HOUSE OF LORDS

Charities Bill [HL] Special Public Bill Committee

Oral evidence: Charities Bill [HL]

Wednesday 15 September 2021

10.15 am

Watch the meeting

Members present: Lord Etherton (The Chair); Baroness Barker; Baroness Barran; Lord Bellingham; Lord Cruddas; Baroness Goudie; Lord Parkinson of Whitley Bay; Lord Ponsonby of Shulbrede.

Evidence Session No. Virtual Proceeding Questions 1 - 20

Witnesses

I: Professor Nicholas Hopkins, Law Commissioner for Property, Family and Trust Law; Baroness Barran, Minister for Civil Society; Aarti Thakor, Director of Legal Services, Charity Commission.

Examination of witnesses

Professor Nicholas Hopkins, Baroness Barran and Aarti Thakor.

Q1 **The Chair:** I should announce for the beginning of the public session that this is the first evidence session of the Charities Bill Special Public Bill Committee, dealing with technical points of charity law, which is following the special procedure for uncontroversial Law Commission proposed Bills.

Today, we have as our first witnesses giving oral evidence, Professor Nicholas Hopkins of the Law Commission, heading the property, family and trust law team, Baroness Barran, who is the Minister for Civil Society and has the oversight of the Bill, and Aarti Thakor, who is the director of legal and accountancy services with the Charity Commission. We thank you all very much indeed for your helpful and comprehensive written evidence, and for attending this oral evidence session today. Thank you very much indeed for that.

We have a series of questions that we would like to ask. Different members of the committee will ask different questions. I will start by asking whether any of you would like to give an opening statement on the Bill itself. I know that you have covered this to some extent in the written evidence, but I think it would be helpful to have something that the public can hear. Shall we start with you, Baroness Barran?

Baroness Barran: Yes, thank you, Lord Chair. Can I start by extending my thanks to the two other organisations also represented here today? This Bill represents years of work by the Law Commission and its commitment to the very thorough research that it has conducted. It means that we can present a Bill that both the Government and the sector have confidence in. We have also benefited greatly from the expertise of the Charity Commission, whose practical knowledge has been of invaluable support. Its role in the implementation of the Bill will be vital, and I thank it in advance for all its hard work.

As your Lordships know, this Bill is the product of very extensive consultation. The Law Commission gained valuable insights from an array of consultation events and meetings involving representatives from across the sector, including charity professionals, academics, legal practitioners, universities and churches. There was also very valuable input from the Association of Charitable Foundations, the National Council for Voluntary Organisations, the Charities' Property Association, the Charity Law Association, the Law Society, the lead judge of the Charity Tribunal, the Attorney General's Office, the Privy Council Office and Governments in England and Wales, to name but a few. I would like to thank all who contributed to the consultation and those who will continue to provide their expertise by giving evidence at these sessions.

When proposing new legislation for charities—I know that the Charity Commission covered some of this in its written evidence to the committee—I think it is worth just pausing to remember the nature of the sector. At the latest count there were almost 170,000 registered charities and, of course, many more unregistered ones. Around 40% of them have

an annual income of less than £10,000 and a further 35% have income below £100,000, so we are talking about very small organisations in large part. Charities with an annual income of less than £5,000 are not required to register with the commission, so there will be many more at the lower end of the scale, and only 4% of charities, although 80% by value, have an income above £1 million a year. The total income of registered charities was £84 billion.

The sector is far reaching, and there are many organisations that are not required to register with the Charity Commission that will also benefit from the changes in the Bill. The sector covers everything from local volunteering groups to international aid organisations, from parent-teacher associations to grant-making foundations. About 45% of the income of the sector comes from the general public, with both local and central government accounting for about a third. Given this diversity, I think we all need to keep in mind that the legislation needs to work across subsectors, different legal forms and different sizes of organisation. I think this is one of the challenges we face with the Bill.

The Charities Bill is highly technical and grapples with some complex issues within charity law. The work of the Law Commission and of my noble friend Lord Hodgson of Astley Abbotts identified overburdensome and arbitrary processes in the current law, which create an inconsistent legal framework across the charities sector and drain away charity resources that could be put to better use. We now have the opportunity to make the law simpler and more accessible, which will allow the sector to work more efficiently and focus their funds on charitable purposes rather than administrative costs.

The changes outlined in this Bill are required to ensure that charity law stays relevant in modern times, to save charities administrative costs that are often unnecessary, to bring consistency to the legal framework under which charities operate and to give more flexibility to trustees to be able to make decisions that are in the best interests of their charity.

In particular, I welcome the emphasis in the Bill on providing trustees with more flexibility in their decision-making, allowing trustees to utilise their permanent endowment better and to make social investments, to use funds from a failed fundraising appeal and to source goods from trustees who may be able to offer better than market value, opening up more opportunities for trustees to make decisions that further their charitable purposes. I also welcome the provision to protect trustees from personally being lumbered with Charity Tribunal costs, which will avoid charities being discouraged from pursuing litigation action and, I hope, encourage more volunteers to step into vital trustee roles.

In removing unnecessary bureaucracy, we must be mindful to ensure that sufficient safeguards remain in place, where appropriate, to protect donors and strengthen the public’s trust in the sector. In preparing this Bill, that balance has been the priority, alongside the need to ensure that the law works practically for charities, for legal practitioners and, of course, for the Charity Commission. Expanding the Charity Commission’s

discretionary powers to require public notice to be given whenever its consent is required, and creating or clarifying powers that were previously unclear, such as ratifying a trustee's appointment or directing a charity to change its name, will help the Charity Commission in its role as the sector's independent regulator.

In my written statement I outlined five areas where the Bill makes the most significant changes and which may be considered the most complex. I am, of course, happy to answer questions on any aspects of the Bill, but I am aware that there may be particular questions that are very technical in nature, which is why I am especially grateful that the Law Commissioner, Nick Hopkins, and the Charity Commission's Aarti Thakor have been invited to give evidence today, as they may be able to help answer these questions for the committee to a fuller extent.

Lastly, I would like to thank all members of the committee for taking the time to discuss the Charities Bill in these evidence sessions. I welcome the debate and look forward to useful scrutiny and discussion. Thank you.

The Chair: Thank you. Professor Hopkins, do you want to add anything?

