CHARITIES BILL: SPECIAL PUBLIC BILL COMMITTEE [HL]

SUPPLEMENTAL WRITTEN EVIDENCE FROM PROFESSOR NICHOLAS HOPKINS, LAW COMMISSIONER

Background

Introduction

1. During my oral evidence to the Committee on 15 September 2021, the Chair asked if I would provide comments on some of the written evidence that had been submitted to the Committee. In subsequent correspondence, the Committee's Clerk identified the evidence on which the Committee would like my comments. In this supplemental evidence, I focus primarily on commenting on the written evidence submitted by those witnesses.

Consultation with stakeholders

2. I am grateful to have had the opportunity to consider the written evidence that has been submitted to the Committee.

3. The evidence gives the Committee a glimpse into the extensive, detailed and helpful engagement that we had with stakeholders during our project. The evidence demonstrates that, particularly in relation to certain topics, there is a range of different views about how the law should be reformed. Conversely, on many topics, there was general consensus amongst consultees (notwithstanding that a few people disagreed).

4. We benefitted greatly from stakeholders' views on reform combined with their practical expertise. Our recommendations are stronger and better as a result of the input and the constructive challenge that we had from stakeholders throughout the project. We took into account all of the different views that were expressed to us in the 91 written consultation responses we received when formulating our final recommendations for reform. In many cases, our recommendations were changed, or refined, as a result of the input that we received from stakeholders. We made a careful, balanced and coherent set of recommendations, informed by the full range of stakeholders' views. Further detail about consultees' views is set out in our Analysis of Consultation Responses, which we published alongside our final Report ("the TICL Report").[1]

5. I am pleased to say that, in relation to issues that were within our Terms of Reference, virtually all of the views that have been expressed to the Committee were also expressed to us during our project (albeit, in some cases, by different consultees). Those views and arguments were therefore taken into account – balanced against competing views and arguments set out by other consultees – in making our final recommendations for reform.

6. We are enormously grateful for the assistance that stakeholders provided to us throughout the course of the project. In my written evidence below, I explain some of the reasoning behind our recommendations and the reasons why we disagree with

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[1] Technical Issues in Charity Law (2017) Law Com No 375. The report and analysis of responses is available at https://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/.

particular comments that have been made to the Committee. That does not detract from our gratitude to those, and all other, stakeholders for their input. It is all part of the important and valuable task of probing, challenging and testing our recommendations.

Topics outside our Terms of Reference, or on which we did not consult

7. Some witnesses have made suggestions for reform in relation to topics that were outside the scope of our project or on which we did not consult and make final recommendations for reform.

8. As set out in my previous written evidence to the Committee, the Law Commission's project examined specific points set out in our published Terms of Reference, and our final recommendations were based on extensive public consultation to ensure that we were aware of the full range of views and potential implications of our recommendations.

9. Accordingly, I can comment on the recommendations that we made and the reasons for them. But I cannot comment on topics that were outside our Terms of Reference, or on which we did not consult and did not make recommendations for reform. If new issues deserve consideration – and in particular wide consultation – then they might be suitable for future work, but I cannot comment on them at this point. If further work were to be done by the Law Commission, we would expect to research the issue in detail, consult publicly, and then make carefully considered recommendations for reform.

10. We hope that the benefits the Bill brings in the areas that it *does* cover are not undermined by disagreement on issues that it does not. The Bill is not designed to address all the areas of charity law that might benefit from reform.

Rejected recommendations

11. Some written evidence submitted to the Committee comments on whether Government was right to reject particular recommendations that we made. As set out in my previous written evidence to the Committee, the Law Commission stands by the recommendations that have been rejected by the Government for the reasons set out in the TICL Report. We recognise, however, that it is appropriately a matter for Government to take a final view on which of our recommendations should be implemented, and Government has disagreed with a limited number of our recommendations for the reasons it has given. Accordingly, it is for Government to respond to any arguments put forward by witnesses concerning rejected recommendations.

(1) Charity Law Association

12. The CLA's response summarises their involvement in the project to date and annexes, as an example of their involvement, their detailed comments on the 2017 draft Bill as published with the TICL Report.

