [Charities Act 2011](#) (the 2011 Act), the [Universities and College Estates Act 1925](#) and the [Trusts of Land and Appointment of Trustees Act 1996](#). The Government has set out the intended purpose of these changes:

The impact of these changes will significantly improve the efficiency of the sector, release more funds for use on charitable purposes rather than administration, and reduce unnecessary and overly bureaucratic regulation that not only increases the sector’s costs but also is a factor in discouraging people from volunteering to become trustees.<sup>59</sup>

The Government estimates that implementation of the Law Commission’s recommendations would deliver cost savings for charities of at least £28m

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“36.12 It is the privilege of the Commons to control charges on the people and on public funds. Where a bill may involve such charges, to avoid infringing this privilege, the House of Lords formally declare that nothing in a bill starting in their House involves such a charge. They do so by means of a ‘privilege amendment’ on Third Reading. The privilege amendment is moved by the peer in charge formally, after any other amendments have been disposed of. It is agreed to without debate.

36.13 The privilege amendment takes the form of a subsection, inserted at the end of the final clause of the bill, to the effect that nothing in the bill shall impose any charge upon the people or on public funds. The text of the privilege amendment is given to the peer in charge in the procedural brief supplied by the Lords Public Bill Office. It is not printed in advance of Third Reading.

36.14 When the bill transfers to the Commons, the privilege amendment appears in the bill in bold type. An amendment should be tabled to remove it in Committee.”

<sup>55</sup> [PBC Deb 25 January 2022 c15](#)

<sup>56</sup> [PBC Deb 25 January 2022 c16](#)

<sup>57</sup> Ibid

<sup>58</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017

<sup>59</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 1



over a ten-year period. It has also said “the added clarity of issues with the law that are causing uncertainty will allow charities to focus on delivering on their mission”.<sup>60</sup>

The [Explanatory Notes](#) (PDF) state the Bill would:

- Give charities wider or additional powers and flexibility:
  - to amend their governing documents;
  - to decide on how they procure goods and services;
  - to make “ex gratia” payments (which charities have a moral obligation, but no legal power, to make).
- Clarify when property can be applied cy-près<sup>61</sup>, including the proceeds of failed fundraising appeals.
- Produce a clearer and less administratively burdensome legal framework for buying, selling, leasing and mortgaging charity land.
- Clarify and expand the statutory regime that applies to permanent endowment.
- Introduce a power – with appropriate safeguards – for charities to borrow from their permanent endowment and to make certain social investments using permanent endowment.
- Facilitate, where appropriate, charity mergers and incorporations.
- Confer additional powers on the Charity Commission:
  - to authorise charities to pay an equitable allowance;
  - to require charities to change or stop using inappropriate names; and
  - to ratify the appointment or election of charity trustees where there is uncertainty concerning the validity of their appointment or election.
- Improve and clarify certain powers of the Charity Tribunal.<sup>62</sup>

## 2.3

## Reaction to the Bill

### Charity Commission

The Charity Commission has welcomed the Bill. It said it had been working closely with charities and their representative bodies, the Department for

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<sup>60</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

<sup>61</sup> Cy-près means “as near as possible”. When a charitable purpose cannot be carried out, the Charity Commission can direct under a scheme that the funds should be used for other similar charitable purposes, [Explanatory Notes to HL Bill 17](#), para 3, footnote

<sup>62</sup> [Explanatory Notes to the Charities Bill \[HL\]](#) (PDF), para 3

Digital, Culture, Media and Sport (DCMS), and the Law Commission, to bring these changes forward.<sup>63</sup> The Charity Commission set out why it supported the changes:

The Commission welcomes the proposed changes which should make life simpler for trustees, and help them maximise the benefits that their charity delivers.

That's what really matters – letting trustees get on with the important work of running their charity, whilst maintaining strong oversight for the instances when things do go wrong.

When enacted, the changes would also ease some of the regulatory pressures on trustees and reduce unnecessary bureaucracy. This will enable charities to deliver greater impact for the people and causes they are set up to support. Given the additional pressures placed on trustees during the pandemic, this is especially welcome. These changes chime directly with a key objective in our 2018-2023 strategy, which is to give trustees the tools they need to succeed...

## National Council for Voluntary Organisations

In May 2021, the National Council for Voluntary Organisations (NCVO), welcomed the announcement of the Charities Bill in the Queen's speech as "a positive step which should simplify the law".<sup>64</sup>

## Joint sector submission to the House of Lords Special Public Bill Committee

A joint submission to the Charities Bill [HL] Special Public Bill Committee on behalf of NCVO, ACF, Charity Finance Group, the Charity Retail Association, the Directory of Social Change, Locality, and Wales Council for Voluntary Action (WCVA) expressed support for the Bill. The overview of the submission stated:

We support this Bill, which makes a number of significant changes for charities, that will make it easier for charities to navigate the law and carry out their functions effectively, while retaining important safeguards. The sector engaged with the Law Commission's consultation and we are pleased to see these changes being brought forward.<sup>65</sup>

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<sup>63</sup> Charity Commission blog, [The Charities Bill: 5 key changes to charity law](#), posted by Aarti Thakor, 14 May 2021 [accessed 18 February 2022]

<sup>64</sup> NCVO, [Governance round up: May 2021](#), posted by Dan Francis, 28 May 2021 [accessed 18 February 2022]

<sup>65</sup> Charities Bill [HL] Special Public Bill Committee, [CHRO009 - Charities Bill \[HL\]](#) (PDF), 15 September 2021

## 2.4

# Clauses in the Bill

The Bill has 41 clauses and two schedules. The Explanatory Notes provide detailed commentary on the provisions in the Bill, and the Government's response to the Law Commission sets out the Government's reasons for including them. This information is not replicated in this briefing paper.

This section of this briefing paper sets out brief information about the clauses in the Bill, which in many cases amend the 2011 Act. It also includes information about how the Bill was amended during its passage through the House of Lords. References to the Explanatory Notes are to those published when the Bill was introduced in the House of Lords.<sup>66</sup>

## Part 1: Purposes, powers and governing documents

Part 1 has 16 clauses.