Professor Nicholas Hopkins: Yes, thank you, Lord Chair. I would like to begin by thanking the committee for inviting me to give evidence on the Bill, and the Minister, her team and the Charity Commission for the work that has been done to get the Bill to this stage. We have had a very positive and very productive working relationship with the department, the Charity Commission and the Law Commission to prepare the Bill through to its consideration by this House.

The Bill implements the majority of the recommendations in the Law Commission's 2017 report, *Technical Issues in Charity Law*. The Bill pursues four main objectives. I explain those in more detail in my written evidence but, in summary, they are: first, to remove unnecessary regulation and bureaucracy while ensuring that appropriate regulation is in place; secondly, to increase the flexibility that trustees have to make decisions in the best interests of their charities, while ensuring adequate protection of charity property; thirdly, to confer more expansive and additional powers on the Charity Commission to increase its effectiveness; and, fourthly, to remove inconsistencies and complexities in the law.

Importantly, the Bill does not just seek to cut regulation. It seeks to ensure that there is effective and careful regulation, so that the money that people give to charities is used to further the good work that charities do and is not spent on unnecessary bureaucracy. In considering what regulation is needed, we have kept a careful eye on the wider context in which the Bill will operate. Regulation supplements legal duties that charitable trustees have to act in the best interests of their charity. The trustees' role is the cornerstone of the charity sector, and that role is respected, relied upon and bolstered by the Bill.

It might be helpful if I say a couple of things about the Law Commission itself and our consultation process, which the Minister has already touched on. Our statutory purpose is to review the law of England and Wales and to make recommendations to government for reform where necessary. We have no regulatory or other powers. We are an independent and consultative body, predominantly a body of expert lawyers. We have in-house parliamentary counsel, who are seconded to us from the Office of the Parliamentary Counsel, and it was our in-house parliamentary counsel who drafted the Bill that accompanied our 2017 report.

Our project originated from Lord Hodgson's 2012 review of the Charities Act 2006 and from our own Eleventh Programme of Law Reform. Through both of those, various suggestions for charity reform were made to us. We discussed these points with government and we agreed detailed terms of reference for our project.

Our project was not a full review of charity law. We are an independent body of lawyers and there are some issues that it would not be appropriate for us to consider, such as political issues. Our terms of reference were therefore important in setting the scope of the project. They are also the issues on which the Law Commission is able to comment and the issues that are reflected in the Bill that is before the House.

We began our project at the end of 2013 and, as with all the work we do, we undertook extensive consultation throughout its course, particularly through a consultation paper and then a supplementary consultation paper. Our approach to consultation is proactive and the consultation periods included us holding various meetings with stakeholders as well as an open public consultation event in Bristol. We had 117 written consultation responses, the majority of which are extremely detailed. They included responses from representative bodies, some of which the Minister has already referred to.

In some cases, the consultation responses led us to change our minds from provisional proposals in our consultation paper. For example, our original proposal was to deregulate the process through which charities sell their land, but our final recommendation, as a result of consultation, was to retain the regime but improve it.

Our engagement with stakeholders continued right up to the publication of our report. Before we published our report we received detailed comments and a draft of the Bill from the Charity Law Association and from some other stakeholders. We went through that process again earlier this year before the Bill was introduced into Parliament, and so the Bill has been scrutinised and fine-tuned over a lengthy period.

As a result of that engagement, consultation and analysis, I believe that the Bill has the broad support of the entire charitable sector. As the Minister has said, it is undoubtedly a technical Bill. It covers a broad range of issues. I am very happy to try to answer all your questions

today but also to provide supplementary written evidence where that would be useful. Thank you.

The Chair: Thank you very much. Ms Thakor, would you like to add anything for the Charity Commission?

Aarti Thakor: Thank you. Thank you for the opportunity to provide evidence today to the committee. We also appreciate the collaborative approach that has gone into preparing this Bill.

The Charity Commission has worked closely with DCMS and the Law Commission throughout. The Charity Commission fully supports this Bill. As regulator of charities in England and Wales, we have considered how these provisions will operate in a real world context and believe that these changes will ultimately simplify and modernise rules for trustees in key areas without compromising on regulatory scrutiny where that is still needed.

The changes strike a healthy balance between placing trust and empowerment in trustees on the one hand and retaining appropriate safeguards on the other. This is what really matters to the commission and to the public, helping trustees who often give up their time as volunteers to get on with the good work that they do for charity, while maintaining oversight for occasions when the risks are higher and the limited instances where things may go wrong.

The proposed technical changes will deliver modest but important upgrades to the legal framework and should make aspects of activities and regulation of charities overall fairer, simpler and more cost effective. All these aims support the commission's statutory functions and objectives, and this is set out in more detail in my written evidence.

Should the Bill be given Royal Assent, the commission will implement the changes in a staggered way so as to allow time for trustees and the public to understand the changes. This approach will also allow the commission time to implement the changes internally in a meaningful way. For example, we will need to significantly update our digital systems to amend the online user journey experience for trustees wishing to amend their governing documents online.

Although there are initial costs and resource implications for the commission—these are set out in my written evidence—we expect some of the changes eventually to free up time and resource that can then be better spent in addressing high-risk issues affecting the sector. In short, we are very grateful for the work done by the Law Commission and for the support of DCMS on the Bill. We support it, and I look forward to answering any questions you may have alongside colleagues here today.

Q2 **The Chair:** Thank you very much for that. Again, although partly dealt with in the written evidence and in the oral statements just now, I think it would be helpful to deal in very general terms with why the changes to the Charities Act are required at this time. Baroness Barran, would you

like to start on that?

Baroness Barran: I am happy to, although I think Nick was going to. I might follow on.

Professor Nicholas Hopkins: Of course. Thank you. The favoured metaphor that we always use is from Lord Hodgson originally. He described the issues that the Bill addresses as like barnacles on a ship. One barnacle does not slow the ship down, but eventually there are so many barnacles that the ship is slowed. That is what we see in the issues that we addressed in our report: that eventually we will reach a stage where the regulation is doing more harm than good on the issues that we look at. So we feel that these changes are essential now to free up charity money and resources so that it can be used to pursue the charities' good causes, while ensuring that there is effective regulation in place when oversight is required.