13. The document annexed to the CLA's evidence demonstrates the level of detail with which the CLA's members have considered the contents of the Bill and the very useful comments which they have provided.

14. The table annexed to the CLA's evidence sets out the comments provided by the CLA at the request of the Law Commission (and Government), and were all addressed before the Bill was introduced.

15. We have separately provided a detailed response to each of the CLA's comments. The document runs to 59 pages, and can be provided to the Committee if that would be of assistance. The comments and our responses can broadly be divided into four categories:

    (1) Typographical errors, minor drafting points or missed consequential amendments: these have been corrected.

    (2) Suggested changes to the Explanatory Notes to clarify uncertainty as to the application of the Bill in certain scenarios: these changes have been made.

    (3) Concerns as to whether the drafting of the Bill would give effect to the intended policy: these points have been considered and either the Bill has been amended in response or we have explained why, in our view, an amendment is not necessary.

    (4) Concerns regarding the underlying policy itself: these points have been considered and we have provided appropriate responses, for example, by providing further explanation, by amending the Explanatory Notes, or by making an amendment to the Bill. An example is explained in footnote 5 of my original written evidence, which explained that the CLA identified a gap in the Bill which has now been addressed.

16. We hope that the CLA is largely satisfied with those responses falling into categories (1)-(3), as well as many in category (4). But we expect that some concerns may remain in relation some category (4) responses where no change has been made to the Bill. It may therefore be of assistance if we summarise our views on those areas for the Committee.

The extension of section 42 directions to working names

(Raised in the comments at row 1.1 of the table annexed to the CLA's evidence.)

17. The CLA's concern is that our recommendation to extend the Charity Commission's powers in section 42 to "working names" is not based on a provisional proposal in our consultation paper, and so was not expressly consulted on. Our recommendation on this point arises from suggestions made during consultation and which we subsequently discussed with the CLA (see TICL Report, para 13.30 to 13.34). It is not unusual for us to agree with suggestions made by consultees during our consultations and for us to make final recommendations about those points, even though they were not provisional proposals in the consultation paper. We always analyse and test the idea before doing so. We are satisfied that we have properly considered this recommendation, and Government was aware of the background to the recommendation when accepting it.

18. We discussed this comment further with members of the CLA and they clarified that the heart of the concern lay in finding a coherent definition of "working names". We

have considered this point and revised the Explanatory Notes to provide further guidance on what a working name is: see Explanatory Notes, para 128.

19. We have also reviewed the decision in *Charity Commission v Cambridge Islamic College* [2018] UKUT 351 and have concluded that it does not require any changes in the Charities Bill. The decision in *Cambridge Islamic College* concerned the application of the "too like" test in section 42(2). The judgment provides some guidance on the meaning of "too like" and the factors that can be taken into account by the Charity Commission in deciding whether or not to issue a direction. The same test, and the guidance given by the Upper Tribunal, will apply when the Charity Commission exercises its new power in respect of working names under the amended section 42(1).

Change of purposes for corporate charities

(Raised in the final comment at row 9.2 of the table appended to the CLA's evidence. Bates Wells has also raised similar points in its evidence (see below).)

20. The section 67 similarity considerations do not currently apply when companies and CIOs want to change their purposes but will apply – in a modified form – under our new scheme. The CLA's concern is that this change will result in increased regulation for charitable and companies and CIOs. This concern is similar to the criticism of the proposed section 280A power for unincorporated charities, namely, that in striving for consistency between different legal forms of charities and increased clarity and certainty, the reforms will make things slightly harder for certain charities in certain situations.

21. We considered the same comment in 2017 prior to the publication of the TICL Report and decided that the benefits of consistency outweighed what would be a minor inconvenience for corporate charities. The point is considered at paras 4.130-135 of the TICL Report which explains that we consulted on the question in the Supplemental Consultation Paper and that – while the question divided consultees – a majority favoured applying the similarity considerations to changes of purposes by corporate charities and, for the reasons we gave in the report, we agreed.

The repeal of section 268

(Raised in the comments at row 12 of the table appended to the CLA's evidence. Bates Wells has also raised similar points in its evidence (see below).)