### Amending governing documents

The Law Commission noted that a charity might need to amend its governing document for a variety of reasons, ranging from “minor technical changes to fundamental changes to the way the charity is run or to the charitable purposes that it pursues”.<sup>67</sup> The Law Commission considered it important that changes might be made “as quickly and efficiently as possible, whilst retaining safeguards to ensure that any amendments are in the best interests of the charity and its beneficiaries”.<sup>68</sup>

The current processes for amending a charity's governing document vary according to the charity's legal form. The Government's [Charities Bill Factsheet](#) describes the intended effect of the provisions which, as recommended by the Law Commission, would deal with amending those processes:

- reduce inconsistency by more closely aligning the amendment mechanisms for incorporated and unincorporated charities
- a new, clearer statutory power for all unincorporated charities to amend their governing documents by resolution
- consistent criteria for the Charity Commission to consider before consenting to a change of purpose, regardless of whether the charity is a company, CIO, or unincorporated charity.<sup>69</sup>

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<sup>66</sup> [Explanatory Notes to the Charities Bill \[HL\]](#)

<sup>67</sup> Law Commission, [Technical Issues in Charity Law Summary](#) (PDF), Law Com No 375 (Summary), 14 September 2017, paragraph 8

<sup>68</sup> Ibid

<sup>69</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

In Second Reading Committee, Baroness Barran said Clauses 1 to 5 would “simplify current processes for amending governing documents and provide greater flexibility”.<sup>70</sup>

**Clause 1** would provide that an alteration of the statement of a company’s charitable objects which does not alter their substance would not be a “regulated alteration” which requires the consent of the Charity Commission. The Explanatory Notes set out examples of alterations which do alter the charitable purposes of the company and would be regulated.<sup>71</sup>

**Clause 1** also sets out matters to which the Charity Commission would be required to have regard when considering whether to give consent to an alteration of a charitable company’s purposes.

**Clause 2** would deal with amendments to the constitution of a charitable incorporated organisation (CIO) and would align the process with that for a charitable company.<sup>72</sup>

**Clause 3** would expand the powers of unincorporated charities to amend their governing document, with Charity Commission consent in some cases. Among other things, unincorporated charities would be able to do this so as to introduce a power to merge.<sup>73</sup>

In Special Public Bill Committee, Lord Hodgson moved **Amendment 1** which would have provided that the power of amendment proposed in **Clause 3** could be used to replace the entire governing document of an unincorporated charity with a new governing document.<sup>74</sup> Lord Hodgson mentioned a specific case concerning a charity governed by a “now very out of date” scheme,<sup>75</sup> where the Charity Commission had said that it was not possible to replace the scheme with a constitution.<sup>76</sup> Lord Hodgson referred to “protected clauses” as “the essence of the rationale and purpose of the individual charity” and said Amendment 1 would keep them up to date but only with the full consent of the Charity Commission.

Lord Hodgson also spoke to **Amendment 2**, which would have provided that Charity Commission consent was not required for purely drafting amendments, which would not change the meaning of protected clauses. He said this would deal with changes of wording “to bring the document up to

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<sup>70</sup> [HL Deb 7 July 2021 c342GC](#)

<sup>71</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), paras 20-21

<sup>72</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), paras 27-31

<sup>73</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021, Recommendation 32

<sup>74</sup> [HL SPBC Deb 18 November 2021 cc1-4](#)

<sup>75</sup> Schemes are legal arrangements, made by the Charity Commission or the court, that change or supplement the provisions that would otherwise apply in respect of a charity or a gift to charity: Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 4.21

<sup>76</sup> [HL SPBC Deb 18 November 2021 c3](#)

date with modern parlance”, rather than with changes to the underlying purpose of the charity.<sup>77</sup>

Lord Parkinson of Whitley Bay, Parliamentary Under-Secretary of State at the Department for Digital, Culture, Media and Sport, resisted both amendments:

- He said the Government considered the new provision proposed in the Bill could be used to replace a governing document in its entirety, with Charity Commission consent in respect of specified matters. Lord Parkinson said the Law Commission and the Charity Commission supported this view.
- Lord Parkinson also considered that the clause as drafted would already achieve what Amendment 2 proposed. Again, he said, this view was supported by the Charity Commission and the Law Commission. Lord Parkinson said the Government would consider whether the Explanatory Notes could be expanded to make this clearer.<sup>78</sup>

Lord Hodgson withdrew Amendment 1 and did not move Amendment 2.

**Clause 4** would insert a new section into the 2011 Act to provide charities established or regulated by Royal Charter with a new statutory power to amend any provision in their Royal Charter which cannot be amended under any existing express power of amendment, subject to the amendment being approved by the Privy Council.

**Clause 5** would deal with the procedure for amending by secondary legislation a statute establishing or regulating a charity – any scheme would be subject to the negative resolution procedure.<sup>79</sup>

### “Cy-pres” and schemes

The current law generally requires charities to contact donors to offer to return their donation if a fundraising appeal does not achieve its target. In Second Reading Committee, Baroness Barran said this can sometimes be disproportionate to the size of the individual donations.<sup>80</sup> She said **Clauses 6 and 7** would “make it easier to use funds from a failed fundraising appeal for other similar purposes, alleviating the need for charities to expend time and resources to search for donors of small donations”.<sup>81</sup>

**Clause 6** would deal with the application of property “cy-pres”, a term used in charity law which means “as near as possible”.<sup>82</sup> A failed appeal could be applied cy-pres:

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<sup>77</sup> [HL SPBC Deb 18 November 2021 c3](#)

<sup>78</sup> [HL SPBC Deb 18 November 2021 cc5-6](#)

<sup>79</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 54

<sup>80</sup> [HL Deb 7 July 2021 c372GC](#)

<sup>81</sup> [HL Deb 7 July 2021 c342GC](#)

<sup>82</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 3, footnote

- if the court or the Charity Commission decide it would be unreasonable to incur expense to return the donation, or unreasonable for donors to expect the donation to be returned;
- if the donor has donated £120 or less in the financial year;
- in respect of donors who cannot be identified or found, after actions agreed with the Charity Commission have been taken;
- in respect of unidentifiable donors.

**Clause 7** would provide charity trustees with a new power to apply the proceeds of a failed fundraising appeal, where too much or too little has been raised, to other purposes, without the need to obtain a cy-près scheme.<sup>83</sup> The trustees would have to obtain the consent of the Charity Commission if the proceeds exceed £1,000.

**Clause 8** would insert a new section into the 2011 Act to confirm that, subject to other provisions in that Act, any power to make schemes in respect of a charitable trust extends to charitable companies, CIOs or any other charity.