Baroness Barran: The Law Commission and the Charity Commission expressed very clearly why the Bill is needed. I think your phrase[1] "fairer, simpler and more cost effective" sums it up. You also asked, Lord Chair, why this moment in time? If we are honest, there is nothing magical about this moment in time, but I think we have reached the end of my noble friend Lord Hodgson's work and report, which is now many years ago, and the work of the Law Commission and Charity Commission. We are at a point where we have brought together all those opinions, all that practical judgment, all that expertise and input, and we need to turn it into reality for the charities that we are here to serve.

The Chair: Ms Thakor, do you want to add anything?

Aarti Thakor: As is in my written evidence, it is timely. That is not to say that it coincided with Covid, but the situation on the ground is such that we believe making changes at this particular point in time will be of benefit to the sector.

Q3 **Lord Ponsonby of Shulbrede:** Can I ask the panel to elaborate on that point? It is the first time that Covid has been raised by the three of you. Has it given it a degree of extra urgency to get this through quickly?

Aarti Thakor: There is definitely evidence of financial challenges in the sector. That is very clear, and some of that is set out in my written evidence. I would argue that it has added a degree of urgency, but it is not so urgent that it ought to be passed immediately. It still needs the due consideration required but, ultimately, we can see how meaningful these changes will be in a practical context because of the financial challenges raised by Covid.

As the Minister has pointed out, given that 70% of the sector, in effect, has an income below £50,000, and we know that ultimately almost 80% of trustees effectively do not have any additional support, you can see how making things simpler becomes more acute in today's environment.

[1] Aarti Thakor's phrase

Q4 **Lord Cruddas:** Aarti, can I ask a question as well? You said earlier that there would be a phased approach to implementing the changes, but I know at first hand how some charities are really struggling because of Covid. Is there a way of speeding up that process to help the smaller charities?

Aarti Thakor: We will aim to look at the changes that will probably have the greatest impact in the first instance, so we will aim to implement those changes as soon as is possible. Work is already under way to take that forward but, as I mentioned, unfortunately with some processes, particularly the digital systems, it is a case of fixing the pipework, which is quite messy, behind the scenes before we can get to the actual online changes that the public will then see from their perspective. We are aiming to implement this as soon as is reasonably possible.

The Chair: The Government rejected or only partly accepted some of the recommendations. We will come in due course to why they did that and whether the Law Commission and the Charity Commission agreed with the rejection or what they feel about all that. I am going to come to that in a moment. I would like to concentrate for the time being on what was accepted and whether there are any issues around it. For example, there is provision for safeguards with regard to the use of cy-près transactions under £120. Would you like to ask further about that one, Lord Bellingham?

Q5 **Lord Bellingham:** Yes, indeed. It certainly appeared to me when I was looking at this doctrine, which is common law doctrine, obviously, that it is applied in various American states with much more flexibility than it has been applied here. First, are there sufficient safeguards around the use of it for transactions of under £120? If you think there are sufficient safeguards, do you think the figure of £120 is reasonable? Would it not make more sense to increase it to maybe twice that figure?

Baroness Barran: I will try to answer that in the first instance. Obviously a lot of work went into thinking about the specific figures. What we have tried to seek in all these things is a fair and practical balance. There is a protection for donors in this in that they can elect to state at the outset that they do not wish their donation to be used for anything other than the purposes, so if it is mending the roof of the scout hut they want it to be only for the roof of the scout hut. They do not want it to be for a microwave for the scout kitchen or whatever the example. Actually, microwaves are probably quite cheap these days, but you get my meaning of the scout kitchen.

Donors have the option to opt out of this flexibility, but I think the vast majority of donors are very comfortable with a cy-près decision, even though they might not use that language. There is obviously an upper limit of £1,000, at which point consent needs to be sought from the commission. We have tried to seek a practical balance based on the feedback that we have received. Do either of the other witnesses want to add to that?

Professor Nicholas Hopkins: Yes, I have a couple of points. On the figure of £120 and why we chose that rather than any other figure, we took the view that that was a high enough figure as a single-sum donation, for example, but it would also cover people who donated £10 per month over the course of a year. That was the reasoning behind the figure.

In terms of safeguards, £120 is only the level at which the trustees do not need to seek to return the money or seek Charity Commission directions on the action that should be taken. When the trustees then decide what to do with that money, they have to take into account the so-called similarity considerations—to use it for a similar purpose. As the Minister has said, if the total sum is more than £1,000, they will have to seek the agreement of the Charity Commission as to what that money is used for. So there are safeguards there.

The message that we got in consultation is that there was an advantage in having a tailored scheme for these small sums, a proportionate way of balancing donor confidence on the one hand but also ensuring that the money is not spent unnecessarily in trying to return it on the other.

Lord Bellingham: Have you come across examples in your evidence gathering, Professor, of collections being very specific for that purpose, with a qualification that your donation, even if it is a tin collection or crowd funding, can be used only for that purpose? Does that happen very often, or is it normally a collection for a particular purpose, there is an understanding that it is obviously for a very good cause, and if you are donating a small amount most people will not mind too much if it is transferred across to another equally good cause within that charity?

Professor Nicholas Hopkins: If it is a failed appeal, which is what the £120 is designed for, the onus is the other way round. The onus is that you would have to prove a general charitable intent not to have to return the funds. Essentially, the assumption is that the money is only being collected for that particular purpose. That is what happens because of that starting assumption. We did consider whether that starting assumption should be removed but concluded that it should not be. Charities can, however, use their literature carefully in appeals so that that general charitable intention is there, and if a charity does that there is no question of having to return the funds.

So there are devices that charities can use but, otherwise, the starting point is that the money is being given for a particular purpose if the appeal fails, unless you can show a general charitable intention.

Q6 **Baroness Barker:** Baroness Barran, you said in your introductory remarks that these proposals are the result of years of work on the part of the Law Commission, Lord Hodgson of Astley Abbotts and others. I think it is therefore inevitable that we concentrate perhaps not so much on that which has generally been accepted by government and by your organisations and the sector, but on the recommendations from the Law Commission that have been only partially accepted or not accepted.

Can you explain in some detail, because they cover quite meaty subjects, the obligations of the Privy Council Office to provide information and guidance, through to the power of the Charity Commission and the Attorney-General and the power of people to challenge their judgments?