22. The Bill repeals sections 268 and 275 on the basis that it is replaced by the wider power in the new section 280A. The CLA's concern is that sections 268 and 275 are used by a number of charities with restricted funds and would see its repeal as a loss. However, removing this provision does not, ultimately, prevent charities who use sections 268 and 275 from doing anything that they can currently do. Rather, it means that they have to follow a different process, using the new section 280A to make the necessary changes to the governing document.

23. There are great benefits in having one uniform and clear statutory power. Having considered the matter afresh, we still find the reasoning in paras 4.116-4.120 (in respect of section 275) and paras 11.44-11.47 (in respect of section 268) of the TICL Report to be persuasive and we stand by that policy. These provisions may have

added convenience for the charities who can use them, but they also have their own problems which we are seeking to address through the introduction of the new section 280A power.

Trustee majorities

(Raised in the comments at row 12 of the table appended to the CLA's evidence. Bates Wells has also raised similar points in its evidence (see below).)

24. The CLA considers the trustee majority requirements in the new section 280A creates an inconsistency. We have had detailed discussions with the CLA in relation to this point. There is no perfect solution and CLA members have expressed diverging views. Ultimately, our primary aim was to achieve as much consistency as possible across different forms of charities. The 75% majority for trustee resolutions where there are no members is designed to be consistent with the company law position: see para 4.111-114 of the TICL Report.

25. We have reviewed in detail the majorities required for trustee and member resolutions to amend governing documents under the current law and our proposed recommendations. Overall, we are satisfied that our recommendations achieve as much consistency as is possible between different forms of charities and do not impose any significant increased burden on any particular form of charity.

26. This response applies equally to comments regarding the amendment power for Royal Charter charities.

New power for unincorporated charities to change their purposes

(Raised in the comments at row 12 of the table appended to the CLA's evidence. Bates Wells and William Henderson have also raised similar points in their evidence (see below).)

27. Since unincorporated charities will be able to change their purposes under the new section 280A without establishing a section 62 cy-pres occasion (but still requiring Charity Commission consent), there is a concern about the implications for donors. The recommendation for the creation of this new power was a policy decision reached in order to strike a balance between respecting the wishes of founders and donors and allowing charities to remain effective in changing times. The incorporation of the section 67 similarity considerations (in a slightly modified form) into the new s280A (see subsection (10)) provides an important safeguard for the wishes of the donor. The result is a compromise position, but we remain persuaded that the policy is the correct one.

Permanent endowment

(Raised in the comments at row 22.1 of the table appended to the CLA's evidence. Bates Wells has also raised similar points in its evidence (see below).)

28. We have had extensive discussions with the CLA about the best way to define "permanent endowment". We have considered various different approaches to defining permanent endowment, and our conclusion is that the definition, as amended by clause 9 of the Bill, is the best and right one.

29. There appears to be consensus that the current definition in the Charities Act 2011 is problematic and should be improved. In paras 8.28-8.33 of the TICL Report, we explain the difficulties with the current definition, and also the narrow way in which we seek to address the problem: we are seeking improve the definition and remove superfluous and confusing wording, without making any substantive changes. The definition is intended better to match the sector's understanding of the term. We did not have a sufficient mandate from consultation to change the *meaning* of permanent endowment, and such a change would require very careful consideration.

30. The CLA has specifically asked whether the definition should expressly exclude, or include, "expendable endowment". Our view is that it is unnecessary and undesirable for the definition of permanent endowment to expressly address the question. To do so would be asking the wrong question and making an inappropriate generalisation. It would go beyond the purpose of having a definition of "permanent endowment" in the Act and would ignore the inherent limitations of that definition. To expand on those points:

    (1) In practice, a fund that is described as "expendable endowment" would probably usually amount to "permanent endowment" under section 353, because it is a fund that is subject to a restriction on spending the capital – and the fact that the trustees have a means to release that restriction does not change the fact that a "restriction" exists.

    (2) The key question in determining whether a fund is permanent endowment is whether there is a restriction on spending capital – and that question has to be considered in each individual case by looking at the particular restriction that applies to a particular fund/asset.

