



## Re Snowden and the Charities Act 2022

COMMENTARY BY [MICHAEL FURNESS KC](#), 20<sup>TH</sup> OCTOBER 2022

1. *Re Snowden* [1970] Ch 700 will be familiar to practitioners as the case which affirmed the principle, established in earlier case law, that the Attorney-General has a discretion to permit charity trustees to make *ex gratia* payments, otherwise than in pursuance of their charitable purposes, in circumstances where the trustees reasonably considered that the charity was under a moral obligation to make the payment. Section 106 of the Charities Act 2011 granted the Charity Commission the same discretion as the Attorney-General to approve such payments, but the nature of the discretion, and the circumstances in which trustees might invoke it, remained unchanged. Sections 15 and 16 of Charities Act 2022 places *Re Snowden* on a statutory footing, and make some changes to its scope, as well as allowing charities to make *ex gratia* payments without permission, up to a certain value. The sections are not yet in force (as to which see below).

2. The Charities Act 2022 was conceived as a means of making purely technical changes to charity law, following the Law Commission Report on Technical Issues in Charity Law<sup>1</sup>. However, recently an argument has been advanced<sup>2</sup> that it has made a much more fundamental change to the law than was envisaged when the Act was passed. It is said that the Act has enabled or facilitated museums and galleries, including statutory charities with specific restrictions on the disposal of assets, to make

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<sup>1</sup> [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2017/09/6.3781\\_LC\\_HC304\\_Technical-Issues-in-Charity-Law\\_FINAL\\_080917\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2017/09/6.3781_LC_HC304_Technical-Issues-in-Charity-Law_FINAL_080917_WEB.pdf)

<sup>2</sup> See for example this article in the Guardian of 25 September 2022: <https://www.theguardian.com/culture/2022/sep/25/museums-england-wales-powers-to-dispose-objects-moral-grounds>

gifts of artifacts in their collections, whenever it can be reasonably be said that there is a moral duty to make restitution.

3. Looking first at what the Act actually says, section 16 amends section 106 by substituting a replacement subsection (1) and inserting a new subsection (1A). Subsection (1) now provides a statutory test in place of the test enunciated in the judgment in *Re Snowden*. The power to approve an *ex gratia* payment now arises when the trustees "in all the circumstances could reasonably be regarded as being under a moral obligation" to make the payment. This contrasts with the *Re Snowden* test which arises: "where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment" (page 707). Note that the new test is entirely objective – the *Snowden* requirement that the trustees actually consider themselves to be under the moral obligation is dispensed with. This change was made to allow the trustees to delegate such decisions, but it does mean that an *ex gratia* payment can be made without anyone at the charity actually considering that the charity is bound by the moral obligation which is being invoked. This is a departure from *Re Snowden*. It remains to be seen whether the new wording in fact makes any difference to the Courts' approach to what is and is not permissible by way of *ex gratia* payments.

4. New subsection (1A) provides that for a charity established by statute, "subsection (1) is not disapplied only because the legislation concerned prohibits application of property of the charity otherwise than as set out in the legislation." This wording is intended to address the reasoning in the *British Museum* decision, where it was held that *Re Snowden* could not operate to override the provisions of a statute. That decision effectively meant that *Re Snowden* power to approve *ex gratia* payments was not available in the case of charities established by statute, which is true of the British Museum, and many other major national collections and libraries. The scope of this provision is considered below.

5. Section 15 of the Act inserts a new section 331A into the Charities act 2011, which allows charities to make *ex gratia* payments without any approval up to certain financial limits, which depend on the size of the charity's income. The maximum value permitted, for the largest charities, is £20,000. The test for whether the payments can

be made is the same as for section 16, and a provision equivalent to new section 106(1A) is available.

6. The potentially controversial aspect of these changes relates to museums which are subject to claims for the restitution of artefacts in their collections. Earlier this year, the Charity Commission gave approval to the Horniman Museum and Jesus College Cambridge for the return of Benin bronzes to Nigeria. This approval was given under the existing *Re Snowden* jurisdiction. Having regard to the circumstances of their acquisition, those campaigning for the return of the Benin bronzes to Nigeria would probably regard this as a fairly straightforward case for the existence of a moral obligation. There are, however, many other artefacts held by museums where the moral case for restitution is less clear and where moral arguments may shade into policy considerations. Sometimes the moral arguments invoke the fact that museums are public bodies. However, *Re Snowden* requires that one assesses the existence of the moral duty on the hypothesis that the charity is an individual, although that is not a requirement which has been reproduced in the statutory re-enactment. It remains to be seen whether the Attorney-General or the Charity Commission decide to give approval to *ex gratia* restitution of artefacts in circumstances where the artefacts themselves have been legitimately acquired, and where the alleged moral duty is based on grounds other than, or in addition to, the fact that the artefacts may have been looted or stolen.