Baroness Barran: With pleasure, thank you. I hope it is helpful to the committee to try to think about the underlying reasons for rejecting those recommendations. As the committee is aware, the Government rejected five of the 43 recommendations and partially rejected three. In many of those cases, that was where the proposal was to remove a safeguard which the Government judge is important to retain.

There are three headings that our decisions sit under. The first is practicality and proportionality, and the noble Lady refers to recommendations 7 and 8 regarding Privy Council guidance and the proposal for a user group. We took the view that this includes a very small number of cases that often have unique features that could be best addressed by a bespoke approach working with each charity. We felt that detailed guidance would become unwieldy and perhaps unduly complex if it needed to accommodate each circumstance.

The second category I think was based on feedback that we had from Charity Commission casework. If we take the example of recommendation 16 regarding land disposals to a wholly owned subsidiary of a charity, there was evidence from the Charity Commission casework that identified conflicts of interest in such land transactions and, therefore, potential risk, and we felt that that was important to retain.

The third category under which a number of our decisions sat was that of upholding public interest. That included recommendation 43, to which the noble Lady referred, but also recommendation 18 about the requirement to advertise proposed designated land disposals because of the nature of what that land might look like. For example, it includes some recreation spaces, alms houses, properties which local people may hold dear, and there is an interest in making sure they are informed of those proposed disposals. Those were the categories under which our decisions sat.

Baroness Barker: I do not think there would be much dispute about the first two categories. I think the problems lie in the third category. I do not think there would be much argument about land disposals. We can quite understand that disposal of charity property can become the subject of great publicity. I want to go back to the Attorney-General and the Charity Commission. That is the one that you have not really spoken about.

Baroness Barran: No. I am more than happy to. I just wanted to give the framework so that colleagues on the committee could understand how we had approached it. On recommendation 43—

The Chair: Just before you do that, we have Baroness Goudie on the telephone and I know this was one of the questions that she had a

particular interest in. Baroness Goudie, is there anything further you would like to add to the question, particularly about recommendation 43?

Q7 **Baroness Goudie:** I am concerned that the trustees can bring proceedings but, at the same time, I do not think it is very clear. I think we have to have a much clearer point on how they fit this in and to define it more. I do not think it is defined enough, which can cause confusion. Then that causes confusion for charity boards and so on if there is a trustee who is unhappy. It takes the eye off the ball, so I think we need to make this much clearer.

Baroness Barran: I wonder if that is a wider point than the specifics around the Attorney-General.

The Chair: I think that is a fair point. Did you have anything specifically on the rejection of recommendation 43, Baroness Goudie?

Baroness Goudie: I just raised the point. It is for looking at it in the long term. I accept it but, at the same time, it worries me. It could cause problems in charities committees and so on. That is just my point. I know that that is moving away from 43. I just think that it perhaps needs to be defined slightly better, that is all, when we go back to looking at the Bill.

Baroness Barran: Thank you. To address that point, I think it is very fair that we need to make sure that on every aspect of the Bill there is a clear plan to communicate that to trustees so that they are clear on what has changed and how it affects their responsibilities.

Specifically, on recommendation 43—I appreciate, Lord Chair, that you almost certainly understand this a hundred times better than I do, but I will do my best—first, I think it is helpful if we try to see the role of the Attorney-General in a wider context. The Attorney-General has a role in all aspects of charity law, being a party to all charity proceedings, so much more broadly. Secondly, on public interest, which was at the heart of the Attorney-General's decision regarding recommendation 43, they have a historic role in upholding the public interest in relation to charities but also in relation to a number of other things including, of course, criminal proceedings and other aspects of the law. So they have a higher overall responsibility for upholding the public interest in charities across the piece and, more broadly, in a legal context.

They specifically have a historic duty on behalf of the Crown to protect those interests, and that role has been retained at several points. It was retained at the point at which the Charity Commission was created and was seen as important as part of the checks and balances in the system. It was also retained when the Charities Act 2011 was passed.

The Attorney-General sees that consent function as very narrowly drawn and the role as filtering out claims that are not in the public interest, and they see the relationship with the Charity Commission as one that is co-operative and supportive. The view of the Attorney-General is that the power to refer questions to the tribunal should be exercised extremely judiciously and as a matter of last resort because of the potential legal

costs and therefore the drain on the public purse of the Charity Commission, AG involvement and public donors' funds for the charity concerned. As the committee will be aware, there have been three such cases in recent years, so it is not something that comes up frequently.

I think those were the main points behind the Government's decision but I am happy to go into more detail if the committee would find it helpful.

The Chair: In effect you are saying that it is right that there should be two regulators: one is the Charity Commission and the second is the Attorney-General, the Attorney-General being a kind of super-regulator in relation to the Charity Commission.

Baroness Barran: Lord Chair, I do not think that is what I am trying to say. I think we are pretty clear that the regulator is the Charity Commission. We are saying that the public interest element of that is assisted and reinforced by the responsibility and wider perspective that the AG brings to those decisions. The phrase they used to describe this to me—forgive me if I just quickly look at my notes—is, "The public interest is an important notion that covers issues outside" what they describe as "black letter law under which the statutory regulator operates, and includes consideration of societal realities which have wider repercussions". Covid was the example they gave. I do not think we are talking about—

Q8 **The Chair:** We can debate what "regulator" means here. There are two entities that are interested in different aspects of controlling the sector in one way or another. The Attorney-General is standing back, but the Attorney-General has the right under common law, as you rightly say, to step in, control matters and take an overview.

These are the points that I would like either you or maybe one of the other panellists to explain. A trustee of a charity can take proceedings against the Charity Commission for a decision the Charity Commission makes and does not need any consent for that, either from the Charity Commission, which is going to be a party to the proceedings, or from the Attorney-General.

More importantly perhaps, as an analogy with what we are talking about in 43, is that any defence of its position by the Charity Commission in those proceedings does not need the Attorney-General's consent. The Attorney-General cannot step in and say, as far as I am aware, "You, the Charity Commission, should not be defending this". It seems to me somewhat illogical to say that the Charity Commission can take proceedings for clarification only if the Attorney-General agrees to it, when he can defend proceedings without such consent.

The Attorney-General does not have a comprehensive view, comprehensive control, at the end of the day, and you have these two entities involved. That is the point I wanted to put to you. I think the Government's rejection of recommendation 43 presupposes that the Attorney-General exercises this overall control for court proceedings. I am suggesting to you that that is not in fact true. Maybe you or the other

panellists can say, "You're completely wrong about that", but that is as I see it at the moment.