    (3) In the TICL Report, a fundamental plank of the Law Commission's reasoning was our conclusion that it is not possible to make generalisations about "all permanent endowment": just because a fund falls within the statutory definition does not automatically mean that the fund always has other particular characteristics (such as "it can never be held by a company", or that "it is always held on trust", or that "it can never be mortgaged"): see paras 8.7 - 8.27 of the TICL Report. It is the same for "expendable endowment" – it is not possible to make generalisations about all expendable endowment. Legislation should not, and cannot, dictate that "expendable endowment is (or is not) permanent endowment".

    (4) The purpose of the definition of "permanent endowment" in the Act is to identify funds that have certain statutory powers available to them (for example, the power in sections 281 and 282), or which are subject to certain regulatory requirements (for example, in the new section 280A and in existing section 292B). To achieve that purpose, it is necessary to assess individually whether a particular fund falls within the statutory definition – and that depends (under the current law and under the Bill) on whether there is a restriction on spending capital.

    (5) So we maintain our policy of seeking to overcome the technical problems with the current definition, without changing the meaning of the definition, and

without making a generalised provision that "expendable endowment is/is not included within the definition".

(2) Bates Wells ("BW")

31. BW are generally supportive of the Bill but express the view that a few of the recommendations run counter to the objectives of reducing unnecessary and overly bureaucratic regulation and giving charities wider or additional powers and flexibility. Specifically:

    (1) the reforms to changing purposes and amending governing documents. It says that:

        (a) there are inconsistencies between the proposed rules for different legal forms such that the powers will not be aligned as intended;

        (b) aspects of the new regime will result in increased red tape for many charities;

        (c) sections 267-274 and 275 should be retained on the basis that there are no advantages to repealing these provisions given the increased bureaucracy and cost for small charities and funds.

    (2) the reforms to permanent endowment. It suggests that:

        (a) the new definition could be clarified; and

        (b) the removal of the income test will result in more endowment funds being brought within the scope of section 282, contrary to the policy objective.

    (3) the administration of the new rules in relation to working names.

    (4) the new power for trustees to make *ex gratia* payments should be located elsewhere in the Act.

    (5) the Bill should be amended to include a new "social disposal" power.

    (6) the Charity Commission should take a proportionate approach to its exercise of its new power to confirm trustee appointments.

32. The vast majority of the concerns raised by BW have been raised with us previously by the CLA Working Party. We therefore refer the Committee to our response to the CLA's evidence above. In addition, a more detailed response to these points is available in our full response to the CLA's comments which can be provided to the Committee if that would be of assistance.

Amending governing documents – companies and CIOs

33. BW raise a similar point to the CLA. See our response in paragraphs 20 to 21 above.

34. A majority of consultees who responded to our Consultation Paper question regarding alignment of the amendment regimes for companies, CIOs and unincorporated charities, expressed firm views in favour: see para 4.52 of the TICL Report. We

consulted further on this point in our Supplementary Consultation Paper, specifically in relation to how the law of cy-près should apply, if at all, in a more aligned regime. The question caused significant divergence of opinion between consultees, but a majority were in favour of applying the similarity considerations to changes of purposes by corporate charities: see para 4.133.

35. The benefits of this approach include greater transparency as to how the Charity Commission will exercise its discretion and, in our view, the slight increase in regulation is outweighed by the increase in certainty: para 4.134. Further, from the perspective of protecting the wishes of donors, consultation responses persuaded us (contrary to the provisional view we expressed in the Consultation Paper) that little if any attention will be paid to the legal form of the charity to which they are donating (and therefore the basis on which the purposes of the charity could be changed). Consequently, the protection offered ought to be the same for all forms of charity: para 4.135.

36. BW make a specific point regarding unincorporated charities with express amendment powers not having to seek Charity Commission consent to a change in purposes unless the express power so requires, and the Charity Commission applying a more relaxed test in those cases (para 4.10.2 of BW's evidence). This view is something we took into account when weighing up the competing arguments on this issue: see para 4.71(2) of the TICL Report. We specifically recognised that there would not be complete alignment between the regimes for unincorporated charities and for charitable companies and CIOs for this reason: see para 4.78 of the TICL Report.

