Charities Bill [HL] Special Public Bill Committee

Oral evidence: Charities Bill [HL]

Tuesday 19 October 2021

11.40 am

Watch the meeting

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

Evidence Session No. 1 Heard in Public Questions 1 - 6

Witnesses

I: Dr John Picton, Senior Lecturer in Law, University of Liverpool; Professor Debra Morris, Director, Charity Law and Policy Unit, University of Liverpool; Dr Mary Synge, Honorary Senior Research Fellow, University of Liverpool; Professor Gareth Morgan, Emeritus Professor of Charity Studies, Sheffield Hallam University.

Examination of witnesses

Professor Debra Morris, Dr Mary Synge, Dr John Picton and Professor Gareth Morgan.

Q1 **The Chair:** Good morning. We are joined by Professor Morgan, whom you can see remotely at the bottom of the screen, I think underneath me. We are extremely grateful to all of you for your written evidence on behalf of the associations or entities that you represent. It has been very important evidence and is part of quite a large body of written evidence that we have received from a number of people. We have asked only some people to supplement their written evidence with oral evidence, and you are among them. We will be extremely grateful to hear from you on the matters we are going to ask you about.

Your name cards are quite a long way away, so I think it will be helpful if you would just introduce yourselves, going from my left to right.

Professor Debra Morris: Professor Debra Morris. Good morning, everyone.

Dr Mary Synge: Dr Mary Synge.

Dr John Picton: I am Dr John Picton.

Q2 **The Chair:** Thank you very much. You will all have received the supplementary evidence of Professor Hopkins in response to your evidence and other evidence, and there has also been further supplementary evidence from DCMS—I do not know whether you have seen that or not; it is now public—which deals mostly with the role of the Attorney-General. You are our last oral evidence session unless we ask for more evidence from Professor Hopkins, which we may or may not do.

I will come to the nitty-gritty of this session from our perspective. Now that we have seen and heard what we have done, is there anything in the supplementary evidence of Professor Hopkins or the further evidence of DCMS relating to the evidence that you have given in writing with which you would strongly disagree, and, if so, why?

I ask the question that way because, on virtually every single subject that we have looked at, there has been an absence of unanimity. Obviously, we note that there are some people who favour this of the Government's response and some who favour that. But at the end of the day we are interested in exploring whether there is a very significant flaw in the analysis by Professor Hopkins in his response to you.

That is the question I want to ask you. Other members of the committee may well want to ask further questions in addition to that. Please feel free at any stage, or at the end, to supplement what you have said to me or other members of the committee. If there is something you want to say that you feel has not been explored sufficiently or if you do not feel we have sufficiently understood, I want you to feel that you have given your best. I do not think this needs to be a prolonged session.

I will start, therefore, with my question, which is whether there is a

fundamental flaw or failure of correct analysis in the supplementary evidence of Professor Hopkins. Can I start with you, Professor Morris, and then move down the line?

Professor Debra Morris: Thank you. Obviously, I have read Professor Hopkins' supplementary evidence and I want to focus on one particular aspect. In my evidence I spoke about my concern that the Government had not accepted the recommendation on reviewing the way in which appeals from the Charity Commission can be considered more broadly—that is, challenging the decisions of the Charity Commission. So my view is in line with the original view of the Law Commission and the response of Professor Hopkins.

The Chair: Which recommendation are we talking about here?

Professor Debra Morris: I am talking about recommendation 27.

The Chair: This is on appeals.

Professor Debra Morris: Yes, for a review of the basis upon which Charity Commission decisions can be challenged, which was in the original recommendations of the Law Commission. I was concerned that this review had not been taken up by the Government. Professor Hopkins simply comes back and says, "Well, that's for the Government to determine one way or another". So I could not say that there is anything wrong with the analysis, by any means, of the Law Commission's view in respect of that. If you want me to, I can say a little bit more about that aspect, or would you like me to pick that up later?

The Chair: We have certainly heard from others that working one's way through the various different appeals is quite complex—what they can be based on, how you conduct them and where they go. So we have that evidence, but please feel free to expand if you want to about that core of objection to the Government's rejection of recommendation 27.

Professor Debra Morris: It was a recommendation to review, not a recommendation about what would happen as a result of that review. I agree with the evidence that has been given already that the process is incredibly complex, particularly for lay people, bearing in mind that the tribunal was set up to provide easy, swifter and less expensive access to a way of challenging decisions and, in fact, non-decisions—that is, decisions of the Commission not to take any action.

Just to say one thing about the complexity that you referred to, there are over 50 different provisions listed in the table that litigants, particularly litigants in person, would need to look at in order to determine whether they can bring an appeal to challenge some activity of the Charity Commission.

