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Communities

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Dr Janice Thompson
Communities Committee Clerk
Room 430
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Dear Janice,

CHARITIES BILL

At the briefing provided for the Committee on 6 May 2021, officials advised of their intention to seek to introduce a Charities Bill. This letter is to provide the Committee with a copy of the draft Bill and the associated Explanatory and Financial Memorandum.

In summary, the draft Bill contains four clauses which:

- amend the Act, with retrospective effect, to render previous decisions taken by staff of the Charity Commission lawful, where the staff member's authority to take the decision depended on the Commission having delegated a statutory power or duty;
- carve out decisions which are the subject of ongoing litigation or which were taken under sections 22(6) and 24(1), and orders made under sections 33-36, so that these are not subject to the Amendment, thereby protecting individuals' rights under Articles 6, 8 and Article 1 Protocol 1 under the European Convention on Human Rights (ECHR). Such decisions and orders will therefore remain unlawful;

- introduce fresh appeal rights as stipulated in Schedule 3 to the Act, applicable from the date of Royal Assent for decisions made lawful by the Bill;
- expressly state that the rendering of registration decisions lawful by the Bill will not impose a duty on those charities to retrospectively provide Annual Reports and Accounts in accordance with Part 8 of the Act;
- expressly state that where a charity has sought and been given a subsequent decision it will supersede any previous decision made lawful by the Bill;
- provide a power for future delegation to Commission staff going forward provided it is set out in a Scheme of Delegation to be approved by the Department. The Bill will stipulate that powers under sections 22(1) and 22(6) to institute a statutory inquiry and publish any resultant report, to make orders under sections 33-36 and the powers to make regulations can never be delegated to staff;
- provide a power to introduce a registration threshold, at some point in the future, via regulations which would be subject to the draft affirmative procedure;

Minister has now written to Executive Colleagues to seek their comments on the Bill. It is her intention that it be tabled at the Executive meeting on 10 June 2021 with a view to introducing it before Summer Recess.

I trust this is helpful. Officials, as always, are happy to provide any further briefing the Committee requires on this issue.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Janine Macauley', written in a cursive style.

Janine Macauley

Deputy Departmental Assembly Liaison Officer
Private Office

Charities Bill

[20/5/2021 10:56:2]

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BILL

TO

Make provision about the lawfulness of decisions taken or other things done by staff of the Charity Commission for Northern Ireland, and about exempting charities, by reference to conditions related to thresholds, from the duty to be registered in the register of charities.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Actions of Commission staff treated as Commission actions [j2]

1.—(1) In this section “relevant action” means any decision made or purported to be made, or other thing done or purported to be done, by a member of the Commission’s staff before 16 May 2019 if—

- 5 (a) it was made or done, or purported to be made or done, in connection with the exercise or discharge of any of the Commission’s functions, and
 (b) the persons by whom it could lawfully be made or done did not include members of the Commission’s staff acting in their capacity as such.

10 (2) Every relevant action is to be treated as, and as always having been, a decision made or thing done by the Commission (subject to subsections (3) to (6)).

Circumstances where deeming is restricted or excluded

(3) Subsection (2) does not alter the outcome of court or tribunal proceedings finally decided before the end of the day on which this Act receives Royal Assent.

(4) If at the end of the day on which this Act receives Royal Assent—

- 15 (a) court or tribunal proceedings are pending, and
 (b) the validity of a relevant action is in issue in those proceeding—
 (i) on the ground that the persons by whom it could lawfully be made or done did not include members of the Commission’s staff acting in their capacity as such, or
20 (ii) on grounds which include that ground,

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the proceedings are to be decided as if subsection (2) does not apply to that relevant action.

(5) Subsection (2) does not apply to a relevant action consisting of—

- (a) a decision, or purported decision, that an inquiry report be published,
- 5 (b) publishing an inquiry report or causing an inquiry report to be published,
- (c) a disclosure of information under, or purporting to be under, section 24(1) of the 2008 Act,
- (d) a decision, or purported decision, to disclose information under that provision,
- 10 (e) the making, or purported making, of an order purporting to be under any of sections 33 to 36 of the 2008 Act, or
- (f) a decision, or purported decision, to make an order under any of those sections.