37. As to the point regarding consideration of the objects of the company when it was established (para 4.10.3 of BW's evidence), this criterion is only one of those which is to be considered by the Charity Commission. Additionally, the Charity Commission is required to consider "the desirability of securing that the purposes of the company are, so far as reasonably practicable, similar to the purposes being altered". Therefore, if a charitable company or CIO has changed its purposes frequently over time, the most recent purposes will be taken into consideration in the consent process.

38. The same responses apply to the comments concerning CIOs (para 4.11-4.14 of BW's evidence).

Amending governing documents – unincorporated charities

39. The reason for requiring that regard be had to the original purposes of a charity (para 4.21 of BW's evidence) is that this provides protection for the wishes of the original donor. This is a modernised version of "the spirit of the original gift" consideration in section 67. As set out above, the second consideration – "the desirability of securing that the purposes of the charity are, so far as reasonably practicable, similar to the purposes being altered" – means that regard will also be had to any change in purposes over time.

40. The argument that charities ought to be able to exclude the new amendment power in their governing documents (para 4.21.2 of BW's evidence) is one that was made during the consultation. Our reasons for concluding that it should not be possible to restrict or modify the new power are set out at para 4.98-4.100 of the TICL Report.

41. In para 4.21.3 of BW's evidence, BW refer to the new consistent test that will be applied when the Charity Commission decides whether to consent to a charitable company or CIO changing its purposes, and when an unincorporated charity changes its purposes under the new section 280A. BW ask whether the Charity Commission will apply that same test when an unincorporated charity changes its purposes pursuant to an *express* amendment power (rather than under the new section 280A), or whether the test that is currently used – which BW say is less strict – would apply. We have raised this point with the Charity Commission, who inform us that they will continue to apply the current test, but that the two tests are in fact similar in practice.

42. As to the concern expressed at para 4.21.5 of BW's evidence, a number of consultees to our initial consultation considered that the section 62 cy-près occasions were unnecessarily restrictive, unclear and poorly understood: para 4.54 of the TICL Report. This view fed in to our consideration of whether there should be alignment of the alteration regime for incorporated and unincorporated charities in our Supplementary Consultation Paper. In that paper we set out three options for reform which are described at paras 4.65-4.74 of the TICL Report. Ultimately, the vast majority of consultees supported our "middle ground" option which would effectively by-pass the need for a section 62 cy-près occasion but not necessarily the entire law of cy-près: see paras 4.75-4.76. There is a balance to be struck between respecting founders' wishes and ensuring charities operate effectively in modern social and economic times. Our policy conclusion was that there should be some restriction on dead-hand control – see, for example, para 4.98(6). Nonetheless, we recognised the concerns raised by consultees about giving trustees the power to change a charity's purposes without having to establish a section 62 cy-près occasion, and chose to adopt various safeguards to mitigate against the risks identified: see paras 4.93-4.97. We expressly took into account the arguments about respecting the founders/funders, and potentially discouraging future founders/funders: for example, see paras 4.53, 4.66, 4.99, and 4.100 of the TICL Report.

43. The repeal of section 275 (para 4.21.4 and 4.22-4.28 of BW's evidence) is discussed at paras 4.116-4.120 of the TICL Report. We recognise that there are arguments for and against this aspect of our reforms but stand by the reasoning set out in that section of the Report. See our response to the CLA's comment at paragraphs 22 to 23 above.

Power for small charities to merge by transferring property under section 268 and 273

44. BW raise a similar point to the CLA. See our response at paragraphs 22 to 23 above. As with the repeal of section 275 above, the concerns raised at para 4.30-4.36 of BW's evidence were taken into consideration in reaching a decision on whether or not to repeal sections 268 and 273. Our reasoning is set out at paras 11.44-11.47 of the TICL Report.

Power to amend trusts of an unincorporated charity

45. BW raise a similar point to the CLA. See our response at paragraphs 24 to 26 above. The question of what majority of trustees and members of a charity should be required in exercising our proposed amendment power (para 4.39 of BW's evidence) is one to which we gave detailed consideration, taking into account the call for consistency from

consultees. Our reasoning for the policy position which we ultimately adopted is set out at paras 4.111-4.114 of the TICL Report. We stand by that reasoning.