There are two things that I think could be considered in a review. One is a tidying up of that table and putting the actions, or inactions, in groups that are more accessible and understandable to people who are on the receiving end of the decisions, or non-decisions, of the Charity

Commission. That is one thing that could be done. It could be made much clearer where an appeal is possible and where it is not.

Another consideration in a review could be that real consideration is given once more to the proposal that has been put many times that there should be a general right of appeal to the tribunal over any decision to make an order, a declaration or a registration decision, or not make those kinds of actions, on the part of the Charity Commission.

So there are two ways in which a review could go, one more modest, and one more revolutionary in terms of giving much more access. It is a shame that the recommendation has come out of the Bill at this point.

The Chair: Yes. Thank you very much. Is there anything apart from that that you would like to pick out?

Professor Debra Morris: In relation to Professor Hopkins' evidence, I accept the points he makes in relation to the arguments that have been put by various people in relation to particular aspects. A lot of it is down to the Law Commission saying, "Well, if the Government don't want to take this up, it's not for the Law Commission to say". But I think the Law Commission still stands by its recommendations and, broadly, I am in support of the recommendations in the report and those that were in the original Bill.

There are particular issues that my colleagues may want to talk about. The role of the Attorney-General in relation to references to the tribunal, I know, is something that Mary particularly has an interest in. Both Mary and John had some comments on clarity on the ex gratia payments in the Bill. There is a concern that when we try to clarify and make things simpler, there is a danger that we might actually make things worse, and I think that is one of the concerns that has been raised in the context of small organisations.

The Chair: We have heard a lot about that issue.

Professor Debra Morris: I will leave some of my colleagues to raise that if they want to.

Just one final thing on this problem of the list in the schedule, and it has already been raised. Bates Wells raised in its oral evidence that it has found one new power in the Bill that is not appealable through the tribunal because it is not currently listed in the schedule. It is quite inconsistent in relation to some aspects. An appeal can be brought where the Charity Commission decides to take action, but it cannot be brought when it does not decide to take action. In other aspects, it is either when they act positively or when there is an omission. I feel quite strongly about that point.

The Chair: Which one?

Professor Debra Morris: The point about challenging the decisions of the Commission and that there has been a bit of a lost opportunity with the tribunal.

The Chair: Thank you very much.

Q3 **Lord Bellingham:** Can I just ask a very quick follow-up? How would you improve it?

Professor Debra Morris: I said that there are two ways in which it could be done. One way is tidying up the list, at least, and making it more logical and clearer to the lay person, because it was expected that the tribunal would give easier access to the justice. Of course, it is not just about access to justice, because the tribunal has clarified the law in particular areas. It has helped trustees, and it has helped the good governance of charities, and the good governances of charities is clearly in the public interest.

So one way is to tidy up, and another way is to abandon the schedule altogether and have a broader right of appeal from actions and inactions of the Charity Commission.

Dr Mary Synge: Could I just contribute something to that? I think it is right; there are those two options. I wonder if there is a third option as well that could come out of a review. This recommendation is only to review the basis for appeals, which I think it is important to remember. I suppose a third route, in reviewing those grounds of appeal, would be adding some in or taking them out. That could be the result of such a review.

I will give one tiny example from public benefit assessments of independent schools that happened a few years ago. If the Charity Commission concluded that a school had not met the public benefit requirement, the school was not able to appeal that decision. I suppose it could try judicial review, but I do not think anyone would recommend that. It was really left with no option but to submit plans for improved means-tested bursaries or whatever. That wasn't on the list in Schedule 6, and therefore it was excluded.

The same happened in Scotland, but Scotland passed amending legislation in 2010 to give a specific right of appeal to that sort of decision.

That would just be on that third option. But the recommendation is for a review, so I also support the recommendation.

Q4 **The Chair:** Doctor Synge, would you like to deal with this basic issue we are grappling with today, which is: is there some fundamental flaw or fundamental issue in relation to the analysis of the Law Commission in response? We have obviously read all your evidence in great detail, so we know what your basic starting position is, so there is no sense in repeating that. We have seen what the answer is, and really this is your opportunity to respond to that supplementary evidence.

Dr Mary Synge: My written submissions were in connection only with recommendation 43, which was the need for Attorney-General consent to the Charity Commission making reference to the tribunal. Professor Hopkins' reply to that was that it is up to the Government to reject. I have nothing specific in reply to Professor Hopkins there. I am very happy to amplify or to answer any questions on my written submission on recommendation 43, if that is of any use to anybody.

I would like the opportunity, if there is time, to speak about a confusion that I think exists over clauses in the Bill on ex gratia payments, at some point.