Baroness Barran: Does anyone else want to come in before I respond to that?

Professor Nicholas Hopkins: On recommendation 43 and the other recommendations which the Government have not accepted, we take the view that we are an independent body. We make the recommendations that we believe will make the law clear, modern, simple and cost effective, but the corollary of our independence is that the Government are free to accept or reject our recommendations. We stand by the recommendations but recognise that it is appropriately a matter for the Government to decide which ones to take forward. I say that by way of context, as I am standing slightly apart from the debate on recommendation 43

On the proceedings that you refer to, Lord Chair, there are a number of different types of proceedings that can occur under the Charities Act. As you have said, if a decision has been made by the Charity Commission about a charity, the charity may be able to seek an appeal or review of that decision in the tribunal and it does not need anyone's consent to do that. That is in part a matter of access to justice.

There are then so-called charity proceedings that tend to be internal matters within a charity, in relation to which the charity needs the consent of the Charity Commission or the High Court to bring proceedings. Then there is the ability of the Charity Commission to bring a reference to the tribunal to resolve a question about the Commission's functions involving the operation of a charity, and those are the proceedings that require the Attorney-General's consent.

I just wanted to highlight that there are those three quite distinct types of proceedings that the 2011 Act envisages. They are all quite distinct, so different considerations apply—for example, as to whether consent is required and whose consent is required when it is.

The Chair: Would you like to add anything to that?

Baroness Barran: I think Professor Hopkins put it very well and we are happy to set that out in a bit more detail in writing if that is helpful.

The Chair: That would be helpful. If we are trying to make things easier and less bureaucratic for the Charity Commission, which does have an overview—the one entity that does have a complete overview of everything is the Charity Commission—it seems somewhat counterintuitive, bearing in mind the object of the Bill, as you so clearly explained, to have yet a further entity, the Attorney-General, exercising yet further control and bureaucracy.

So, yes, I think it would be helpful. I know about the three different categories. My simple point was that there are proceedings that can be taken and defended that do not need the consent of the Attorney-

General. It comes down to being as simple as that.

Baroness Goudie: I was wondering about question 11, to take that out of kilter, or if you would like to ask it, Chair, as I have to leave at 11.15 am. I am very happy with the way we have left question 7— getting further information in writing.

The Chair: Why do you not ask what we have down as question 11? I think it is fair enough that we do that now.

Q9 **Baroness Goudie:** Thank you very much. How many consultees gave evidence on the Royal Charter charities and supported recommendation 6, other than the recommendation about printing on vellum, 7 and 8 of the Law Commission? I am very curious about this point. I know it is relevant to the Royal Charter charities. Thank you.

The Chair: I think that is a matter for you, Professor Hopkins.

Professor Nicholas Hopkins: I am happy to answer that and to provide the consultation responses that we received. We had 91 written responses to our consultation paper, 57 of which addressed the consultation questions we asked about all charter and statutory charities. The consultation questions we asked do not exactly match what became recommendations 6, 7 and 8 in our report. I am afraid this does get detailed and I am happy to provide it in writing if that would be of assistance.

On recommendation 6, which was to remove publicity requirements for supplemental charters, there was no specific proposal in our consultation paper. That suggestion was made in one of the consultation responses that we received, and the recommendation was based on that response.

Similarly, on recommendation 8, which was our recommendation to set up a user group for the Privy Council, we did not have a specific proposal in the consultation paper to set up such a group. That recommendation emerged from a number of comments we received from consultees about the amendment process and how they thought that practical improvements could be made to that process that would not require law reform. Those are two recommendations where we cannot say that X number of consultees supported the consultation question because they emerged from responses that consultees made to the paper generally.

On recommendation 7, which is about guidance for Royal Charter charities on amending government documents, we asked two relevant consultation questions. One of those, question 4 in the consultation paper, was answered by 34 consultees, 29 of whom said that guidance would be helpful. The other, question 17 in the consultation paper, was answered by 28 consultees, 27 of whom thought that guidance would be helpful.

The Chair: Does anybody want to ask any questions on the Privy Council side and the rejection in relation to that? Baroness Goudie, is there anything further you want to ask on Royal Charter charities or, indeed,

any other recommendation that was rejected by the Government? I think she may have gone.

Can we go back then to the panel here? Does anybody else want to ask any further questions about any rejected or only partially accepted recommendations of the Law Commission? We have dealt quite comprehensively with 43, 6 and 7 and some of the others. Is there anything anybody else wants to ask about those?

Q10 **Baroness Barker:** I think that recommendation 40 is the only one that is substantive, where the recommendation was that the basis for authorisation to pursue charity proceedings should be reviewed and you have said no. I would like to know the story behind that, please.

Baroness Barran: I will do my best to address that and Nick will set me right if needed. To put this into perspective, the majority of proceedings taken by charities against the commission are heard in the Charity Tribunal and we agree with the Law Commission that the tribunal proceedings are not classified as charity proceedings for these purposes and, therefore, can be brought without the Charity Commission's authority. These kinds of proceedings, other charity proceedings where the Charity Commission is directly involved, are rare.

Secondly, the existing arrangements for these charity proceedings protect charity assets by preventing charity funds being wasted on litigation that is without merit. They ensure that disputes are held with the appropriate forum because the Charity Commission cannot, without special reasons, authorise the taking of proceedings if it considers that the dispute could be resolved by its regulatory powers.

The commission—and you[2] may wish to add to this—was concerned that allowing applicants to seek authorisation with the court directly would weaken these protections, and the court would not be expressly obliged to consider whether the dispute could be resolved by the commission.

The other thing to keep in mind is the rights that are conferred on charities by Section 115(5) of the Act to apply to the High Court for leave to bring proceedings. Those rights still remain and provide important protection.

Q11 **The Chair:** Can I follow up on that question so that you can deal with all aspects on the recommendation? We are here looking at a situation where the Charity Commission itself may face a conflict of interest. I think to most people, particularly to somebody who has been adversely affected by a charity, or a charitable trustee, and adversely affected by a decision of the commission, the idea that they can bring the proceedings against the Charity Commission only with the Charity Commission's consent would appear—if I can use a polite way of putting it—slightly unusual.