7. The other area of uncertainty here concerns the scope of the application of subsection (1A). One interpretation of the wording is that it simply allows *Re Snowden* to operate notwithstanding any general obligation on the part of a statutory charity to apply its assets for statutory purposes only, but that it does not overrule any more specific prohibitions or restrictions on the disposal of artefacts. That certainly seems to be the interpretation placed on it by the draftsman, as appears from the Notes on Clauses for the Bill<sup>3</sup>. The alternative interpretation is that subsection (1A) goes further, and overrules all restrictions in the relevant act which would otherwise prevent the application of assets under *Re Snowden*. The point is material because some statutes which establish a charity not only impose a general duty on the trustees to use the

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<sup>3</sup> <https://bills.parliament.uk/publications/41673/documents/319>

charity's assets for the statutory purposes, they also impose specific restrictions on the circumstances in which artefacts can be disposed of (see, for example, the British Museum Act 1963 section 3 and various sections of the National Heritage Act 1983). If not overruled by subsection (1A), the latter forms of restriction would still preclude the application of *Re Snowden* to those museums which are subject to them.

8. If the enactment of the Charities Act 2022 does indeed bring about a significant relaxation in the rules prohibiting the disposal of assets from national museums, it would appear that no-one involved in the drafting and enactment of the legislation had any idea that this would be the case. Such a consequence is not mentioned in the Law Commission Report, the Notes of Clauses, the debates in the Parliament<sup>4</sup> or the explanatory note published by the Charity Commission after the Act was passed<sup>5</sup>. If the restitution of cultural artifacts is to be addressed by legislation, it would seem preferable for Parliament to enact legislation specifically aimed at this issue, rather than have such questions determined under the *Re Snowden* dispensation, which was never conceived with issues of this sort in mind, and which offers no clear guidance on their resolution. It is no doubt with this in mind that on 13 October 2022 it was announced by the Under-Secretary of State for the DDCMS, in the course of a House of Lords debate on the National Heritage Act, that sections 15 and 16 of the 2022 Act will not now be brought into force in the Autumn, as previously announced. The minister said:

"I am aware that it has been reported that the two provisions, Sections 15 and 16 of the Act, have the effect of enabling national museums for the first time to retribute items from their collections, based on moral grounds. However, I am also advised that when your Lordships and the House of Commons debated the Charities Bill, no such intent was considered, nor agreed on. Given this, the Government are deferring the commencement of the sections of the Act, which we initially expected to be part of the first tranche of commencements in the autumn, until we fully understand the implications for national museums and other charities."<sup>6</sup>

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<sup>4</sup> The debate on the first reading is at: [https://hansard.parliament.uk/Lords/2021-07-07/debates/F09E7E75-B3C1-4913-87ED-4EF83E840271/CharitiesBill\(HL\)?highlight=charities%20act%202022#contribution-C3F23729-A9F2-4DC8-96EC-42D3BAF3095E](https://hansard.parliament.uk/Lords/2021-07-07/debates/F09E7E75-B3C1-4913-87ED-4EF83E840271/CharitiesBill(HL)?highlight=charities%20act%202022#contribution-C3F23729-A9F2-4DC8-96EC-42D3BAF3095E). Note that at Col. 372GC the minister responded to a question about what constituted a moral obligation by giving the example of a charity receiving an undeserved benefit under a will. Nothing of significance was said on the second and third readings.

<sup>5</sup> <https://www.gov.uk/guidance/charities-act-2022-guidance-for-charities>

<sup>6</sup> <https://hansard.parliament.uk/lords/2022-10-13/debates/2A9B0A96-9EE5-4F84-824D-EFB3B214043C/NationalHeritageAct1983>

However, as the recent Charity Commission decisions show, for non-statutory charities *Re Snowden* is already being used to authorise restitution of artefacts on moral grounds. It remains to be seen whether the government takes any action to cut down its application in that area.

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