Royal Charter charities – new power of amendment

46. As above, the question of the appropriate majorities for the new amendment power (para 4.41 of BW's evidence) is one which we considered at some length in light of the views expressed by consultees. Our reasoning is set out at paras 5.49-5.50 of the TICL Report.

Permanent endowment – new definition

47. BW raise a similar point to the CLA. See our response at paragraphs 28 to 30 above. The new definition is no different from the current law in terms of whether it captures "expendable endowment". As for distinguishing between functional and investment permanent endowment, that would involve a substantive change to the meaning of permanent endowment, and we did not have sufficient mandate from consultation to make this specific change, or to make any substantive change.

Permanent endowment – power to release restrictions (paras 5.8.1-5.8.4)

48. We discuss the financial thresholds in sections 281 and 282 at paras 8.66-8.76 of the TICL Report, and our conclusions on the need for reform are at paras 8.77-8.88. Paragraphs 8.86-8.88 specifically address the question of what the threshold should be.

Working names

49. See our response to the CLA comment at paragraphs 17 to 19 above. The concern expressed at para 6.3 of BW's evidence is considered at para 13.31-13.34 of TICL the Report.

Ex gratia payments

50. BW suggest that the new section 331A be moved to follow after section 106 as a new section 106A. This point was raised by the CLA in 2017 and again before the Bill was introduced. We have reached the conclusion that, while section 106 also deals with *ex gratia* payments, it is within a group of provisions that deal with powers of the Charity Commission, the Attorney General and the Court to authorise various dealings with charity property. The new power, by contrast, is for the trustees to authorise such dealings.

Suggested new "social disposal" power

51. BW suggest the creation of a new "social disposal" power (section 8 of BW's evidence). We think that what BW is suggesting can already be achieved without any further modification to the Bill or the Charities Act 2011. We previously recommended the creation of a new statutory power for charities to make social investments, which was implemented in the Charities (Protection and Social Investment) Act 2016, inserting a new section 292A-C into the Charities Act 2011. It is therefore already possible for charities to make social investments, which are defined as the application or use of funds or property with a view to directly furthering the charity's purposes and achieving a financial return. A disposal of land would fall within the broad range of transactions that are covered by the definitions in section 292A.

52. The power in section 292B sits alongside the duty on trustees to obtain advice when disposing of land. If a social investment includes the disposal of land, the requirements in Part 7 of the Charities Act 2011 must be complied with. Clause 18 of the Bill amends an exception to the Part 7 advice requirements, and provides that the trustees do not have to obtain advice if the disposal is a gift to another charity. If, however, the disposal is made with a view to achieving the best price that can be obtained, or if it is partly motivated by the price that is being obtained (as well as being motivated by advancement of the charity's purposes, making it a "social investment" within the definition in section 292A), then the advice requirements in Part 7 will apply. Our reasons for that policy are set out in paras 7.253 – 7.263 of the TICL Report.

53. The separate requirement in section 119(1)(c) to achieve the "best terms" does not change that position: a disposal of land which is a social investment should be on the "best terms" reasonably obtainable (viewing the transaction as a whole, taking into account the financial return and the advancement of the charity's purposes). It does not require the disposal to be at the "best *price*" reasonably obtainable.

54. We do not, therefore, consider that any further amendment to the Bill is needed to address this point.

Power of the Charity Commission to confirm trustee appointments

55. We have raised the concern in para 9.4 of BW's evidence with the Charity Commission, which has confirmed that it is considering how it might use the power. The Commission has a statutory duty to have regard, where relevant, to principles such as proportionality, when exercising its regulatory powers.

(3) Charity law and policy unit, University of Liverpool

56. The CLUP's response summarises their involvement with the project and states their general support for the reforms, in particular those which increase uniformity in the treatment of charities with different legal structures, those which will resolve technical issues, and those which update regulatory regimes to allow charities to run more efficiently. The CLUP disagree with the Government's rejection of recommendations 18 (advertising disposals of designated land), 27 (review of basis on which decisions of the CC can be challenged) and 40 (authority to pursue charity proceedings).