### Permanent endowment

**Clauses 9 to 14** concern the use of permanent endowment, that is, property held by, or on behalf of, a charity that is subject to a restriction on it being spent.<sup>84</sup> The Government's [Charities Bill Factsheet](#) states the provisions would provide:

- a new definition of permanent endowment which is clear, consistent and aligns with the sector's understanding of the term
- a new power to borrow from permanent endowment as a useful alternative to the existing rules
- for trustees who have opted in to total return investment,<sup>85</sup> the ability to use permanent endowments for loss-making social investments when they expect those losses to be offset elsewhere, which will promote long-term investments for social good.<sup>86</sup>

In Second Reading Committee, Baroness Barran set out the intent of these clauses:

The Bill will open up more opportunities for trustees to exercise flexibility in making decisions that are in the best interests of their charity, allowing them to utilise their permanent endowment better and make social investments, while protecting the enduring nature of such funds. The Bill creates a clearer definition of permanent endowment and a new power for trustees to borrow

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<sup>83</sup> For meaning of "scheme", see footnote 75 above and [Explanatory Notes to the Charities Bill \[HL\]](#), para 72

<sup>84</sup> Section 353(3) of the Charities Act 2011

<sup>85</sup> See Charity Commission guidance, [Total return investment for permanently endowed charities](#), 1 November 2013

<sup>86</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

from their permanent endowment, and it streamlines the existing power available to trustees to release those funds.<sup>87</sup>

**Clause 9** would provide a new definition of “permanent endowment”. When accepting the Law Commission’s related recommendation (Recommendation 22),<sup>88</sup> the Government said this would address “legal problems which arise from the different legal interpretations of the current definition”.<sup>89</sup>

**Clause 10** would amend powers in the 2011 Act to release restrictions on spending capital. The powers would be available to both corporate and unincorporated charities.

**Clause 11** would amend the time limit for the Charity Commission’s response to a charity’s resolution to use an endowment.

**Clause 12** would create a new statutory power for a charity to borrow a limited amount from its permanent endowment, subject to repayment within 20 years. The effect of exercising the power would be to release the amount borrowed from the restrictions on spending capital which applied to it when it was part of the permanent endowment fund.<sup>90</sup>

In Special Public Bill Committee, Lord Ponsonby of Shulbrede moved **Amendment 3** (on behalf of Lord Etherton who was not present). The amendment was recommended by the Delegated Powers and Regulatory Reform Committee. It would have required the regulations under the new provision in the 2011 Act which Clause 12 would insert to be subject to the affirmative resolution procedure (requiring the consent of both Houses of Parliament to become law.).<sup>91</sup> At the request of Lord Parkinson, who said he would consider the matter further, Lord Ponsonby withdrew the amendment.<sup>92</sup>

At Report stage, Lord Parkinson moved a Government amendment (**Amendment 1**) intended to have the same effect – to provide for the power to make regulations added by Clause 12 to be subject to the affirmative resolution procedure.<sup>93</sup> He said the Government accepted that the two thresholds in Clause 12—to vary the proportion of permanent endowment which may be borrowed, and the period over which such borrowing must be repaid—were of a different nature from the other financial thresholds contained in the Bill. The Government maintained that the negative resolution procedure was appropriate for variations of the financial level at which it is appropriate for trustees to make a decision independently, or for the Charity

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<sup>87</sup> [HL Deb 7 July 2021 c342GC](#)

<sup>88</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF) Law Com No 375, September 2017, paragraph 8.33

<sup>89</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021, Section 6

<sup>90</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 87

<sup>91</sup> [HL SPBC Deb 18 November 2021 c7](#)

<sup>92</sup> [HL SPBC Deb 18 November 2021 c9](#)

<sup>93</sup> [HL Deb 14 December 2021 c239](#)

Commission to oversee that decision. Lord Parkinson set out why Clause 12 required a different approach:

Clause 12 does not indicate where regulatory intervention is required in the same way. It does not set out monetary sums. Instead, it places a percentage limit on how much a charity can borrow from its permanent endowment and specifies the period over which such borrowing must be repaid. Therefore, any variation of these thresholds has a slightly different implication. The financial thresholds elsewhere in the Bill can be adjusted to reflect changes in the value of money. By contrast, any amendment of the Clause 12 thresholds would not be about changes in the value of money.<sup>94</sup>

Lord Parkinson said the amendment would “help to maintain the balance between protecting donors’ funds and wishes and providing flexibility for trustees to make the best use of opportunities to fulfil their charitable purposes”.

**Amendment 1** and consequential Amendments 5, 6 and 7 (moved by Lord Parkinson) were agreed without a vote.

**Clause 13** would create a new power for trustees, who have opted in to investing on a total return basis under section 104(A)(2) of the 2011 Act, to use permanent endowment to make social investments that they could not otherwise make because they are expected to produce a loss.<sup>95</sup>

**Clause 14** would omit [Part 14 of the 2011 Act](#)<sup>96</sup> which deals with “special trusts” and move the definition of “special trust” into section 353 of that Act. The Law Commission referred to sections 288 and 289 of the 2011 Act as constituting a “parallel regime” for special trusts and concluded that the provisions were redundant.<sup>97</sup>

### Ex gratia payments

At present, a charity cannot make an ex gratia payment without prior authorisation from the Charity Commission, the court or the Attorney General. Baroness Barran described these payments as being what trustees “want to make morally but cannot make legally”.<sup>98</sup> She gave an example:

For example, it could be that a testator has left money to a charity in their will and gave their solicitor instructions to leave some of the money to a family member instead, but died before the will was changed. Legally, the charity could and must take the money, but morally it might wish to make a payment to the family member.<sup>99</sup>

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<sup>94</sup> [HL Deb 14 December 2021 c239](#)

<sup>95</sup> Detailed information about what is proposed, with an example, is set out in [Explanatory Notes to the Charities Bill \[HL\]](#), paras 94-5

<sup>96</sup> [Charities Act 2011 sections 287-292](#)

<sup>97</sup> Law Commission, [Technical Issues in Charity Law](#), (PDF), Law Com No 375, September 2017, paragraphs 8.94-96

<sup>98</sup> [HL Deb 7 July 2021 c342GC](#)

<sup>99</sup> [HL Deb 7 July 2021 c372GC](#)



**Clause 15** would give charity trustees a power to make ex gratia payments up to a certain level (depending on the level of income of the charity) without requiring authorisation from the Charity Commission under section 106 of the 2011 Act.

**Clause 16**, by amending section 106 of the 2011 Act, would codify the test for making ex gratia payments to put it on to a statutory basis. Charity trustees would not need to decide themselves whether to make an ex gratia payment but could delegate that function as part of the general delegation of functions in the charity's governance structure.<sup>100</sup> The Government agreed with the Law Commission that decisions were often not significant enough to warrant trustee involvement and that waiting for approval for an ex gratia payment from the trustees could cause delays. However, it noted that trustees would retain ultimate accountability where they delegated such decisions.<sup>101</sup>

The Attorney General, the court and the Charity Commission would have power to authorise ex gratia payments by any charity including statutory charities.<sup>102</sup>

Decisions by the Charity Commission not to authorise an ex gratia payment would be subject to review by the Charity Tribunal (**Schedule 2, paragraphs 26 and 27**).