15 (6) Subsection (2) does not apply to a relevant action if in its place, and in the period beginning with the date of the relevant action and ending with the day on which this Act receives Royal Assent, a fresh decision or thing has been made or done by the Commission or by a committee established under paragraph 9 of Schedule 1 to the 2008 Act.

Refreshed appeal rights

20 (7) Where—

- (a) subsection (2) applies to a relevant action, and
- (b) the relevant action is one mentioned in column 1 of the Table in Schedule 3 to the 2008 Act (actions where there is a right of appeal or review),

25 the Charity Tribunal Rules (Northern Ireland) 2010 apply in relation to the decision or other thing treated as made or done by the Commission with the modifications mentioned in subsection (8) (and so apply whether or not an appeal or review was initiated in relation to the relevant action as made or done by a member of the Commission's staff).

(8) The modifications are—

- 30 (a) that rule 17(2) (time limit for initiating appeal or review) is to be read as if it provided that an appeal notice under rule 17(1) must be filed within 42 days of the end of the day on which this Act receives Royal Assent, and
- (b) that rule 17(3)(i)(iii) and (iv) are to be read as referring instead to the fact that the appeal or application is brought by virtue of subsection (7).

35 *Disapplication of accounting and reporting requirements*

(9) Where, as a result of a relevant action, a charity was purportedly added to the register of charities kept under section 16 of the 2008 Act, requirements imposed under any of sections 64 to 70 of the 2008 Act (accounts, reports and returns) do not apply in relation to an exempt year; and here “exempt year”—

- 40 (a) if the charity was lawfully added to that register in the period beginning with its purported registration and ending with the day on which this Act receives Royal Assent, means a financial year of the charity beginning before its lawful registration, but

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(b) otherwise means a financial year of the charity beginning before 1 April 2022.

Interpretation etc

5 (10) For the purposes of this section, members of the Commission's staff are not acting in their capacity as such when they are acting as members of a committee established under paragraph 9 of Schedule 1 to the 2008 Act.

(11) In this section—

“the 2008 Act” means the Charities Act (Northern Ireland) 2008;

“the Commission” means the Charity Commission for Northern Ireland;

10 “financial year”, in relation to a charity, has the same meaning as in the 2008 Act (see section 180(1) of the 2008 Act);

“inquiry report” means any such report or statement as is mentioned in section 22(6) of the 2008 Act;

15 “member of the Commission's staff” includes any person working for the Commission under paragraph 4(1)(a) or (b) or 5(1) of Schedule 1 to the 2008 Act (employees, service-providers and secondees).

(12) This section is to be treated as having come into operation on 27 March 2009.

Power of Commission to delegate to staff [j3]

20 **2.** In Schedule 1 to the Charities Act (Northern Ireland) 2008 (provision about the Charity Commission), after paragraph 9 insert—

“Performance of functions by staff

25 9A.—(1) Anything authorised or required to be done by the Commission may be done by any member of the Commission's staff who is authorised for that purpose by the Commission, whether generally or specially (but this is subject to sub-paragraphs (2) and (7)).

(2) The following may not be delegated under sub-paragraph (1)—

- 30 (a) the instituting of an inquiry under section 22(1);
(b) the making of a decision that a report or statement be published under section 22(6)(a) or (b);
(c) the making of an order under any of sections 33 to 36;
(d) the making of regulations in exercise of power conferred by a statutory provision.

(3) The Department may make a scheme describing—

- 35 (a) things that may, consistently with sub-paragraph (2), be delegated under sub-paragraph (1), and
(b) in relation to anything which may be delegated under sub-paragraph (1), the member or members of the Commission's staff to whom it may be delegated.