The Chair: Why not deal with that now?

Dr Mary Synge: That would be very helpful, thank you. I do not have any objection to Clauses 15 and 16, which deal with ex gratia payments, as they stand. I support the move to making it an objective test, which I think is sensible. I am not very keen on the thresholds, for reasons that will become clear, but my more fundamental concern is that I think the consultation has revealed a real confusion over the scope of Section 106 payments. Unless that confusion is cleared up, I fear that the scope given to 106 payments will be so broad as to lead to practices, or endorse existing practices, which contravene charity law.

To be slightly more specific, the 106 payments are the moral obligation payments, and they arise out of Re Snowden and are, I think, very, very limited. They are essentially where the charity is legally entitled to receive some property, but where I think almost everybody would agree in the circumstances that, "We shouldn't really have this property. We're prepared to give it back, or we're prepared to waive it, because the moral obligation is so intense".

That is one small part of ex gratia payments, and I think some of the confusion has arisen because Section 106 has in its subtitle "ex gratia payments". I think we all talk about ex gratia payments under 106, but I think, as the Law Commission makes clear in its report, ex gratia payments are far, far broader than that, and I would include them in Section 105.

Let me be more specific. Those moral obligation payments are typically legacy payments, and those are set out in the Charity Commission's guidance, I think very well, in CC7. They are very unusual circumstances. All the cases that the Charity Commission gives as examples are of those sorts of will cases.

It was clear during the consultation, partly arising from the Law Commission's report but also from consultation submissions, that there was confusion over the scope of the 106 payments. Are they just those sorts of legacy payments, or possibly when an overly generous donor gives money and then finds himself in poverty, which is the only other example the Charity Commission comes up with, or do they include employee payments—a little bit of extra pension, extra redundancy,

possibly payments on severance? There is always a danger here, as there is in the public sector and other spheres, of giving payments in order to be generous or to mask underperformance or bad management, and so on, especially if you cloak them with confidentiality agreements. There is a real difficulty there.

I would like to suggest not necessarily a change to the clause but that in the Explanatory Notes, or preferably in a direct statement from the Charity Commission included in its guidance, that those 106 payments are very, very strictly controlled and do not encompass employee payments. I am sure someone could think of an example where sometimes the circumstances are so extreme that a payment to an employee could fall under ex gratia, but those would still go to the Charity Commission for consent. But I fear that there is a real confusion, and clearly a willingness, as evidenced by Veale Wasbrough Vizards, who say, "Well, we're not sure these are so much legacy payments as employee payments".

The Chair: The way to deal with that would not be by way of an amendment. It would, as you say, be by way of Explanatory Notes or perhaps a clearer or expanded memo by the Charity Commission.

Dr Mary Synge: I think so. It is very much needed, I think, because of the confusion that is very evident. The Law Commission report gives the example of an extra pension payment. It refers to Re Snowden, where the judge refers to extra payments that might be given because they make "good business sense" or out of "enlightened self-interest", or because they are "expedient". I think those sorts of ex gratia payments fall under Section 105.

If I might add just one more comment to try to explain what I am saying, I think charity law provides a very, very rigorous framework. The powers of trustees can be exercised only in furtherance of the purposes. The property belongs to the charity and not to the trustees or the members, and that property must be applied to the purposes. There is a duty, very much more than a power in my mind, to act only in the best interests of the charity, and that means to act in the best interests of furthering the charitable purposes. The charity only exists for the purposes that it is set up for, as the Supreme Court made careful note of recently. Also, the doctrine of private benefit says that benefit going to individuals is permitted only where it is necessary and incidental. So we should not be surprised by that framework in charity law.

The law then allows some leeway. There is Section 247 in the Companies Act, which allows extra payments on the cessation or transfer of a business, but they are still subject to directors' duties. There is the Charity Commission's de minimis £1,000 a year for not challenging 106 payments or for honoraria to trustees. Apart from that, there are 105 and 106. We should not be surprised that in charity law there is that rigorous control and that need for third-party consent where property might be applied other than for the purposes. The law tolerates very incidental expenditure, like a trustees' annual dinner or sending the workers out to

the country for tea—we get that from the case law—but they are very, very small.

The Chair: Thank you very much. Anything else you want to add at this stage?

Professor Gareth Morgan: Lord Chair, would you like me to speak about Clause 3 at this stage?

Dr Mary Synge: Shall I answer that question? No, actually, we will leave that and see if there is time. That is all I want to say on ex gratia payments.

The Chair: I was going to go to Dr Picton and then to you, Professor Morgan, if that is all right.