## Part 2: Charity land

Part 2 has eight clauses which deal with charity land transactions. The Government's [Charities Bill Factsheet](#) states the intended effect of these provisions:

- greater flexibility to obtain advice on disposals of land from a greater range of professional advisers
- removing certain overly prescriptive and burdensome statutory requirements
- creating certainty for purchasers when they buy land from charities, with a reliable, straightforward and practically workable process for certifying compliance with the Charities Act requirements.<sup>103</sup>

In Second Reading Bill Committee, Baroness Barran said:

Clauses 17 to 24 will remove ineffective and disproportionate statutory requirements around disposals of land by charities, create a simple process for

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<sup>100</sup> [Explanatory Notes to the Charities Bill \[HL\], paragraph 101-2](#)

<sup>101</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021, Recommendation 29

<sup>102</sup> [Explanatory Notes to the Charities Bill \[HL\], paragraph 105](#)

<sup>103</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

ensuring compliance with statutory requirements and pave the way for secondary legislation to broaden the pool of advisers at trustees' disposal.<sup>104</sup>

**Clause 17** would amend section 117 of the 2011 Act to clarify the meaning of land held “by or in trust for a charity”.

**Clause 18** would amend the exceptions to the general restrictions on dispositions and mortgages of charity land set out in sections 117(3) and 124(9) of the 2011 Act.

**Clause 19** would remove the automatic statutory requirement for charity trustees to advertise a proposed disposition as advised in a “designated adviser’s” report (see **Clause 20**). The charity must consider any advice on advertising that is given by the designated adviser, but there would no longer be a statutory requirement to follow that advice.<sup>105</sup>

**Clause 20** would expand the category of advisers who might provide charities with advice on disposals of charity land.

**Clause 21** would enable charity trustees, officers and employees of a charity to provide a report or advice in connection with charity land transactions, including if they do so in the course of their employment by the charity.

**Clause 22** would enable a charity to grant a short fixed-term or periodic tenancy to an employee of the charity to use as their home. It would still be necessary to obtain advice on the grant of such a lease, but there would no longer be a requirement for Charity Commission consent.<sup>106</sup>

**Clause 23** would amend the wording to be included in instruments concerning dispositions (both contracts and conveyances) and mortgages of charity land and would set out protections for purchasers from charities.<sup>107</sup>

**Clause 24** would amend the Universities and College Estates Act 1925 and would introduce **Schedule 1** which contains consequential amendments. When accepting the Law Commission’s related recommendation (Recommendation 21), the Government said:

This recommendation would remove the complex and technical arrangements that apply to a very small number of particular institutions under the Universities and College Estates Act 1925, and replace them with a simpler regime: a series of new general land transaction powers. We agree that the exercise of new, general powers, should attract the Part 7 advice requirements in the Charities Act 2011. We also agree that the new, general land transaction powers, should complement existing powers in these organisations’ statutes.<sup>108</sup>

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<sup>104</sup> [HL Deb 7 July 2021 c342GC](#)

<sup>105</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 112

<sup>106</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 116

<sup>107</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 118

<sup>108</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021

### Part 3: Charity names

Baroness Barran summarised the purpose of the four clauses in Part 3:

Regarding inappropriate charity names, Clauses 25 to 28 expand the Charity Commission's powers in respect of misleading, offensive or very similar charity names to remove anomalies and prevent an inappropriate name appearing on the register of charities.<sup>109</sup>

**Clause 25** would confer enhanced powers on the Charity Commission to require charities, even if they are not registered, to change, or stop using, unsuitable names or working names.<sup>110</sup>

**Clause 26** would enable the Charity Commission to delay the registration of a charity for a specified period if it had given a direction requiring the charity's name to be changed.

**Clause 27** would enable the Charity Commission to delay the registration of a change of name by a charity for a specified period if it had given a direction requiring the charity's new name to be changed.

**Clause 28** would allow the Charity Commission to issue a direction requiring an exempt charity's name to be changed, after consulting with the exempt charity's principal regulator.<sup>111</sup>

There would be a right of appeal to the Tribunal against a Charity Commission direction that a working name should no longer be used (**Schedule 2, paragraph 36**).

### Part 4: Charity trustees

**Clause 29** would allow the Charity Commission to ratify the appointment or election of charity trustees where there is uncertainty concerning the validity of their appointment or election.<sup>112</sup>

**Clauses 30 and 31** deal with the remuneration of charity trustees. The Government's [Charities Bill Factsheet](#) provides further information about the intended effect of these clauses:

- remuneration for supply of goods from trustees: enabling trustees to be paid for goods provided to a charity, subject to appropriate safeguards - this aligns with the current law which allows trustees to be paid for services, creating consistency and enabling charities to access goods which may be offered at more favourable terms by a trustee than elsewhere

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<sup>109</sup> Ibid

<sup>110</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), paras 127-30 provide details of the new provision

<sup>111</sup> Charity Commission guidance, [Exempt charities \(CC23\)](#), 9 August 2019, provides information about exempt charities

<sup>112</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

- equitable allowances: enable the Charity Commission to authorise trustees to be paid for exceptional skill and effort with which they have carried out work for their charity in circumstances where it would be unjust not to do so.<sup>113</sup>

**Clause 32** deals with trust corporation status,<sup>114</sup> and would confer trust corporation status (for the specified purposes) on any trustee of a charitable trust that is a body corporate and itself a charity, in its capacity as trustee of a charitable trust.

## Part 5: Charity mergers

**Clause 33** would enable a gift to a charity which has since merged to take effect as a gift to the new charity, even where the gift specifies that it will only take effect if the charity continues to exist on the date the gift takes effect.<sup>115</sup> The Government's [Charities Bill Factsheet](#) states this would "remove a need for "shell charities" to be maintained, which results in wasted money through admin costs".<sup>116</sup>

**Clause 34** would amend the types of property listed in the 2011 Act as being excluded from a pre-merger vesting declaration.

**Clause 35** would amend the wording in section 306 of the 2011 Act ("Meaning of 'relevant charity merger' etc").

## Part 6: Legal proceedings

**Clause 36** would enable the Charity Tribunal to make an "authorised costs order". The Explanatory Notes state this would provide charity trustees with advance assurance that any legal costs they incur in proceedings before the Charity Tribunal would be a proper use of the charity's funds which would be payable from the charity's funds.<sup>117</sup>

Baroness Barran said this clause would provide protection for trustees "to avoid charities being discouraged from pursuing litigation because of the risk of having to pay the costs of proceedings personally".<sup>118</sup>

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<sup>113</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

<sup>114</sup> Information about trust corporation status is provided at: Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paras 11.105-11.137 and [Explanatory Notes to the Charities Bill \[HL\]](#), paras 152-3

<sup>115</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), paras 154-5

<sup>116</sup> Department for Digital, Culture, Media and Sport and Office for Civil Society guidance, [Charities Bill Factsheet](#), 22 June 2021

<sup>117</sup> [Explanatory Notes to the Charities Bill \[HL\]](#), para 160

<sup>118</sup> [HL Deb 7 July 2021 c343GC](#)

## Part 7: General

**Clause 37** would extend a discretionary power of the Charity Commission so they could give public notice, or require the charity to give such notice, when the Charity Commission is required under certain provisions in the legislation to give consent to a matter.

