CHARITIES BILL: SPECIAL PUBLIC BILL COMMITTEE [HL]

ADDITIONAL SUPPLEMENTAL WRITTEN EVIDENCE FROM PROFESSOR NICHOLAS HOPKINS, LAW COMMISSIONER

Introduction

1. I have provided to the Committee:

   (1) initial written evidence, dated 10 September 2021;

   (2) oral evidence, on 15 September 2021; and

   (3) supplemental written evidence, dated 7 October 2021, at the request of the Committee. That evidence set out my comments on other written evidence that had been submitted to the Committee.

2. The Committee has requested that I provide additional supplemental written evidence, to provide my comments on the written evidence of Professor Gareth Morgan.

3. This additional supplemental written evidence should be read alongside my previous evidence to the Committee, which I will not repeat here.

Comments on written evidence from Professor Gareth Morgan

4. Professor Morgan largely supports the Bill. I will comment only on the points that he disagrees with.

Clause 3: powers of unincorporated charities

5. The Bill repeals sections 267 to 280 of the Charities Act 2011, and replaces them with a new general power for unincorporated charities to make amendments to their governing documents, in a new section 280A. Prof Morgan does not agree with the repeal of sections 267-274.

6. I responded to similar comments from the Charity Law Association and Bates Wells in my supplemental evidence of 7 October: see paragraphs 22-23, 43, 44. Our conclusions are set out in paragraphs 4.116-4.120 and 11.44-11.48 of the TICL Report.

7. There are good arguments both ways, which were expressed to us during the project and which we took into account in reaching our final recommendation. On balance, however, I remain of the view that sections 267 to 280 should be repealed.

8. Currently, sections 267 to 280 set out an ad hoc patchwork of statutory powers. They are the result of a series of sticking plasters, layered and adjusted over the years.

9. In our project, we started by considering whether these provisions could be expanded and improved – and we consulted on some potential changes to them (which is what Professor Morgan is suggesting): see Consultation Paper, paras 5.24-5.37 and 12.44-12.54. However, with the benefit of consultation responses, we reached the conclusion that further sticking plasters were not appropriate here (see TICL Report, para 4.62). If you were designing a scheme from scratch, it is inconceivable that legislators would design the current law in sections 267-280 as the best set of processes for amending governing documents. We needed to start again.

10. In seeking to design the new scheme, we considered what is actually needed, how it can most simply be achieved, and what level of regulation is necessary and appropriate. It was not a "race for the bottom", where *everything* is brought down to the lowest level of regulation that *currently* exists in *certain* cases.

11. What we have achieved is removing 14 complicated sections of the Charities Act 2011 covering a range of different and uncertain specific cases, replacing them with 2 sections which provide a single general power that can achieve everything that the current law achieves, and more.

12. The result is that, in some specific cases, where a particular charity happens to fit within the scope of a particular existing provision, the new single process might not be quite as convenient. But looked at from the point of view of charities as a whole and ensuring that the regulatory regime is clear and certain, the reforms are advantageous. And crucially, the Bill does not ultimately prevent charities from doing anything that they can currently do.

13. Prof Morgan suggests that the existing statutory provisions (sections 267-274) should be retained and improved. As noted above, that is how we initially approached sections 267-280. However, the existing provisions have their own problems, which were clear to us from consultation: see TICL Report, para 4.118, and Analysis of Responses, paras 5.50-5.113, and 12.5-12.52. For example:

    (1) The restriction on designated land, which Professor Morgan suggests could be removed, was supported by some consultees: see Analysis of Responses, paras 5.70-5.86, and 12.16-12.19.

    (2) Prof Morgan refers to the benefits of the existing provisions which allow certain steps to take effect automatically as long as the Charity Commission does not object within a certain time period. But some consultees did not like that structure, and explained problems of a deemed consent regime. For example, there can be uncertainty about whether a resolution has been received by the Charity Commission and therefore whether the resolution has been effective. Those consultees said that they would prefer to have a written document from the Charity Commission confirming that the resolution had been received, considered and decided, rather than having no document at all and having to rely on 60 days of silence (see, for example, Analysis of Responses, paras 5.42(3), 9.43, and 12.12).

14. I would not, therefore, suggest retaining the existing provisions, because that would be to retain the ad hoc patchwork of sticking plasters which themselves have their own problems. Nor do I agree that those existing provisions could be redrafted into a simple, single section – that would require considerable further work, similarly to the lengthy and careful work that we did to prepare section 280A itself.