Dr John Picton: Thank you. Mary and I both agree that ex gratia payments need clarification, and that is a clear agreement, but I think that might be the point at which the agreement ends. I agree that charity law should not easily allow payments that are not in furtherance of the charity's purposes, which is a fundamental feature of charity law, and that ex gratia payments in pursuit of a moral obligation are difficult to justify in terms of furthering the charity's purposes.

However, I think that charities should be able to make ex gratia payments even where they do not further the charity's purposes, and I think the legislation needs to clarify, non-exhaustively, the grounds on which charity trustees might reasonably do that, for example when making payments out of charity funds where a donor lacks mental capacity, or where a founder or a major donor is tainted in some way in the context of an abuse scandal, which of course is ever present in our minds in the current climate, or perhaps—I am sure there is clear disagreement between me and Mary here—in reputational management of the charity, when making ex gratia payment to maintain the charity's reputation. If there is disagreement on that point there can, I think, be agreement that the law needs clarification, if not through an amendment then perhaps through guidance.

A note of caution on guidance. I agree again with Mary that the current law does not allow a wide interpretation of the grounds on which ex gratia payments can be made and that asking the Charity Commission, which of course does not have law-making powers, to clarify unclear law is potentially a recipe for confusion. That the law is not there to ask it to produce guidance on unclear law is not always satisfactory.

The Chair: I think you are saying there that in an ideal world there would be something in the Act itself that would set some sort of parameters. Is that right?

Dr John Picton: Yes.

The Chair: In an ideal world. But if it was not that, there is a need for clarifications somewhere. Is that a fair summary?

Dr John Picton: Yes.

The Chair: Anything else at this stage?

Dr John Picton: Directly in terms of legal disagreements—of course, respectful legal disagreements—with Professor Hopkins, he took the view that non-charitable appeals that fail are outside the scope of this work and therefore the committee.

Perhaps you would allow me very quickly to make the case where they might be. These are, of course, quite rare circumstances, as you will be aware, such as an appeal for a memorial or a grave, or perhaps some sort of social justice campaign such as a campaign for free school dinners. If that campaign fails, perhaps because not enough money is raised to achieve its aim, there will be a resulting trust and the current law is that the money will return to the donors. There is nothing wrong with that on the face of it, except that sometimes donors are not identifiable in the context of the cash collections and such like. Professor Hopkins says that that is outside the scope of his work and this committee.

The Chair: I think he says that the point was never raised in the course of the consultations, so they have not considered that. Am I wrong about that? My recollection is that that is what he says about that.

Dr John Picton: That is one of my other points, if you will let me touch on it briefly. Briefly, it is that other jurisdictions deal with this within their charity legislation.

The Chair: Oh I see. Which other ones?

Dr John Picton: Queensland deals with this directly within its legislation, and I think New South Wales as well.

The Chair: Your suggestions follow their law, do they?

Dr John Picton: Yes.

The Chair: Okay, that is helpful, thank you. Are you content for me to move on now to Professor Morgan? Is there something else?

Dr John Picton: Yes. There is another question, which will come later.

The Chair: Anyway, at the end, anybody should feel free to say something further, if they want to, about anything that they do not feel has been sufficiently emphasised. Professor Morgan, what would you like to say at this point?

Professor Gareth Morgan: Thank you very much, Lord Chair. Like everyone, I think, I welcome the Bill, broadly speaking, in removing these barnacles in charity legislation, as you have heard them described.

The main issue where I have a slight disagreement with Professor Hopkins in his response to that earlier evidence is Clause 3, which in

some ways is the most radical provision of the Bill, because it deletes 14 sections in the 2011 Act concerned with the powers of unincorporated charities and replaces them with just two new sections, 280A and 280B.

I am all for simplification and rationalisation, and I agree that there was an awful lot in those former sections that was messy and confusing, but I feel it is a big mistake to do away with the power in Section 268, allowing an unincorporated charity to pass a resolution to transfer all its property to a CIO. It is worth saying that a Section 268 resolution is a very powerful concept, because even if the charity does not have any dissolution clause in its current governing document, it can pass a resolution to transfer everything to a CIO, and the £10,000 limit that would normally apply under this section does not apply if you are transferring all your property to a CIO. So it is an incredibly helpful provision.

I take the point that Professor Hopkins makes that you could still go through the process allowed by the new Section 280A, but it is a vastly longer process, and in my view it would be adding a massive new barnacle to the process. Let me just explain with a simple example. Last year I was working with a couple of community charities with old governing documents from the 1940s and 1950s. They wanted to re-establish themselves as CIOs, village halls, community associations, that kind of thing. In both cases, they had no clear power under their current governing document to be able to wind up and transfer to a CIO, so we used the mechanism of passing a resolution under Section 268. They passed those resolutions around last Christmas and we gave notice to the Charity Commission in January, so the 60-day period was up in March. On 31 March, at the end of their financial year, they were therefore legally able to transfer the existing community buildings and so on from their existing trusteeship to the CIO.