At Special Public Bill Committee stage, Government amendments to Clause 37 were agreed without vote. Lord Parkinson said the amendments (**Amendments 8 to 11**) were “minor and technical clarifications” to ensure that the policy intention of the Bill would be achieved without the law being misinterpreted.<sup>119</sup> He confirmed that the amendments did not represent any change in the policy of the Bill or the Charities Act 2011.

**Clause 38** would remove the reference to “illegitimate child” from the definition of “connected person”.

**Clause 39** would enable the Secretary of State to make regulations, subject to the affirmative resolution procedure,<sup>120</sup> to amend the definition of “connected person”.

**Clause 40** would give effect to **Schedule 2** which contains minor and consequential amendments.

A Government amendment to Schedule 2 (**Amendment 12**) was agreed at Special Public Bill Committee stage without vote. Lord Parkinson said the amendment was intended “to ensure consistency between the framework established by the Cathedrals Measure [2021] and that of wider charity law, and to ensure appropriate continued oversight in the regulation of Church of England cathedrals”.<sup>121</sup>

Further Government amendments to Schedule 2 (**Amendments 8 to 12**) were agreed without vote at Report stage.<sup>122</sup> Lord Parkinson said **Amendment 8** would remove superfluous words from the Bill. He described **Amendment 12** as a “concessionary amendment”, moved in response to an amendment tabled by Lord Etherton for Special Bill Committee stage. This dealt with an issue of appeal rights which had been raised during the Committee’s evidence-gathering. The Government agreed that there should be a right of appeal to the Tribunal against a Charity Commission decision to withhold consent for an unincorporated charity to make certain types of amendment to their trusts (under new section 280A which would be inserted into the 2011 Act by **Clause 3**).

Lord Parkinson described **Amendments 9,10 and 11** as minor changes consequential on **Amendment 12**.

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<sup>119</sup> [HL SPBC Deb 18 November 2021 c27-9](#)

<sup>120</sup> Requiring the approval of both Houses of Parliament to become law

<sup>121</sup> [HL SPBC Deb 18 November 2021 c28-30](#)

<sup>122</sup> [HL Deb 14 December 2021 cc251-4](#)

The Government disagreed, however, that there should be a right of appeal to the Tribunal against a decision made by the Charity Commission concerning the application for new purposes of funds in excess of £1000 from a failed or surplus fund-raising appeal. Lord Parkinson said:

Opening up new appeal rights in respect of these decisions is expected to invite a disproportionate administrative burden on the Charity Commission and the tribunal, given the types of issues usually at stake in such decisions.<sup>123</sup>

In this type of case, Lord Parkinson said, judicial review is considered the most appropriate route to challenge a Charity Commission decision.

**Clause 41** deals with extent, commencement and short title.

## 2.5 Territorial extent and application

The Bill extends to England and Wales only, subject to certain exceptions. Information is provided in paragraphs 9 to 19 and Annex A of the Explanatory Notes.<sup>124</sup>

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<sup>123</sup> [HL Deb 14 December 2021 c252](#)

<sup>124</sup> [Explanatory Notes to the Charities Bill \[HL\]](#)

## 3 Law Commission recommendations not included in the Bill

### 3.1 Recommendations to be implemented by secondary legislation

Charities' registration, accounting and reporting requirements vary according to financial thresholds such as a charity's income. The Law Commission recommended that the Government should periodically review all financial thresholds in the Charities Act 2011 with a view to increasing them, by secondary legislation, in line with inflation (Recommendation 1).<sup>125</sup>

The Government accepted this recommendation and agreed that such a review should take place at least every 10 years. Subject to resources, the Government said it would aim to undertake a review of the financial thresholds in 2022:

We appreciate, in times of uncertainty, set financial thresholds present difficulties and can be restrictive. They can create additional administrative burdens for, in particular, small charities at times of financial difficulty as a result of increased inflation over time. We agree with the Law Commission's conclusion that an automatic inflation adjustment would not be the right solution: it would add more complexity and potential for confusion to the landscape, and would add to compliance costs due to frequent, and unpredictable changes.<sup>126</sup>

In House of Lords Second Reading Committee, Baroness Barran confirmed that thresholds in relation to permanent endowment and failed fundraising appeals would be included in the review.<sup>127</sup> She spoke of Law Commission recommendations which would be taken forward by way of secondary legislation:

The Law Commission's recommendations relating to expanding the range of advisers qualified to advise charities on land transactions and the matters to be reported on in such advice will require secondary legislation subject to the negative procedure, which DCMS will take forward in 2022. Similarly, the requirement to review various financial thresholds in the Charities Act 2011, with the view to increase them in line with inflation, will also be taken forward

<sup>125</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 3.17

<sup>126</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

<sup>127</sup> [HL Deb 7 July 2021 c343GC](#)

by the department in 2022, also via regulations subject to the negative procedure.<sup>128</sup>

## 3.2 Recommendations addressed to the Privy Council

The Law Commission recommended that the Privy Council:

- review its current policy of requiring all petitions by charities for charters and for supplemental charters to be published in the London Gazette for eight weeks with a view to removing, or replacing, that requirement; and
- cease to require charters or supplemental charters granted to charities to be printed on vellum (Recommendation 6).<sup>129</sup>

The Government and Privy Council accepted this recommendation in part:

The publication of petitions for Charters and Supplemental Charters in the London Gazette ensures there is transparency about proposed changes to Charters (whether or not the organisation is a charity). This is provided at no cost to the charities concerned. The Privy Council Office also publishes details of petitions on its website, again providing a mechanism for public notice. Incorporation by Charter is a form of Government regulation in the public interest, so it is important that there are mechanisms to ensure public notification of any changes.