15. Finally, I would suggest that the concerns expressed in relation to Prof Morgan's worked examples are overstated:

    (1) A dissolution clause might not be necessary at all: as consultees told us, charities can sometimes merge (which includes a transfer of operations to a CIO) simply by transferring their assets to the CIO (with similar purposes) as an

application of funds in pursuit of their charitable purposes: see TICL Report, para 11.22, and Analysis of Responses, para 12.6 and 12.9.

(2) If a dissolution clause does need to be added, Prof Morgan refers to the need for two resolutions. In relation to the charity's first resolution (to amend its governing document), I do not agree that a completely new trust deed would be required, taking 6 months and costing £1,000. Rather, a resolution could be passed under section 280A which simply incorporates a single new paragraph into the existing governing document: there is no need for a completely new constitution which will become redundant shortly afterwards.

Clause 6: language of cy près

16. Accessible language is, of course, beneficial. However, cy près is an established and well-known principle in charity law, and there are existing provisions in the Charities Act 2011 (which the Bill does not amend) which use the term. We did not consult on changing it.

Clause 7 and the nature of Charity Commission consent

17. Prof Morgan suggests that resolutions should take effect automatically after notification, rather than requiring an express consent from the Charity Commission. I comment on the opposing arguments in paragraph 13(2) above. Consultees expressed mixed views. We took the view that an express consent from the Charity Commission was helpful for the trustees.

Clause 9: permanent endowment

18. My comments in paragraphs 28 to 30 of my supplemental evidence of 7 October 2021 explain the limited drafting change that the Bill makes to the definition of permanent endowment, which addresses Prof Morgan's comments.

Clause 12: power to borrow from permanent endowment

19. As Prof Morgan points out, the new power to borrow from permanent endowment is aimed at borrowing from an investment fund. It does not facilitate borrowing by mortgaging land which is permanent endowment: TICL Report, para 8.2 and 8.126. The Charity Commission considers that securing borrowing against land which is permanent endowment is already possible, though the point is uncertain: see Analysis of Responses, para 9.11(1). We referred to this uncertainty in paragraph 8.11(3) of the TICL Report and concluded in that chapter that it is not possible to provide a universal answer to this question – the position will be fact-specific: see paragraph 30(3) of my supplemental evidence of 7 October 2021.

20. Section 124 is a stand-alone requirement, and it applies whether or not the land being mortgaged is permanent endowment.

Clause 14: special trusts

21. The clause moves an existing definition – unchanged – to another part of the Act. We did not consult on any change to the defined term, and have not considered any potential implications. I would suggest that any change would require careful consideration and consultation.

Clause 30: Remuneration of charity trustees etc providing goods or services to charity

22. Prof Morgan suggests a simplified procedure for obtaining consent to trustees amending governing documents to remove express provisions that authorise remuneration of trustees. A regulated alteration is an amendment which "would *provide authorisation* for any benefit to be obtained by" the charity trustees or members" (section 198(2)(c), 226(2)(c), and 280A(8)(c)). *Removing* a provision that authorises the remuneration of trustees would not be a regulated alteration, so the amendment contemplated by Prof Morgan would not require Charity Commission consent.

Clauses 34 to 35: vesting declarations

23. Section 310 of the Charities Act 2011, and regulation 61 of the CIO (General) Regulation 2012, are complicated. We set out our recommendations on this subject in chapter 12 of the TICL Report. In relation to Prof Morgan's comments, see in particular, paras 11.50-11.81 and 11.134-11.137. Generally speaking, where existing provisions are set out in secondary legislation, we have not sought to elevate them to primary legislation.

Clause 40: minor and consequential provisions

24. Prof Morgan suggests more radical reform of Schedule 6 to the Charities Act 2011. We made a recommendation for Schedule 6 to be reviewed (TICL Report, Recommendation 27), but that recommendation was rejected by Government.

25. In relation to the definitions of connected persons, we consulted on "connected persons" within the Part 7 regime regulating disposals of land (TICL Report, paras 7.185-7.215), but we did not consult on changing the definitions throughout the Act, and the issue was not within our Terms of Reference. It is not a simple matter because consideration needs to be given to different definitions in other pieces of related legislation (e.g. Companies Act 2006). We do not have an evidence base, or mandate from consultation, to be able to recommend any change. We do, however, include in clause 39 of the Bill a new power to amend the definitions of "connected person" in the Act by secondary legislation, which would allow for potential problems with the definition to be resolved.

Clause 41: Extent, commencement and short title

26. Clause 41 deals with commencement. We understand that Government plans to implement the Bill in stages, in discussion with the Charity Commission.

Professor Nicholas Hopkins
Law Commissioner
18 October 2021