If they had had to use the new process, they would first have had to prepare a new governing document, with a dissolution clause, replacing the out-of-date one, pass resolutions under Section 280A, submit them to the Charity Commission and wait for the Charity Commission to give consent with no clear timescale. That new governing document would come into force just for a few weeks, and then under the new governing document they could pass the resolutions to transfer to the CIO.

So what is currently a one-stage process would become a massively spread-out, two-stage process with a new governing document in between. That is why I feel quite strongly that something along the lines of Section 268 needs to be retained.

The Chair: Just a couple of points on that. That is the example that you give in your evidence that you repeated there, is it not?

Professor Gareth Morgan: Yes.

The Chair: I think Professor Hopkins takes the view that if a new provision to permit a transfer to a CIO is necessary because there is no

dissolution provision already, you do not have to have a completely new trust document; you just add that one provision. I think that is his view.

Professor Gareth Morgan: Yes, I think that would be okay, but you still have the two drawn out stages. Stage 1 is passing the resolution to add the new provisions to existing governing documents and waiting for Charity Commission consent. Maybe six months later you can use that provision. You would not be able to have any certainty of timing in order to transfer your assets to the CIO at the end of the financial year, for example, if that was what you were seeking.

The Chair: Let me see if I can just clarify this. In a case where the commission is required to give consent under Section 280B, the resolution under 280A will take effect on the latest of a number of things, and the last one is: "(d) if relevant, the date on which the Commission gives any consent required". That is why you are saying it is uncertain and it may take too long. Have I summarised that correctly?

Professor Gareth Morgan: That is correct, Lord Chair, but waiting for the commission's consent, the uncertain timing, is only part of my concern. The second concern is the whole vehicle of putting small charities through a massive two-stage process: stage 1, amend your existing governing document; and stage 2, pass the resolution to transfer to the CIO. Why not allow them to pass a resolution to transfer to the CIO in the first place without going through the rather unnecessary process of amending an existing governing document that will be in force only for a few weeks?

The Chair: That was a point you made, if I may say, so powerfully in your written evidence. Is there anything else you would like to add as at this stage on what, as I said, really concerns me, which is what the answers to the supplementary evidence of the Law Commission and DCMS are and where they have gone fundamentally wrong? You have emphasised certainly Clause 3. Basically, I think under Clause 3 you simply disagree with the policy.

Professor Gareth Morgan: It just seems unusual to me, if the whole idea of this Bill is to simplify things, to introduce a more complex process in that particular case. That is why I disagree. Your Lordships may take the view that there are other merits to justify the new process, but I would like to point out that it would be considerably more complex for smaller charities to go through the new vehicle. I welcome the simplified resolutions of Section 280A. I am not disagreeing with the principle of the section, but I think if you want to transfer property to a CIO, it would be much simpler if you could do it with one resolution rather than a long, drawn-out two-stage process.

In answer to your question about other things, I do not think I have any other fundamental disagreements, but I would just like to highlight the point which I and I think a number of other people have made about the proposed new definition of permanent endowment in the Act, which will be introduced by Clause 9. I think a number of people have commented

that that new definition may not be as clear as it might be—in particular, you had evidence from Francesca Quint. I do not think we have had a clear response back on that particular issue.

The Chair: Thank you very much. Are there other questions that members of the committee would like to ask the panel?

Q5 **Baroness Barker:** I think the only major outstanding one is the role of the Attorney-General, and I wondered if we might come to Dr Synge for that. Just talk us through your evidence, if you would not mind.

Dr Mary Synge: I am very happy to, thank you. The reference procedure is a very, very sensible one. It was brought in for good reason, and it is a hugely valuable and important tool for the Charity Commission to be able to seek clarification of charity law, which it is charged to apply in all its statutory functions, duties and objectives. Charity law is recognised to be very complex. I do not think the 2006 Act resolved that complexity, so it is very important that the Charity Commission should have clarification where it is needed. I think it should be encouraged and independent to seek clarification where it is needed.

Then I ask: is there any good reason why you should put an obstacle in its way, either a need for consent from the Attorney-General or anything else? I honestly cannot think of a reason why that would be a good idea. Then I look at the reasons that I have understood the Government so far to have given—for example, that it saves costs and duplication, that it prevents the Charity Commission perhaps inadvertently seeking a reference without telling the Attorney-General. Those two can be met by a notification procedure, and I believe Lord Hodgson's amendment meets that perfectly well.