The Privy Council Office no longer requires printing on vellum in all cases, and would be happy to discuss possible alternatives with those petitioning for a Charter or Supplemental Charter.<sup>130</sup>

Recommendation 7 was about guidance:

We recommend that:

1. in order to improve the process by which charities can make constitutional amendments:

(a) the Privy Council Office, in consultation with the Charity Commission and DCMS, produce guidance concerning the process by which Royal Charter charities can amend their governing documents;

(b) the Charity Commission and DCMS produce guidance concerning the process by which statutory charities can amend their governing documents;

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<sup>128</sup> [HL Deb 7 July 2021 c369GC](#)

<sup>129</sup> Law Commission, [Technical Issues in Charity Law](#), Law Com No 375, September 2017, paragraph 5.69, Recommendation 6

<sup>130</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021



2. in order to facilitate the re-allocation of provisions within governing documents:

(a) the Privy Council Office, in consultation with the Charity Commission and DCMS, produce guidance for Royal Charter charities concerning the types of provisions that should generally appear in the Royal Charter, the bye-laws or the regulations;

(b) the Charity Commission, in consultation with DCMS, produce guidance for different statutory charities concerning the types of provision that should generally be subject to Parliamentary control; and

3. the PCO amend its guidance to make clear that amendments to bye-laws only require approval when that is expressly required by the Royal Charter itself.<sup>131</sup>

The Government and Privy Council accepted this recommendation in part. They did not agree with a “one size fits all” approach to Privy Council guidance and engagement with charities:

The Privy Council Office already provides general guidance on its website regarding the process of petitioning for a Charter or seeking a Supplementary Charter. This can only give a high level overview, due to the varied circumstances of applicant organisations. It would be disproportionate and could cause confusion to attempt to provide guidance that covered all eventualities. Instead, the Privy Council Office encourages applicants to get in touch directly to benefit from bespoke advice that will take into account their specific circumstances.

In relation to the types of provisions that should generally appear in the Royal Charter, the bye-laws or the regulations, these will often vary depending on the circumstances of the applicant, and so one-size-fits-all guidance would not be appropriate or proportionate. The Privy Council Office routinely consults with the relevant government departments on receipt of an application for a Charter, Supplemental Charter, byelaws or amendments to byelaws.<sup>132</sup>

The Government said DCMS would work with the Charity Commission on guidance regarding the process for making a scheme under section 73 of the Charities Act 2011 for charities governed by an Act of Parliament. However, it said it would be difficult and disproportionate to produce guidance on all the types of provision that should generally be subject to Parliamentary control, “as each case presents its own issues, and a bespoke approach is required”.<sup>133</sup>

The Government and Privy Council did not accept a recommendation (Recommendation 8) that the Privy Council Office should establish a user group to allow those who engage with the process of amending Charters and bye-laws to propose and discuss improvements to the procedures:

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<sup>131</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 5.107

<sup>132</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021

<sup>133</sup> Ibid

Due to the unique issues that arise in relation to different Charters, and the very small volumes of casework, it would be disproportionate to establish such a user group.<sup>134</sup>

### 3.3 Recommendation addressed to Welsh Government

Law Commission Recommendation 10 was that, in order to facilitate the amendment of, and the reallocation of provisions within, the governing documents of Welsh higher education institutions the Welsh Government should consider introducing specified measures.<sup>135</sup>

### 3.4 Recommendations addressed to the Charity Commission

The Law Commission recommended that the Charity Commission should:

- amend its guidance Acquiring Land (CC33) in specified ways (Recommendation 19).<sup>136</sup> The Government said it understood the Commission accepted this recommendation;<sup>137</sup>
- investigate whether, on registering a merger, a charity's entry in the register of charities could include a reference to the registered merger (Recommendation 34(4)).<sup>138</sup> The Government said the Charity Commission had confirmed it was investigating this;<sup>139</sup>
- revise the guidance in Managing a Charity's finances (CC12) in specified ways (Recommendation 36).<sup>140</sup> The Government said the Charity Commission had confirmed its intention to revise its guidance;<sup>141</sup>
- delay the date on which its decisions take effect to allow time for a challenge (to the Tribunal or to the court) where the decision is likely to

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<sup>134</sup> Ibid

<sup>135</sup> Law Commission, [Technical Issues in Charity Law](#), (PDF) Law Com No 375, September 2017, paragraph 5.152

<sup>136</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 7.243

<sup>137</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

<sup>138</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 11.103

<sup>139</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

<sup>140</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 12.45

<sup>141</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

be controversial and is not time-sensitive (Recommendation 42).<sup>142</sup> The Government said it understood that the Charity Commission accepted this recommendation and intended to develop guidance for case officers on this.<sup>143</sup>

## 3.5 Recommendations the Government did not accept

### Recommendation 16: connected person regime

The Law Commission recommended that the definition of connected persons should exclude wholly-owned subsidiaries; that disposals of land to wholly-owned subsidiaries should be notified to the Charity Commission; and that the Charity Commission's guidance for trustees disposing of land, and guidance for designated advisers, should make clear that disposals to wholly owned subsidiaries should be for the best terms that could reasonably be obtained for the charity.<sup>144</sup>

The Government did not agree, and neither did the Charity Commission, that wholly-owned subsidiaries should be excluded from the definition of connected persons:

Evidence from the Charity Commission's casework shows that charities frequently fail to appreciate the need to deal with subsidiaries on an arm's length basis and do not appropriately manage conflicts of interest. There is a lack of understanding of the legal distinction between charities and their subsidiaries. This can sometimes lead trustees to consider the interests of the subsidiary either in place of, or alongside, the interests of the charity.

The Charity Commission believes, and we agree, that removing subsidiaries from the definition of connected persons would result in an increase in disposals of charity land to wholly owned subsidiaries on terms that would not be in the charity's best interests. Further, the Charity Commission would find it more difficult to identify or prevent improper disposals of charity land before the transaction takes place. A notification requirement after the transaction has taken place would make it much more difficult for the Charity Commission to safeguard an asset (or its value) for the charity.<sup>145</sup>

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<sup>142</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 15.58

<sup>143</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

<sup>144</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 7.214

<sup>145</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

## Recommendation 18: advertising disposals of designated land

The Government did not agree with a recommendation to abolish the requirement for charities to advertise proposed disposals of designated land and to consider any responses received. It said longstanding community assets (such as recreation grounds or village hall properties) are often held as designated land. Proposals to dispose of such assets could be “highly controversial” and could attract “significant response” from the public. The Government set out why it was not accepting the recommendation:

We consider that the requirement for advertising proposed disposals of designated land remains important for beneficiaries and other stakeholders, enabling them to be informed and to make representations before assets of this kind are sold. Otherwise, there is a risk that trustees might dispose of charitable community assets without a complete understanding of the implications, including the impact on beneficiaries and the local community. This would affect the perceived legitimacy of trustee decision-making, and could have an adverse impact on public trust and confidence in charities.