Trustee training

57. The CLUP suggest that Part 4 of the Bill be amended to include a provision requiring trustees to undertake appropriate training.

58. Appropriate training for trustees, and useful guidance from the Charity Commission, are of course important to ensure that trustees are well-equipped to pursue the charity's purposes. However, the adequacy of trustee training requirements was not an issue that was raised with us for consideration during the course of our project. It is not something that we consulted upon and it would not be appropriate for us to make new recommendations about this point at this late stage. The Charity Commission will be ensuring that guidance is provided to trustees on the changes made by the Bill and we hope that those in the sector will provide suitable training in these areas.

(4) Dr John Picton

Return of funds from failed non-charitable appeals

59. Dr Picton suggests that recommendation 11 (return of funds to donors following a failed appeal) be expanded to cover non-charitable appeals.

60. This suggestion goes beyond the scope of our project. This part of the Report stemmed from Lord Hodgson's recommendation that "proceeds of a failed appeal should be applied for the charity's general purposes unless the donor expressly requests otherwise": TICL Report, para 6.2. The difficulties that we are seeking to address are summarised at para 6.23 and are specifically related to fundraising appeals by charities.

The basis for making ex gratia payments

61. Dr Picton suggests that the clauses relating to recommendation 28 (*ex gratia* payments) non-exhaustively define the bases on which ex gratia payments can be made and, specifically, that they expressly state that trustees are able to make reparative payments in the light of harms caused by a founder or major donor (i.e. abuse cases).

62. Our recommended reforms to the law governing *ex gratia* payments was limited to providing charity trustees with the power to make small payments without having to seek consent from the Charity Commission, the court or the Attorney General. The new power will be exercisable on the same basis as the Charity Commission's existing power to authorise *ex gratia* payments under section 106 of the Charities Act 2011. Consultees did not raise concerns regarding the basis for authorising *ex gratia* payments under that existing power, but rather with the costs and time involved in seeking authorisation being disproportionate in the context of small payments. See TICL Report, paras 10.2-10.4.

63. Section 106(1) provides a specific and tailored power for such payments to be made where the trustees have no power to do so but "in all the circumstances regard themselves as being under a moral obligation". This is an extension to trustees' powers beyond those conferred by the common law and under the charity's governing document.

64. Further, any *ex gratia* payment is likely to lead to a financial detriment being suffered by the organisation (take the examples given at Figure 19 of the Report, p252). Accordingly, we cannot see why reparative payments for harms caused by a founder or major donor could not fall within this power in appropriate circumstances.

65. Finally, we do not agree that trying to provide even a non-exhaustive list of the myriad of circumstances in which trustees may consider themselves to be under a moral obligation to make a payment in legislation would be helpful. The Charity Commission produces guidance on *ex gratia* payments to assist trustees.[2]

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[2] See Charity Commission, *Ex Gratia Payments by Charities* (CC7) (May 2014) p 2, available at https://www.gov.uk/government/publications/ex-gratia-payments-by-charities-cc7

Gifts to charity not by way of trust

66. Dr Picton suggests an area of further reform, in relation to outright gifts made to charities by will (as opposed to those made by way of trust). Such gifts are not regulated by the Charity Commission but by the Crown's Law Officers. Therefore, if the gift fails (for example, because it is made to a charity that no longer exists), the Charity Commission cannot act to and apply the gift cy-près, even if there is a general charitable purpose. Dr Picton says that currently there is no published information on how such gifts are dealt with by the Crown's Law Officers. He recommends that the Crown's jurisdiction is removed, and the Charity Commission given a statutory power to deal with these gifts.

67. This issue was not raised with us while the project was ongoing, and it is not an issue on which we have consulted or made recommendations for reform. We consider that this is an area in which any reform would require careful consideration following consultation.

(5) Dr Mary Synge

68. Dr Synge sets out her objections to the Government's rejection of recommendation 43 (Attorney General consent to references by the Charity Commission to the Charity Tribunal).