The main reason given most recently is that it is part of the Attorney-General's very important role as protector of charities to protect charitable interests. Of course it is, but I do not understand how the Charity Commission's ability to seek a reference without the Attorney-General's consent puts those charitable interests at risk.

On the contrary, I do not think it puts them at risk; it protects them. We saw, not so much from the poverty reference but from the education reference, that the Charity Commission went to the Attorney-General, who said that that office was going to make the reference. The Charity Commission then posed two questions. The first one was asked and was very easy to answer. The second one was a very, very sensible question: in what circumstances might the trustees owe duties to those who cannot afford the fees? That, I think, clarified the rather muddied waters over whether this was a matter of charitable status or whether it was a matter of trustees' duties. So I think the commission's question would have been far better.

Peter Luxton has written before that the reference questions that were submitted by the Attorney-General were rather politically influenced. It gave the tribunal an encouragement to give its endorsement to the

sponsorship of academies, for example. I think the Charity Commission would have done better, perhaps.

On religion, I think we need a reference more than in any other area, perhaps. We have the confusion over the no-presumption provision of the 2006 Act and the confusion still over the presumption, despite the poverty and education references where the tribunal said no presumption had existed.

The Charity Commission considered making a reference, which I know from a freedom of information request, although its later decision to register the Preston Down Trust referred only to it having asked the Attorney-General. But it asked the Attorney-General, and the Attorney-General said, "We're not going to make a reference, but you can if you wish". The Charity Commission had not asked, but the Attorney-General gave consent.

In doing that - in my evidence I said two times, but actually I think it was three times - the Attorney-General also mentioned, "Of course you might, instead of going for a reference, refuse the Preston Down Trust and let it appeal", and that that might be a good idea where a charity has the ability and the financial means to do so. Although that was one of the reasons for introducing the reference in the first place—that it should take the burden of costs from charity and put it onto the Charity Commission for the good of all.

The Charity Commission did not proceed to submit a reference, even though it had the consent that it had not asked for. I think it is very difficult to avoid a conclusion that it felt under influence not to do that but to proceed to refuse registration. Sadly, having reached that stage, then when it refused in 2012, its letter of refusal to the Preston Down Trust made it absolutely clear that it was thoroughly confused about what the law was. It did not try to mask that. It quite clearly summarised the legal principles from case law but then said, "But we're not sure if these still stand. We're not sure what the effect of the no-presumption provision is", for example. So it proceeded on that basis, which I think is unsatisfactory. Even in its later decision, resulting from negotiations between the Preston Down Trust and the Charity Commission, which I think is also unsatisfactory, it still showed the confusion.

The Attorney-General, in refusing or saying that he was not going to give a reference, said, "We accept that this could bring clarity in this and similar cases, but we do not think it would give the comprehensive guidance that is of universal application". I am sure that is probably right. Guidance of universal application is a tall order, but it could have given clarification in those and similar cases. There is an estimate that around 5,000 previously excepted charities, like the Preston Down Trust, now need to register because of the Charities Act 2006. That date has been put back and put back and I think it is now 2031.

There is still, to my understanding, great confusion as to what the public benefit requirement means in religion. In my take on charity law, I do not

think there is any confusion at all, but evidently there is confusion out there, most importantly about what a religious charity must demonstrate, how, and whether case law is still of value.

That is a question that the Charity Commission almost certainly would have submitted. It was one of the questions in the poverty reference: "Does this case law still stand?" It would have been a very easy question, and I think it would have given greater clarity, for everyone concerned, than that refusal to make a reference. The refusal to give a reference on the Royal Albert Hall is a more recent circumstance.

I worry that the Attorney-General, in applying public interest considerations, as of course they must, might be giving weight to considerations that fall outside the main, central area of the reference, which is to give clarity over the law because it is needed. If the Charity Commission had had to proceed without that clarity, 1,500 benevolent charities would have been disadvantaged in the poverty cases, and in other cases we are all disadvantaged because there is ongoing confusion. Protracted litigation and added burdens and costs could, and I think should, be avoided in the interests of charity, which is why I do not understand why the need for consent in the reference procedure is still there.

Baroness Barker: Thank you.

Q6 **The Chair:** Would any other member of the committee like to ask a question? No. Then I think the time has come when I ask if you want to make some final, sweep-up statement. As I said, please remember we have read your written evidence very carefully, but if there is something that you want to come back to and would like to mention now, please feel free to do so.

Professor Debra Morris: Let me start. Thank you. Just further to Mary's point there, I do not feel as strongly about the role of the Attorney-General in this in relation to references, but I think it would be helpful if there were some kind of public statement on the way in which that oversight by the Attorney-General is given and how the considerations are made. What factors are taken into account specifically when the Attorney-General is deciding whether to exercise this power to give consent to a reference? Also, perhaps there should be some clearer expectations about the timescale for that decision. The Royal Albert Hall case is a good example of that being very drawn out.