The Charity Commission recognises that the public notice requirements in section 121 are not appropriate in every case. However, under the existing law, charities can apply to the Charity Commission for directions granting them an exemption from the requirements. We agree with the Charity Commission that this approach strikes the right balance between the need to protect charity assets on the one hand, and the need for flexibility in some cases.<sup>146</sup>

## Recommendation 27: challenging Charity Commission decisions

The Law Commission recommended that the basis on which decisions of the Charity Commission can be challenged, including in particular the rights of challenge to the Charity Tribunal, should be reviewed.<sup>147</sup>

The Government did not accept this recommendation:

The rights of appeal listed in Schedule 6 to the 2011 Act were all carefully considered in terms of who could exercise them, in what circumstances, and the appropriate remedies in each case.<sup>148</sup>

## Recommendation 40: authorisation to pursue charity proceedings

Section 115 of the Charities Act 2011 prevents “charity proceedings” (as defined) from being pursued, whether by or against a charity, unless authorisation has been obtained from the Charity Commission or the

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<sup>146</sup> Ibid

<sup>147</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 9.40

<sup>148</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021

High Court.<sup>149</sup> The Law Commission noted that the definition of charity proceedings distinguishes between proceedings regarding disputes within the charity, such as claims about the way a charity is being run (which are charity proceedings and therefore require authorisation) and disputes with third parties, such as claims for breach of contract (which are not charity proceedings and therefore do not require authorisation).<sup>150</sup>

The Charity Commission may not authorise the taking of charity proceedings where it considers that the case can be dealt with by the Commission under its other powers, unless there are special reasons for doing so. If the Commission refuses to authorise proceedings, authorisation can instead be sought from the High Court.<sup>151</sup>

The Law Commission recommended that it should be possible to obtain authorisation to pursue charity proceedings from either the court or the Charity Commission in circumstances where the Charity Commission would face an actual or apparent conflict of interests if asked to give such authorisation.<sup>152</sup>

The Government did not accept this recommendation:

The majority of proceedings taken by charities against the Charity Commission are heard in the First-tier Tribunal (General Regulatory Chamber). We agree with the Law Commission that Tribunal proceedings are not classified as “charity proceedings” and can therefore be brought without the Charity Commission’s authority. Other “charity proceedings” where the Charity Commission is directly involved are rare.

However, the existing arrangements protect charity assets by preventing charity funds from being wasted on litigation that is without merit. They also ensure that disputes are dealt with in the appropriate forum because the Charity Commission cannot, without special reasons, authorise the taking of charity proceedings if it considers that the dispute concerned can be resolved using its regulatory powers. The Charity Commission is concerned that allowing applicants to seek authorisation from the court directly would significantly weaken these protections. This is because the court would not be expressly obliged to consider whether the dispute could be resolved by the Charity Commission.

In the small number of cases where a conflict does arise, it should be dealt with in a more proportionate manner that does not risk losing the protections discussed above...<sup>153</sup>

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<sup>149</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 15.5

<sup>150</sup> Law Commission, [Technical Issues in Charity Law Summary](#) (PDF), Consultation Paper No 220 (Summary), 20 March 2015, paragraph 30

<sup>151</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraphs 15.7-8

<sup>152</sup> *Ibid*, paragraph 15.18

<sup>153</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report ‘Technical Issues in Charity Law’](#), 22 March 2021

## Debate in House of Lords

In Special Public Bill Committee, on behalf of Lord Etherton, Lord Ponsonby of Shulbrede moved **Amendment 4** which would have inserted a new clause allowing charity proceedings to be pursued without authorisation by the Charity Commission if the Commission had failed to respond within 60 days to a request for consent. In that case consent would be deemed to have been given.<sup>154</sup>

Lord Ponsonby spoke of the effect of failing to obtain a timely decision from the Charity Commission, without which no application for leave could be made to the court: “there may be a lengthy period of uncertainty and enforced inactivity”. He said the 60-day limit mirrored other provisions in the 2011 Act.

Lord Parkinson of Whitley Bay resisted the amendment. He said he was not aware of any particular issue with the amount of time taken by the Charity Commission to respond to applications to pursue charity proceedings. Any such issue could be looked at without the need for legislation, for example by looking at internal processes.

Lord Parkinson said the Charity Commission had raised concerns about the appropriateness of a statutory timescale.<sup>155</sup> He spoke of the reason for requiring the Charity Commission’s consent and the practical difficulties the amendment might cause:

The need for Charity Commission permission is intended to protect charitable funds and the courts from claims that have no reasonable prospects of success or which could be addressed more appropriately in other ways. It is also important for the Charity Commission to be satisfied that it is in the best interests of the charity that the matter be adjudicated on by the court. For the most part, these cases relate to internal disputes. While these issues can be complex and involve a lot of information, they also typically relate to one charity and therefore have a low impact on the sector as a whole.

The issue with having a timescale imposed on the Charity Commission for a decision of this nature, when no equivalent timescales are imposed for other Charity Commission decisions, also means that resolving these requests may become a higher priority for the commission than other higher-risk or higher-impact work. This would not be conducive to the Charity Commission’s role as a regulator of the sector when taken in the round.

If after a certain time cases were automatically to proceed to court without the consent of the Charity Commission, we would be concerned about the potential for court time and costs being spent on unnecessary or meritless claims. There is also the issue of cases where the Charity Commission has not received enough information to make a decision, which often happens with such requests, and further information or advice may also be sought by the commission following legal referrals.<sup>156</sup>

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<sup>154</sup> [HL SPBC Deb 18 November 2021 c9](#)

<sup>155</sup> [HL SPBC Deb 18 November 2021 c10](#)

<sup>156</sup> [HL SPBC Deb 18 November 2021 c10](#)

Amendment 4 was withdrawn.<sup>157</sup>

## Recommendation 43: the role of the Attorney-General in references to the Charity Tribunal

The Charity Tribunal has jurisdiction to hear references on questions of charity law from the Attorney General and from the Charity Commission. The Attorney General can make references of their own volition, but references by the Charity Commission can only be made with the consent of the Attorney General.<sup>158</sup> At Report stage, Lord Parkinson of Whitley Bay reiterated how rare such cases are:

The Charity Commission and the Attorney-General have worked together on two references that the Attorney-General has made to the tribunal since the 2006 provisions were put in place, and there has been only one reference that the Charity Commission has sought the Attorney-General's consent to pursue, which the Attorney-General... refused to give earlier this year.<sup>159</sup>

The Law Commission recommended that the Charity Commission should not be required to obtain the Attorney General's consent before making a reference to the Charity Tribunal, but that the Charity Commission and the Attorney General should be required to give the other four weeks' advance notice of any intended reference.<sup>160</sup>

The Government did not accept this recommendation:

The Attorney General's consent for references to the Charity Tribunal is an important element in the system which should not be removed. The Attorney General has a duty, on behalf of the Crown, to protect charitable interests in England and Wales; this mechanism assists the Attorney General to fulfil that duty.<sup>161</sup>

### House of Lords debate

In Special Public Bill Committee, Lord Hodgson of Astley Abbotts moved **Amendment 5** which would have inserted a new clause into the Bill to implement the Law Commission's recommendation.<sup>162</sup> He said this was an issue on which the Committee had taken a lot of evidence. The Special Bill Committee debated this matter at some length and referred to a recent case concerning the Royal Albert Hall where the Attorney General refused consent

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<sup>157</sup> [HL SPBC Deb 18 November 2021 c11](#)