What the Government suggest in answer to that is that structures should

[2] Aarti Thakor

be put in place, Chinese walls, within the Charity Commission to make sure that those who deal with litigation matters are separated off from other people. Does the Charity Commission have the time and the personnel to do that?

Aarti Thakor: As the Minister has stated, we did consider that removing this particular protection would cause us concerns. I think the key thing is to take one step back and look at the context first, which is that we generally receive quite a small number of applications in this area. It is averaging around five per year at the moment, so it is quite a small number. Of those, predominantly all the ones that we have had relate to disputes about the trustee board or issues affecting the way in which the administration of the charity is governed day to day.

As the Minister mentioned, that is a particular factor that we have to consider. That is, using our own regulatory powers is very effective in trying to ensure that the main issue that is brought to the table can be addressed. We have not yet experienced a situation whereby the commission has been placed in a position of conflict, but we have agreed to look at our guidance and strengthen it, and we believe that we can in fact institute robust information barriers to protect us from any potential or actual conflict in future situations, should they arise.

The Chair: Very well. Does anybody want to add anything to that? No. Lord Ponsonby has a question about Clause 10, which was not in the original recommendations.

Q12 **Lord Ponsonby of Shulbrede:** Indeed. Could you explain the thinking behind the addition of material on the power to release permanent endowment restrictions to Clause 10, which was not in the version of the Bill published by the Law Commission?

Baroness Barran: With pleasure. The addition to which the noble Lord refers was identified by the Charity Law Association when it provided comments on the draft earlier in the year. The aim of this addition is to explain the relationship between two provisions—the existing provision to release the permanent endowment and the new provision created in the Bill for trustees to borrow against their permanent endowment—and to clarify how they work together. We are grateful to the Charity Law Association for having pointed out the gap.

The Chair: Does anybody want to ask any supplementary questions on that? No.

Lord Cruddas, do you want to ask a question about any other proposals that might have been considered but not asked yet?

Q13 **Lord Cruddas:** Yes. First, I have to say that these are exciting changes and will be welcomed, especially by smaller charities. You can see very clearly that a lot of hard work and effort has gone into this Bill. It is exciting, quite frankly, for someone who has been involved with charities for a long period.

The question I have is for the Law Commission. Were there any other

proposals that you seriously considered but rejected and, if so, why?

Professor Nicholas Hopkins: Thank you. The report that we published covers all the matters that were in our terms of reference and that we looked at, so our report does not only address matters on which we decided to make a recommendation. There were some situations in which, in our consultation paper, we considered making changes and, in light of the consultation responses, we decided not to or decided to make a different change.

I referred in my opening comments, for example, to our recommendations on dispositions of charity land where, in the consultation paper, we suggested removing the current regime so that charities would in some circumstances be able to dispose of land without obtaining a survey. In light of the consultation responses we received, we decided to keep that regime in place but to make other reforms by widening whom advice could be sought from.

In essence, there were a number of matters where, in light of consultation responses, we changed our mind or we did not make a recommendation for change, but all the matters that we considered we discuss and comment on in the report.

Q14 **Lord Cruddas:** One thought springs to mind. Once we have gone through this process and the Bill receives Royal Assent, is there another process to start to stretch it beyond where it is today? Is it a long-term plan?

Professor Nicholas Hopkins: As far as the Law Commission is concerned at the moment, the publication of our report brought to an end our work on charity law. It was the second report that we published. We had an earlier report on social investments by charities. Our work on charity law has come to an end. But if there are other matters that members feel the Law Commission should look at and if government want us to review other matters, we can, with the agreement of government, agree new work on charity law to address those. Our position is that we need consent from a Minister to take on a project. We cannot unilaterally decide that we will do further work in an area, but if the demand is there, we would.

Baroness Barran: If I may add to that, I meet very regularly with charity leaders across a whole range of areas. If themes began to emerge that required a legislative response, of course we would look at them, but at the moment, as has been alluded to already in this session, the primary focus is on fundraising after the pandemic.

The Chair: We have covered rejection or partial acceptance, and there is nobody on the committee who wants to add further questions about that. Am I right on that? We have dealt to some extent with control of charity proceedings ultimately by the Attorney-General through the Charity Commission. Does anybody want to ask any general questions about the oversight of the Charity Commission by the Attorney-General?

Q15 **Lord Bellingham:** Have there been any recent examples of the Attorney-General's intervention? Law Commissioner, please forgive me, I have not been a student of all your work on charity law reform, but over the period of analysing the current state of the law and making these recommendations, did you come across any specific examples that might have gone into the public domain over the last 10 to 15 years or so?

Professor Nicholas Hopkins: At the time that we published our report back in 2017, we were aware of only two examples.

Baroness Barran: That is right, there were two at that point, and more recently there has been the case of the Royal Albert Hall where there has also been a decision. We are aware of three references since 2011, two where the Charity Commission brought the case to the Attorney-General's attention and the Attorney-General decided to take the case forward—the independent schools reference in 2011 and the relief of poverty reference, which was 2011-12—and then more recently the Albert Hall case, which is the only one we are aware of where the AG has refused a request from the commission to make a reference to the tribunal.

Lord Bellingham: Minister, what conclusions did you draw from those examples?

Baroness Barran: The first conclusion is that this is a very rare occurrence and we need to keep it in perspective, and that perhaps with only three examples it is a bit dangerous to try to draw too many conclusions because each case will have been looked at on its merits.

Q16 **The Chair:** I want to retrace my steps slightly. Professor Hopkins dealt specifically with what he considered to be the remit and the ambit of authority of the Law Commission to question—if I can put it like that—decisions of the Government on acceptance or rejection. The Law Commission is an independent body that makes its recommendations and sticks by those recommendations, and the Government chose a different line and so be it. I do not think that we have heard the position from you, Ms Thakor, as to the Charity Commission's position on all or any of the recommendations of the Law Commission that were rejected in whole or in part. What is the view of the Charity Commission on those matters?

Aarti Thakor: If I can take the current recommendation, the just-discussed recommendation 43, we were supportive of the Law Commission's recommendation in this regard to remove the Attorney-General's consent in relation to references. The principal rationale for that, which is set out in the Law Commission's 2017 report, was simply to remove a practical duplication of functions, from our perspective. The Minister has already set out that we have distinct roles for charity, but in this particular regard we saw this very much as a practical efficiency that could be achieved, and that remains the commission's position.