The Chair: I think it was four years.

Professor Debra Morris: Yes, and a bit of toing and froing along the way. It does not do the reputation of the charitable sector in general any good.

The Chair: I do not know the answer to this and I probably ought to. In the case of the Albert Hall for example, I think there have been only three cases where the Attorney-General has been asked for consent by the commission to bring proceedings, of which the latest was the Albert

Hall one. When it refuses, such as in the case of the Albert Hall, is there a public statement as to the reasons given?

Professor Debra Morris: I am not aware that there is, no. I think it just filtered out that it was not going to be going ahead. That is my understanding.

The Chair: There is no public statement or explanation.

Professor Debra Morris: Not that I am aware of.

Dr John Picton: Nor me.

Dr Mary Synge: The only answers I have seen submitted on behalf of the Attorney-General in the case of the Royal Albert Hall say, "I'm helping the Charity Commission and the Royal Albert Hall with the process" or "I am waiting for documents". I have seen nothing definitive. I do not think the Charity Commission asked for consent to make its own application in poverty, education or religion. I do not know whether those are the ones you are referring to or whether there are ones that I do not know about.

The Chair: There were three. One was education, I think, one was the Albert Hall, and I have forgotten what the first one was.

Dr Mary Synge: The first one was poverty perhaps.

Professor Debra Morris: They are referring to poverty, yes.

Dr Mary Synge: The Attorney-General said that he would be making a reference based on doubts that had been expressed by the commission, but the commission did not ask for consent to make a reference itself. The tribunal expressed doubts as to why the case had been brought at all. The Charity Commission appeared as a neutral party and just gave the arguments against.

On education it did not ask either. For the poverty one, it had said conditionally: "If you're not doing it, would you consent to us doing it?" On education, it did not do that. It just said, "Are you doing it?", and the Attorney-General said, "Yes, we're doing it". Then the Attorney-General put out questions, and the Charity Commission said, "Do you think you could ask a more open question than that?" and the Attorney-General said no.

This was recorded in the October hearing of the Independent Schools Council v Charity Commission case, under Mr Justice Sales, that the Attorney-General had taken on board some of the things that the Charity Commission had asked for, "but by no means all". Most importantly, it had not taken on board that open question, which might have led to a more helpful judgment than the 116 pages that we had, where the tribunal itself said, "Look, we're sorry. This isn't very clear, but we'll have to leave that to others". Part of the difficulties the tribunal faced, I think, was the format of the Attorney-General's questions. They were very

difficult to answer. They muddied charitable status and trustees' duties, which has been singularly unhelpful in my view.

Professor Debra Morris: It appears that there is no open process in which this comes about. It comes out in the wash, does it not? Or we read in the charity press that the Attorney-General is still considering the Royal Albert Hall case. As I say, it does not do the reputation of the sector as a whole any good, particularly in that case, where it is still up in the air. We have not really got anywhere with it.

The Chair: Thank you.

Professor Debra Morris: On whether I wanted to say anything else, we were asked about recommendations that were not in the Bill, and we made a point in the Charity Law and Policy Unit submission about perhaps having a statutory framework for trustee training. I know the response from the Law Commission was that it was not something that came up in the consultation, but it crosses my mind that quite often when you read Charity Commission inquiry reports and other reports of things that have gone wrong in charities, there are some very basic issues that charity trustees are unaware of.

Currently you could just say that their fiduciary obligations require them to be aware of what they need to know, but it might be helpful if there were some kind of statutory framework that clearly directed them towards at least an induction process. I know that the Charity Commission and other bodies have a lot of guidance on this, and there is a governance code. But when we see things going wrong, they are quite often very basic things, and I am not talking about situations where there is conscious wrongdoing by trustees but cases where things get into a mess simply because trustees have not been aware.

The Chair: I do not think there is any dispute, and I think Professor Hopkins entirely agrees, that training is very important, so I think you are pushing at an open door there. The only question is: does it fall within the remit of the Act? Is it something that the Law Commission can deal with? We are going through a Law Commission special procedure here, and we certainly do not want to come out of this procedure and go back into the ordinary procedure.

Professor Debra Morris: It was about the sections that dealt with trustees—for example, the Charity Commission has the new power to identify who trustees are in a particular situation. We thought that perhaps it could fit in somewhere there, perhaps being a little bit optimistic.

The Chair: We have that bit. Thank you very much.

Professor Debra Morris: Thank you.

The Chair: Does anybody else want to add at this point?