<sup>158</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 15.59

<sup>159</sup> [HL Deb 14 December 2021 c248](#)

<sup>160</sup> Law Commission, [Technical Issues in Charity Law](#) (PDF), Law Com No 375, September 2017, paragraph 15.67, Recommendation 43

<sup>161</sup> Department for Digital, Culture, Media and Sport, and Office for Civil Society, [Government response to the Law Commission report 'Technical Issues in Charity Law'](#), 22 March 2021

<sup>162</sup> [HL SPBC Deb 18 November 2021 cc11-12](#)

almost four years after the Charity Commission’s application, on the grounds that a reference would not be in the public interest.<sup>163</sup>

Lord Hodgson said the requirement for the Charity Commission to seek the consent of the Attorney General had consequences:

First, it means that there is no longer a clear chain of responsibility and command—one thing that I think is important in the sector. Indeed, the noble and learned Lord, Lord Etherton, put his finger on that point in the evidence session with the Minister, the noble Baroness, Lady Barran, when he said straight up that this means that there are two regulators. He was completely right. Secondly, this undermines the commission’s authority and can prevent it obtaining clarity in the operation of charity law. Thirdly, and most unattractively, it can serve to encourage individual charities to take on the commission.<sup>164</sup>

Lord Hodgson acknowledged the contrary view that “there could be a risk that the Charity Commission would be rushing off to the tribunal too often”. He accepted that the Attorney-General should not be “blindsided by the Charity Commission”:

so while the Charity Commission has the ultimate responsibility and power, it has to give the Attorney-General 28 days’ notice of intention to refer a case to the tribunal. During that time, the Attorney-General will be able to argue, no doubt forcefully, if he or she believes that different opinions should prevail.<sup>165</sup>

Lord Parkinson of Whitley Bay said that, having noted the difference of opinion among experts in oral and written evidence taken by the Committee, the Government remained of the view that the Attorney-General’s consent function represented an important check in the system:

This difference strengthened our conviction that the role of the Attorney General as the constitutional protector of charities is important, and that this is a different role from the regulatory function of the Charity Commission. It is a mechanism that we feel must be protected.<sup>166</sup>

Lord Parkinson considered that the mechanism was not an obstacle for the Charity Commission but rather a safeguard for it:

The mechanism is already narrowly drawn, and a second opinion prior to the tribunal can help filter out claims that are not in the public interest before they burden the tribunal and, potentially, the charity in question if applicable to that case.<sup>167</sup>

Lord Hodgson withdrew Amendment 5 but returned at Report stage with an amendment in the same terms (**Amendment 2**). He said:

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<sup>163</sup> [HL SPBC Deb 18 November 2021 cc11-23](#)

<sup>164</sup> [HL SPBC Deb 18 November 2021 cc12-13](#)

<sup>165</sup> [HL SPBC Deb 18 November 2021 c15](#)

<sup>166</sup> [HL SPBC Deb 18 November 2021 cc20-21](#)

<sup>167</sup> [HL SPBC Deb 18 November 2021 c21](#)



The present position as regards the relationship between the Attorney General and the Charity Commission is wrong in principle, and has proved flawed in practice. The change that I put before the House tonight is supported overwhelmingly by the sector, by trade bodies such as the NCVO and by academic opinion.<sup>168</sup>

Lord Parkinson again resisted the amendment. He spoke of the role of the Attorney General and the unusual nature of the reference procedure:

The Attorney-General's wider role means that she has a unique perspective and is able to take into account considerations of societal issues and the wider repercussions for charities. In recent years, we have had Attorneys General in both your Lordships' House and another place. As such, the Attorney-General's oversight reaches beyond charity law and regulation.

It should be remembered that the reference procedure is a unique declaratory power which enables the Charity Commission and the Attorney-General to seek rulings on what might be hypothetical questions. Outside this procedure, hypothetical questions are rarely entertained by the courts, for good reason. It is therefore right and proper that a public interest consideration is applied in the exercise of this unusual procedure. The value of the Attorney-General's unique perspective has been recognised and commented on by the courts.<sup>169</sup>

Lord Hodgson pressed for a division on his amendment. Amendment 2 was defeated by 81 votes to 18.<sup>170</sup> Lord Ponsonby of Shulbrede had already indicated the Opposition would abstain:

...the traditional way that both Houses deal with Law Commission Bills is to essentially nod them through. That was, and is, the agreement between the usual channels regarding this Bill as well. However, the best that I can do for the noble Lord, Lord Hodgson, is to abstain, because there is merit in the underlying preceding agreement which the usual channels have had.<sup>171</sup>

At Special Bill Committee stage, Lord Ponsonby spoke to **Amendment 6**, an alternative amendment which had been tabled by Lord Etherton. It would have provided an exception to the prohibition on the Charity Commission making a reference to the Tribunal without the consent of the Attorney General: where the Attorney General had neither refused nor granted consent within 60 days, consent would be deemed to have been given. The proposed new provision would also have stipulated that the reasons for any refusal of consent must be published.<sup>172</sup>

Reading comments from Lord Etherton, Lord Ponsonby said he considered the Attorney-General and the DCMS had made out a good case for maintaining the present requirement. He said, however, it was clear that there was a considerable problem of delay by the Attorney-General in responding to a

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<sup>168</sup> [HL Deb 14 December 2021 c244](#)

<sup>169</sup> [HL Deb 14 December 2021 c247](#)

<sup>170</sup> [HL Deb 14 December 2021 c251](#)

<sup>171</sup> [HL Deb 14 December 2021 c246](#)

<sup>172</sup> [HL SPBC Deb 18 November 2021 c23](#)

request for consent and a lack of transparency about the reasons for refusal.<sup>173</sup>

At that stage, Lord Parkinson said imposing a 60-day time limit on the Attorney General to decide whether to give or withhold consent on applications for references to the tribunal was a suggestion “that requires due consideration”.<sup>174</sup>

However, at Report stage, Lord Parkinson said he could not accept a further amendment tabled by Lord Etherton in similar terms (**Amendment 4**). He said the amendment did not acknowledge that there might be good reasons, beyond the Attorney General’s control, for example the submission of further information, that would require additional time for a decision to be made. Lord Parkinson added:

Given how complex these rare cases normally are, a strict 60-day time limit following which consent is automatically given would amount to the effective removal of the Attorney-General’s consent function by the back door.<sup>175</sup>

Lord Parkinson acknowledged it was “regrettable” that the decision on whether to grant consent to a reference in the case involving the Royal Albert Hall took so long but said, “one complex case does not justify a change in the law”.

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<sup>173</sup> [HL SPBC Deb 18 November 2021 c17](#)

<sup>174</sup> [HL SPBC Deb 18 November 2021 c21](#)

<sup>175</sup> [HL Deb 14 December 2021 c248](#)

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