

CHARITIES BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department for Communities (“the Department”) in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

2. The Memorandum needs to be read in conjunction with the Bill. It is not, and neither is it meant to be, a comprehensive description of the Bill. Where a clause or part of a clause does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. In February 2020 the Court of Appeal dismissed the Appeal by the Charity Commission for Northern Ireland (the Commission) against Madam Justice McBride’s High Court Judgment of May 2019, which found that the Charity Commissioners were the body corporate, “the Commission”, and that they do not have implied or express power to delegate their functions to staff acting alone. The Judgment rendered decisions taken by Commission staff unlawful where the staff member’s authority to take the decision depended on the Commission having delegated a statutory power or duty.

4. The Bill will amend the Charities Act (Northern Ireland) 2008 (the Act) with retrospective effect to render lawful previous decisions taken by Commission staff in reliance on unlawful delegation in cases where doing so is consistent with rights under the European Convention on Human Rights (ECHR) and the decision is not unlawful on other grounds. It will provide a power of delegation to Commission staff going forward provided the functions to be delegated are set out in a Scheme of Delegation approved by the Department, but will stipulate that certain functions can never be delegated to staff.

5. In addition the Bill will insert a power to enable the Department to introduce a registration threshold at some future point, via regulations, subject to the draft affirmative procedure.

CONSULTATION

6. No formal consultation was undertaken as the Bill is technical in nature, will return the majority of charities to the status which they previously enjoyed and was of benefit to them, provide a limited power of delegation to Commission staff if approved by the Department, and provide a power to introduce a registration threshold at a later date via regulations, which themselves would be subject to consultation.

OPTIONS CONSIDERED

7. With regard to staff decisions rendered unlawful by the Judgment, the larger part of which consisted of decisions to include a charity in the register of charities, the Department considered 3 options:

- (i) Do nothing;
- (ii) Creating a new register of charities via subordinate legislation; and
- (iii) Primary legislation with retrospective effect to make decisions taken by Commission staff lawful with suitable ECHR protections.

8. Do nothing was rejected as all decisions would remain unlawful and none of the potential harm to the charity sector would be addressed.

9. Creating a new register of charities via subordinate legislation was rejected as no suitable power to establish such a register is contained within the Act. Such an option, if viable, would have done nothing in respect to the other unlawful decisions.

10. Primary legislation with retrospective effect with suitable ECHR protections was chosen as it is the only way to render previous decisions made by staff lawful, thereby providing protections to charities that may have been left vulnerable by a situation not of their making. It is also the only way to provide an express power of delegation to staff and a power to introduce a registration threshold via regulations.

OVERVIEW

11. The Bill has 3 substantive clauses. Any reference in this Memorandum to a numbered section is to that section of the Act. A commentary on the provisions follows (comments are not given where the wording is self-explanatory).

COMMENTARY ON CLAUSES

Clause 1: Actions of Commission staff treated as Commission actions

Clause 1 makes provision with retrospective effect to make the majority of decisions taken by Commission staff lawful and provide fresh appeal rights for those decisions in accordance with Schedule 3 to the Act.

Importantly, decisions which are the subject of ongoing litigation or were taken under sections 22(6), 24(1) and decisions to make an order under sections 33-36 will not be subject to the clause in order that individuals' rights under Article 6 or 8 of, or Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR) are protected. Such decisions will therefore remain unlawful, as will decisions which were additionally unlawful on grounds other than the unlawful-delegation ground. Where an unlawful decision has been replaced by a fresh lawful decision before the Bill becomes law, the Bill does not alter the operation of that replacement decision.

Clause 2: Power of Commission to delegate to staff

Clause 2 inserts paragraph 9A into Schedule 1 to the Act allowing for certain functions to be delegated to staff provided they are set out in a Scheme of Delegation approved by the Department. It also stipulates that the following can never be delegated: power under section 22(1) to institute an inquiry; decisions under section 22(6) that a report or statement be published; power to make an order under sections 33 to 36; and any statutory power of the Commission to make regulations.

Clause 3: Power to introduce a registration threshold via regulations

Clause 3 inserts new sections 16A to 16C which provide a power to introduce a registration threshold through regulations at some future point, subject to the draft affirmative procedure (except in the case of varying the amount of an existing threshold)". The power will allow for the regulations to:

- exempt charities falling below the threshold from the requirement to register;
- determine the nature of the threshold;
- determine any evidence to be provided to the Commission and allow for that evidence to be used in pursuance of the Commission's functions;
- apply or dis-apply any provision of the Act to any charity exempted from registration by the threshold; and
- amend any offences or introduce similar or corresponding ones as a consequence of the threshold.

The clause itself will permit charities falling below the threshold to register voluntarily or be removed from the register if they so wish.

FINANCIAL EFFECTS OF THE BILL

12. It is not anticipated that the Bill will give rise to any additional expenditure.

HUMAN RIGHTS ISSUES

13. The provisions of the Bill are compatible with the European Convention on Human Rights.

EQUALITY IMPACT ASSESSMENT

14. A screening exercise was undertaken on the proposals in accordance with Section 75 of the Northern Ireland Act 1998 and did not identify any issues adversely affecting any Section 75 groups.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

15. A Regulatory Impact Assessment has been completed. No negative impacts were identified.

DATA PROTECTION IMPACT ASSESSMENT/DATA PROTECTION BY DESIGN

16. A Data Protection Impact Assessment has been completed. No negative impacts were identified.

RURAL NEEDS IMPACT ASSESSMENT

17. A Rural Needs Impact Assessment has been completed. No negative impacts were identified.

LEGISLATIVE COMPETENCE

18. At introduction, the Minister for Communities, Ms Deirdre Hargey had made the following statement under section 9 of the Northern Ireland Act 1998:

“In my view the Charities Bill would be within the legislative competence of the Northern Ireland Assembly.”