Response to the Call for Evidence, seeking views on … whether the Government were right to reject, or only partially accept, recommendations 6, 7, 8, 16, 18, 27, 40 and 43

This is an objection to the government's rejection of **Recommendation 43**.

Recommendation 43 was that the need for the Charity Commission to obtain the AG's consent (s 325(2) Charities Act 2011) should be repealed.

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My research specialism is charity law. I submitted a detailed response on this point to the Law Commission's Consultation on Technical Matters in Charity Law (see extract: LC Analysis of Responses, 16.95). I also published an article in *Public Law*, in 2016, which provides a rather fuller argument than is possible here and concluded that the requirement for the Commission to obtain the AG's consent before making a Reference 'should be abolished, as it risks impairing the Commission's independence, damaging its ability to perform its role and inhibiting more generally the development of charity law': 'The Attorney General and the Charity Commission: one rule without reason?' (2016) *Public Law*, 409-417.

Response

I believe that the Government were wrong to reject the LC's recommendation for the following reasons:

1. The reasons for retaining the need for consent are weak:

(i) The Government's first reason (in the *Government's Response*) was that the need to obtain the AG's consent is 'an important element in the system'. Without any indication of why or how it is important, however, this does not appear to be a good reason for its retention, especially when the weight of argument is against it.

(ii) The Government's second reason was that the need for consent 'assists the AG in fulfilling his duty to protect charitable interests', but it is suggested that charitable interests are not, in fact, put at risk by the Charity Commission's seeking clarity on matters of law from the Tribunal without having to obtain the AG's consent.

(iii) The reason given during the passage of the Charities Bill in 2006 was that the need for consent would reduce costs, avoid duplication of work, prevent the Commission from acting 'inadvertently' without the AG's knowledge and ensure a common understanding behind the approach to be adopted (Hansard, 12 October 2005, HL col 346 (Lord Bassam)). These are unconvincing: costs could actually be increased (and delays incurred) where the AG refuses consent or makes the Reference without accommodating the Commission's concerns and a common understanding cannot be guaranteed by a need for consent. A requirement for the Commission to notify the AG of its intention to submit a Reference would avoid both duplication of work and any risk of the Commission acting without the AG's knowledge.

2. The reasons for repealing the need for consent are strong:

(i) The purpose of the Reference is to give clarity and direction to the Charity Commission as to 'the operation of charity law in any respect or its application to a particular state of affairs'. If the AG refuses consent to the Commission's proposal to lodge a Reference, the Commission is deprived of the opportunity to obtain judicial clarification in areas where it is unsure of the law and/or its application. As a result, the Commission is at risk of not being able to comply fully and most effectively with many of its statutory objectives (s 14), general functions (s 15) or general duties (s 16). For example:

a. How can it determine whether or not an applicant for registration is a charity (s 15(1)), if it is uncertain of the law surrounding the public benefit requirement (which is part of the statutory definition of charity)? Similarly, how can it promote awareness and understanding of the public benefit requirement (s 14) in those circumstances? The Commission's initial refusal to register the Preston Down Trust made it abundantly clear that it was unsure of the effect of s 4(2) on established precedent. This was a crucial question that the Commission considered referring to the Tribunal, but instead it refused registration, so that the law could be tested on appeal. This was an alternative that was referred to twice in a letter from the AG to the Commission (24 March 2011). The point of law, which the AG and Commission both agreed required clarification, was not clarified in the subsequent 'negotiations' between the Commission and the Trust and remains unclear as a result. This is deeply unsatisfactory for the charity sector (especially as vast numbers of formerly excepted religious charities are required to apply for registration). One might say that the Commission was free to make the Reference – and the AG, in fact, gave its consent even though the Commission did not formally request it – but it is my view that the Commission was influenced by the AG's apparent preference for the course of action that it took (see (2016) *Public Law* article, referred to above).

b. How can the Commission encourage and facilitate the better administration of charities (s 15(1)) or promote compliance with legal obligations or the effective use of charitable resources (s 14), if it is unsure of the full extent and nature of those obligations? The AG's recent refusal to allow the Commission to lodge a Reference in connection with the Royal Albert Hall (September 2021) carries the risk of failing to protect charitable interests, failing to provide clarity on charity law and failing to improve accountability.

(ii) Ultimately, by ensuring that the Commission cannot be prevented from seeking clarity from the Tribunal over the same law that the Commission is obliged and expected to follow and apply, the Commission's own resources can be used 'in the most efficient, effective and economic way' (s 16). Continuing to endeavour to perform the statutory objectives, functions and duties, whilst unsure of the law that it is to apply, risks protracted litigation at a later date and confusion along the way.

(iii) The case for removing the need for consent has strong support:

a. The Law Commission recommended removing the need for consent following a detailed and careful consideration of the law and consultees' responses.

b. A clear majority - 17 of 23 - consultees recommended removing the need for consent.

c. The AG acknowledged that the need for consent was not necessary and the AG remains entitled to be a party (s 325(4)).

d. Lord Hodgson, in the statutory review of the Charities Act, also recommended that the need for consent should be removed (Cabinet Office, *Trusted and Independent: Giving charity back to charities* (2013) para 7.30).

(iv) The AG is free to refuse consent *on any grounds* and has stated that he exercises the discretion in the 'public interest'. It does not seem implausible to suggest that consent might be refused based on political considerations, to the detriment of charity law and its development. (A number of commentators have questioned the independence of the AG's role in various respects, including in respect of the Reference that was made in respect of education: P Luxton, Opening Pandora's Box (2012-13) 15 *CL&PR* 27, 49-50). There appears to be no reason for the AG to exercise the sort of 'superintendence' that it exercises over prosecuting departments, where issues of liberty or national security may be present.)

(v) The Commission is most closely involved in matters of charity law and practice and is, therefore, in a good position to identify questions that require answers, without the AG's input. (My view is that the questions that the Commission proposed to refer to the Tribunal, in connection with education, were significantly better than the ones eventually lodged by the AG and would have avoided some of the complexities in the 116-page judgment that members of the Upper Tribunal appeared to regret.)

(vi) The role of the Tribunal in giving consideration to questions of law is to be highly valued, particularly in view of diminishing numbers of charity law cases reaching the courts, in part due to the considerably greater powers conferred on the Commission. (I hold this view, notwithstanding the criticisms that I (and others) have made of the Upper Tribunal's decision in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (which combined a Reference and judicial review of the Commission's guidance in respect of public benefit).) Where that role is denied because the AG refuses consent, the consequences for the charity sector may be severe.

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