Nevertheless, as the Minister has pointed out, we have instituted only three requests since the inception of the procedure. On a practical level we operate very closely and collaboratively with the Attorney-General's

Office. We recognise that this recommendation is not something that the Government wish to pursue at this stage.

The other recommendations, 16, 18 and 40, are the ones for which the commission had put forward concerns about removing particular safeguards, because we felt that they would unduly dilute the protection of chartable assets. It might help the committee on those to give a few specific examples as to how that has worked in practice to explain why we had those concerns as a conclusion. Land is often a charity's most valuable asset, and so any dealings with them tend to be controversial, particularly where there are long-standing community assets.

Recommendation 16 is the recommendation dealing with the connected persons regime and the wholly owned subsidiaries. Our casework has demonstrated a disproportionately widespread lack of understanding about the need to treat entities separately: that is, placing the interests of the charity only first and paramount in relation to any transactions that are due to be undertaken. As a result, we have seen in casework that we have had to intervene in those types of cases quite regularly.

An example of that can be seen in the inquiry report on the Durand Education Trust. In that particular case the commission found that the trustees had failed to satisfy their duties, in part because they had failed to distinguish the difference between the charity and the connected entities. That is an example of where the safeguard operates in practice and is effective. If there was a notice proposal in relation to that, we felt that it would make our powers very limited in relation to intervening because it is very difficult to secure any effective outcome after the event.

Very similarly, recommendation 18, which deals with public notice, is also one where we have found that it is better to have that as an option on the table because it often leads to a better outcome. An example I can give in this case is there was a recreational trust charity that had proposed a change in use for land that it held. On providing notice, the commission received 1,863 representations on the proposed change of use, which clearly demonstrates that the trustees had not really considered the implications of the decision to its fullest extent and they then needed to work through that. Similarly, in another situation, a charity had proposed to sell an historic home that it owned because it was no longer self-sufficient. Notice was given in that particular case and that achieved a positive result whereby a benefactor ultimately stepped forward to cover the deficit in a particular case and that home is still owned by the charity today and is open for public access.

These cases hopefully show that there are real benefits to having the particular safeguard in place. We believe that they will lead to more informed decisions on behalf of the trustees, and it helps to engage the beneficiaries and usually the local communities to make the right outcome. We also find that identifying these risks early on allows issues to be dealt with more efficiently and hopefully will prevent setbacks further down the line.

The Chair: Apart from 43, you are content and support the Government's position on all the other recommendations that were rejected or accepted only in part?

Aarti Thakor: That is correct.

Q17 **The Chair:** That is very helpful. Can I ask you directly—you have referred to this—whether you regard the relationship between the Attorney-General and the Charity Commission on the matters in the Bill or the Law Commission's report as satisfactory? We have dealt with 43, but apart from recommendation 43 are you satisfied with the oversight?

Aarti Thakor: Yes, the commission's view is that its oversight over the sector generally, in relation to the provisions of the Bill, as well as generally in relation to its framework, is sufficient. The first point to remember is that trustees are afforded a wide degree of autonomy and discretion in their day-to-day business, and it is not expected that the commission be engaged in the day-to-day running of charity affairs. That is the starting point.

Nevertheless, the commission will operate its oversight in four important ways. The first, as we have seen as part of some of the rejected recommendations, is by way of our authority being needed on certain transactions before they can take place. Our view is that it is right that in some instances those safeguards were either maintained as is or, indeed, are still present in the Bill as it relates to certain thresholds. We hope that that is the right balance between giving trustees autonomy and empowerment but, equally, having regulatory oversight.

More broadly, though, the commission has oversight of charities by way of use of its compliance powers, of course. Where there is apparent misconduct or maladministration in a charity, the commission can intervene and will use its regulatory powers accordingly. As you may know, the Charity Commission was afforded additional compliance powers under the 2016 Charities Act. The Government's latest review of that Act in 2020 confirmed that the commission was using its powers effectively.

Thirdly, the commission also has purview over charities with its financial data as a result of reporting requirements, whether that is through the annual report or annual returns. That allows the commission, effectively, to look at financial data and to hold trustees to account. It also improves transparency from the public's perspective as to what the trustees are choosing to spend charity funds on.

Fourthly, through our outreach, engagement and guidance work, we are also able to exercise a degree of oversight and education as it relates to how trustees can go about complying with those duties. Through those mechanisms and more generally—we also review our framework from time to time to make sure it is fit for purpose—we believe that we have sufficient oversight.

Q18 **The Chair:** I now want to turn to what I think is a slightly vexed matter, which is the question of the report of the Delegated Powers and

Regulatory Reform Committee. As you know, it has expressed concern at the extent to which amendments can be made to primary legislation, but they are only subject to negative resolution. Listening yesterday to the courts and sentencing Bill, the Government got a bit of a telling off for similar issues, and it was contrasted with the Environment Bill, which had followed all those recommendations.

This is a question for the Minister. On reflection, do you think it is possible that a distinction can be made between some of these provisions? They are not all to do with, for example, changes to reflect the value of money, but some of them are different and they are more significant. Without damaging the purposes of the Bill, they can be made subject to affirmative resolution rather than a negative resolution.

We know what the policy of the House and the will of the House is on this, which is that Henry VIII clauses are to be deprecated unless absolutely essential, and certainly that Parliament ought to have the ability, through a positive resolution, to examine them very carefully. There is one provision here that is affirmative resolution, but the rest are negative. On further reflection, do you feel it would be possible to go if not completely in the direction that the DPRRC has said, at least part of the way?

Baroness Barran: There are two questions there and I will try to answer both of them. Part of the question is: is there a qualitative difference between the different powers, the six powers, that were discussed in the DPRRC report? The underlying principle for all six is that they talk about a threshold at which Charity Commission consent is needed. The driver for needing that consent is different. Some of them pertain to a potential misuse of donor funds, if that is not too strong language. It is about donor money and how we ensure that that is used appropriately. The second relates more to the financial stability of the organisation—how its endowment is used and so forth.