69. As stated above, it is for Government to respond to the arguments made in support of this rejected recommendation.

(6) William Henderson

The law of cy-près

70. Mr Henderson expresses concerns about "the easing of the constraints on the circumstances and ways in which the purposes of charities can be altered at the behest of current trustees and regulators".

71. A similar comment was made by BW, and we respond to this point in paragraph 42 above.

Power to change purposes in section 280A

72. Mr Henderson says that it is unclear whether the power to alter the purposes of a charity still requires a cy-près occasion to occur (under section 62).

73. The new amendment power is <u>not</u> subject to the constraints of section 62. This point could be clarified in the Explanatory Notes.

Statutory charities

74. Mr Henderson disagrees with clause 5 of the Bill, which allows orders amending governing documents of statutory charities to be subject to the negative procedure (as opposed to the current law, which requires the affirmative procedure in certain circumstances).

75. We do not agree. Amendments would still be subject to Parliamentary oversight, since the negative procedure means that Parliament can still require a vote on a proposed

order under section 73. We discuss the competing arguments and set out our reasoning in para 5.115 to 5.118 of the TICL Report. The proposal was unanimously supported by consultees (see para 4.155 of the Analysis of Responses), and the DPRRC was also content with this provision.

76. Mr Henderson also comments on section 73(5), which allows a scheme under section 73 to be amended again in the future without Parliamentary oversight.

77. That is an existing provision in the Charities Act 2011, and the Bill makes no change to it.

Clause 8: schemes

78. Mr Henderson suggests that the proposed new section 75ZA may have a wider reach than is intended, sidestepping sections 68 and 73.

79. We do not agree. The new section 75ZA is expressly "subject to the provisions of this Act" (section 75ZA(2)(a)). It is therefore subject to section 68 and 73. The point is explained in para 72 of the Explanatory Notes.

Ex gratia payments

80. Mr Henderson suggests that the amendment to section 106 removes the requirement that the charity trustees should regard themselves as under a moral obligation without identifying a substitute test which they should apply.

81. We do not agree. The test remains the same, and is a test of whether there is a moral obligation. The only change to the test is to ensure that the decision can be delegated by the trustees, if they wish to do so. If they do not delegate the decision, then the trustees will still be making the decision, and the basis of the decision will be the same as under the current law.

82. Mr Henderson suggests that allowing statutory charities to make *ex gratia* payments would thwart the will of Parliament.

83. We do not agree. The new section 106(1A) works on the basis that a general statement made about the purposes of a charity should not be taken as (and is extremely unlikely to have been intended to have the effect of) preventing the very specific case of *ex gratia* payments being permitted. All the new provision does is say that a general statutory provision which states that "all a statutory charity's property should be applied for Charitable Purpose X" does not mean that *ex gratia* payments are prohibited – they are a very limited and specific type of payment which should, as a matter of policy, be available to all charities. Our reasoning is explained in para 10.48 to 10.53 of the TICL Report, where we expressly considered the question of Parliamentary intent.

84. Mr Henderson also says that the Commission and the Attorney General might face the predicament of not knowing how much weight (if any) to attach to the requirements of the legislation, exemplified by the decision in *Attorney General v British Museum Trustees* [2005] EWHC 1089 (Ch), [2005] Ch 397.

85. The British Museum case is unusual: most *ex gratia* payments are simpler cases, arising in the administration of wills. In difficult cases such as the British Museum case, it is highly likely that the Charity Commission would not itself decide to authorise the *ex gratia* payment, but would instead refer the matter to the court for a decision. The provision gives the court a discretion, and the court would take into account all the relevant factors pointing in both directions before making a decision.

86. What the provisions in the Bill do is remove the *automatic* prohibition on statutory charities making *ex gratia* payments. It still then, however, becomes a question of the trustees having to make a decision, subject to scrutiny by the Charity Commission or court. *Ex gratia* payments are currently rare and will remain rare. But rather than being *impossible* for statutory charities, they will at least be possible, and that was supported by consultees.

Conclusion

87. If there are points on which the Committee would like further detailed explanation, I am happy to provide further supplementary evidence.

Professor Nicholas Hopkins

Law Commissioner

7 October 2021