Dr John Picton: Is this our final contribution?

The Chair: Yes.

Dr John Picton: On the Crown's law officers, I have a comment in relation to the Attorney-General. I want to talk about quite a rare circumstance where a gift is made by will outside a trust, an outright gift. In those circumstances, and this is a historic rule, the court, and therefore the Charity Commission, does not have jurisdiction over that gift. Instead, the Crown and the Attorney-General do.

This matters in circumstances where something goes wrong with the gift. For example, if a gift is left to a charity that no longer exists free from the trust, the Crown will manage that gift. As I understand it, the Crown is likely to keep the gift in charity and give it to another charity. It has its own shadow cy-près procedure running concurrent with the Charity Commission.

The problem with that procedure is that it happens almost entirely without publicity. In my own research, I have been able to find very little information about what the Crown does with the gifts—this is the Solicitor-General. Maximally, in my own research I argue that there is no reason for the Crown to have this power, and it could quite straightforwardly be abolished. Minimally, there could be guidance and information about how the Crown is dealing with these gifts.

The Chair: Thank you very much. Yes, Professor Morgan.

Professor Gareth Morgan: Thank you. I would add that there are a few other things that I do not think have been picked up that have been raised by a number of people, particularly on the terminological issues. I think a number of us made comments about the definition of special trusts, for example, and whether this should be replaced by the term "restricted fund". Why have we still three separate definitions of connected persons in the Act? I think there are still a number of small issues of that kind, and it would be very helpful if the committee were willing to follow them up.

It may also help to say that I agree with my academic colleagues in the room with you about the reasons you have been given for the Government's rejection of recommendation 27, on appeal to tribunal, and recommendation 43, on allowing the commission to make references without going through the Attorney-General. I would entirely agree with their reasoning.

The Chair: Very good indeed. Thank you very much.

Dr Mary Synge: Sorry to return to the ex gratia payments, but I do not think I mentioned this then. All I suggest that we need is absolute clarity, and I support the Charity Commission's CC7 guidance. I think it does a very good job of setting out what those ex gratia payments are. It is only because there is clearly confusion in the Law Commission report about extra "good business" payments in Snowden, which I do not think Snowden says at all.

The other thing that is mentioned in the Law Commission report, or somewhere in one of the reports, is, "We might feel better about it because of the requirements of the charities SORP, which requires the finance, accounting, reporting, practice statement"[1]—Gareth, what does it mean?—"that can make us feel better, because that requires detailed information about ex gratia payments, the amounts, the nature of them, the legal authority and justification for them".

That is all very good, but I think we also need to remember that not all charities comply with the SORP or are even required to comply with it. At the moment, I am writing a book that asks: are universities really charities, and if they are, what does that mean for the way they operate and for their relations with the state? In looking at that, I am aware that universities comply neither with the charities SORP, for example; nor, after a recent relaxation of the rules from the Office for Students, are they required to comply with the SORP FHE. They need to comply only with the FRS 102, and that does not give anywhere near that sort of detail. So although we might have a lot of comfort by thinking we will all get to know about these ex gratia payments, I think it is worth remembering that in a lot of cases we do not, because the SORP does not apply.

The Chair: It does not sound as though you are going to be very popular with the universities. We shall see.

Professor Gareth Morgan: May I just add to that last point, Lord Chair, because there are a huge number of concerns about the category of exempt and excepted charities in England and Wales, as you will be aware? This is something of an anomaly that does not really apply in most other charity law jurisdictions, which require universal charity registration. In Scotland, for example, all charities have to be registered. Mary Synge referred earlier to the vast number of excepted charities that are yet to be brought on to register. This does not require new provisions in this Bill, because it is already there in Sections 30 to 33 of the 2011 Act. It just needs the Government just to bring those provisions into effect—for example, the registration threshold for most religious charities is still at the £100,000 level, and the policy intention to bring that down to £5,000, which was announced when the 2006 Act was going through, has still not been implemented.

So bringing excepted and exempt charities into the more general charity regulation framework and under the commission's oversight is a huge issue, which you might see as outside the scope of this Bill but I think it certainly needs to be on your Lordships' radar.

The Chair: Thank you for that. Yes, I strongly suspect that the answer is that it is not within our remit, but I take your point that it is perhaps something that needs to be considered by DCMS.

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[1] Dr Mary Synge has clarified that she meant to say "the Statement of Recommended Practice, which applies to financial accounting and reporting"

We are extremely grateful to all of you, the three of you attending in person and Professor Morgan remotely. We will obviously consider everything you have said—it will be written up in Hansard—before we reach any decision. We will be looking at it extremely carefully, together with the totality of the evidence. Thank you very much indeed.