The first group is predominantly sensitive to inflation, so potential changes in that group are a function of inflation, whereas the second is much less the case. Having said that, we did make a commitment in our government response on recommendation 1 that, subject to resources, we would aim to undertake a review of financial thresholds every 10 years. The "subject to resources" bit relates to doing the first one in 2021. There is an agreed mechanism about how we will look at these. That obviously in large part reflects the advice from the Law Commission that we should not be doing this every five minutes, for all the complications and additional bureaucracy that we are trying to avoid. I hope that answers the point about is there a qualitative difference between these.

On whether we see reasons, having reflected on the committee's report that showed the committee's typical care and diligence in its scrutiny, we stand by our decision that the negative procedure is appropriate. I will try to go through the reasons for that. First, each of the powers is very narrow in scope and has very limited impact on how the policy operates.

Secondly, there is clear precedent in the Charities Act 2011 that powers that vary financial thresholds should be subject to the negative procedure. Thirdly, the Government will always consult when amending new thresholds in the future, as we did in 2015 on accounting and audit thresholds. That consultation will obviously, importantly, take into account the views of the Charity Commission.

As has been mentioned already, there is a layer of protection in this, which is the role of trustees to protect the best interests of charities. Even the fact that Government changes these thresholds does not mean that charities instantly have to go to the maximum limit or even use them at all. It is up to the judgment, discretion and skill of the trustees to protect the best interests of their charities. Those are the main reasons why we felt that the negative procedure is still appropriate.

The Chair: Professor Hopkins, do you agree that there is no qualitative difference between the different provisions providing for regulations?

Professor Nicholas Hopkins: As the Minister said, there were some financial thresholds that might be raised for reasons other than simply a change in the value of money through inflation. Clause 12 would fall into that category. It is a new power to borrow from permanent endowment, which is subject to a limit of 25% of the permanent endowment to be repaid over 20 years. Those thresholds can be changed under the negative procedure under our Bill.

We adopted that procedure in the Bill because it fits in with other similar powers in the Charities Act 2011. It provides for internal consistency within the Act. For example, the threshold of £5,000 income beyond which a charity needs to be registered can be amended within the Act under the negative resolution procedure. The audit threshold can also be amended under the negative procedure and has been amended under that procedure.

We certainly acknowledge, on Clause 12, that the reasons why the threshold might be amended are different to some of the other financial thresholds in the Bill, but we think that the negative procedure produces internal consistency for how other provisions of the Charities Act 2011, which are unchanged by the Bill and by our work, would operate.

The Chair: Is there anything you would like to add on that point?

Aarti Thakor: No, thank you.

The Chair: Is there anything the committee would like to ask about on that issue? No. Those cover all the points that we need to ask. We did not ask about consideration leading to proposed arrangements for thresholds to amend governing documents. Do you want to ask any further questions on that, Baroness Barker?

Q19 **Baroness Barker:** Yes. I take Lord Cruddas's word "exciting". Show me a constitution that is exciting.

Would it be fair to summarise the proposals in lay terms as it being possible for charitable trustees not to change what a charity exists to do but how it goes about doing what it is meant to do? We are talking about trustees being able to make minor alterations to how they go about achieving their objectives rather than setting themselves up for a different or expanded purpose. Will that be the thrust of the communication of a very long and technical document to the trustees? That is the key point for me.

Professor Nicholas Hopkins: I might address the first and Aarti might come in on the second. That distinction is absolutely right on where the Charity Commission oversight begins and ends. The charity trustees could change administrative matters such as how they communicate, using email rather that post or having a meeting virtually rather than in person. Under our new powers, it would be able to make those amendments without requiring the consent of the Charity Commission.

We acknowledge that there are some amendments that are more important, where the trustees could still put in motion the process for making that change but would require Charity Commission consent. A change to the purposes of the charity is one of the amendments that falls within that category. That distinction reflects the analysis that we have given of ensuring that the oversight is proportionate to what the charity is doing, trusting the trustees in light of their fiduciary duties to make their own changes to governing documents where it is on important but relatively minor matters but then requiring the consent of the Charity Commission where it is more significant, such as the trustees wanting to change the purpose of the charity.

Baroness Barker: Do you see a role there for guidance for the trustees in that they may not have to seek the Charity Commission's permission to do something, but if they are going to do something they should be under an obligation to make sure that their members know that it is being done? The loophole that I see is there being some rogue trustees or trustees doing something perhaps in genuine error that is wrong and there being no oversight of it at all.

Aarti Thakor: That risk exists as of the law today. That is the key thing, which is that ultimately a lot of this does depend on trustees understanding, as you have said quite rightly, the nature of the provisions in what they can do themselves versus when they need to come to the commission. We will be at pains, particularly in this area because it is quite complex, to simplify the language and make it accessible. We will do a full guidance rewrite of the current guidance that exists on this particular area.

Also, as I have mentioned, we have the online user system, which will funnel trustees through a process to help them to understand either the questions they might need to ask or, if necessary, when they will need to come to the commission for formal consent with additional information. We will also have targeted communications on this in addition to the

published guidance, just to make sure that the changes are accessible and clearly understood.

The Chair: Northern Ireland?

Q20 **Baroness Barker:** Yes, my perennial question. This principally relates to England and Wales but potentially has some possible impacts down the line for Northern Ireland and Scotland. We had discussions with the regulators in both those places.

Aarti Thakor: Yes, territoriality has been considered in the context of the application of the Bill and we will be taking forward specific conversations once we get through to the implementation phase, just to make sure that we have covered off any practical implications as a result of the changes in the Bill.

The Chair: Does anybody else on the panel want to ask any other questions that have been anticipated? No.

I do not know whether you have seen that some people and some entities have already submitted further evidence to the committee, and we will have to decide in due course whether we wish to call some of them to give oral evidence. In some cases the further written evidence is extensive and highly detailed. It would be certainly of great assistance to the committee if the department and the Law Commission—for witnesses who are going to be called to give oral evidence—could do a very short statement of response to the extremely detailed points that are raised. The overall impact of them is that they are supportive of the Bill, but there is a large number of qualifications of a very technical nature that would be quite difficult for the committee to deal with without assistance from you. We would very much welcome it if you felt able in due course to do a further written paper of evidence on the points in some of those cases. Is that something you could do?

Baroness Barran and Professor Nicholas Hopkins: Of course.

The Chair: We will let you know about that. I do not have anything further. Is there anything further from any members of the committee? No. Thank you all very much indeed for your very clear and helpful answers to our questions. It has been extremely fruitful so far as we are concerned. Thank you very much indeed.