40 (4) The delegation which may be allowed by a scheme under sub-paragraph (3) includes (in addition to delegation of described things or to described staff)—

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(a) delegation of all things authorised or required to be done by the Commission and not excepted by sub-paragraph (2), or delegation of all such things with additional exceptions described by the scheme;

5 (b) delegation to all staff, or delegation to all staff other than those described by the scheme.

(5) Before making a scheme under sub-paragraph (3), the Department must consult the Commission.

10 (6) The Department must publish a scheme made by it under sub-paragraph (3).

(7) A delegation under sub-paragraph (1) is effective only so far as it is in accordance with a scheme under sub-paragraph (3).

(8) Sub-paragraph (1) is additional to paragraph 9(1)(a) (delegation to committees).

15 (9) In this paragraph—

“the Department” means the Department for Communities;

“member of the Commission’s staff” includes any person working for the Commission under paragraph 4(1)(a) or (b) or 5(1) (employees, service-providers and secondees).”.

20 **Regulations exempting charities from registering by reference to thresholds [jEXEMP]**

3.—(1) The Charities Act (Northern Ireland) 2008 is amended as follows.

(2) In section 16, after subsection (2) (all charities must be registered) insert—

25 “(2A) Subsection (2) does not apply to a charity exempted under section 16A.

(2B) A charity exempted under section 16A must, if it so requests, be registered in the register.”.

(3) In section 16(4), after “The register shall contain” insert “for each charity registered in it”.

30 (4) In section 16, after subsection (5) insert—

“(5A) A registered charity which is exempted under section 16A must be removed from the register if it so requests.”.

(5) After section 16 insert—

“Power to set thresholds for exemption from registration

35 16A.—(1) The Department for Communities may by regulations provide that a charity is exempt from being registered in the register if it meets one or more specified threshold conditions.

(2) A “threshold condition”, in relation to a charity, is—

40 (a) a condition that the charity’s income does not exceed a specified amount, or

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(b) a condition that the value of the charity's assets does not exceed a specified amount.

(3) The regulations may make provision about—

(a) what counts, or does not count, as income of a charity for the purposes of a threshold condition;

(b) what count, or do not count, as assets of a charity for the purposes of a threshold condition;

(c) quantifying income or values for the purposes of a threshold condition.

(4) Provision under subsection (3)(c) may (in particular) be about—

(a) the method, principles or basis for calculating, or estimating, income or values;

(b) certifying, or providing other evidence of, amounts calculated or estimated;

(c) the persons by whom any calculating, or estimating or certifying, is to be or may be done.

(5) Sections 16B and 16C make further provision about what may be done by regulations under this section.

(6) Regulations under this section may amend, repeal, revoke or otherwise modify any statutory provision.

(7) Regulations under this section may not be made unless a draft of the regulations has been laid before, and approved by, a resolution of the Assembly.

(8) Subsection (7) does not apply to regulations that do nothing more than alter an amount specified under subsection (2)(a) or (b).

(9) In this section “specified” means specified in regulations under this section.

Charities exempted under section 16A: information

16B.—(1) Regulations under section 16A may make provision requiring, or authorising the Commission to require, any—

(a) relevant institution, or

(b) person connected with a relevant institution,

to provide the Commission with information or evidence for the purpose of enabling the Commission to determine whether the institution is, or is still, a charity exempted under section 16A.

(2) Requirements under subsection (1) may set deadlines for the provision of the information or evidence.

(3) Information or evidence provided in response to a requirement under subsection (1) may be used also for the purposes of the exercise, in relation to the relevant institution or a person connected with it, of any function of the Commission.

(4) In this section “relevant institution” means—

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- (a) any institution if—
 - (i) it is not a registered charity, and
 - (ii) a representation that it is a charity, or that it is a charity of a particular description, is made by a person connected with it, or
 - 5 (b) any purported institution if a representation that it is a charity, or that it is a charity of a particular description, is made by a person connected with it.
- (5) For the purposes of this section, a person is connected with an institution if—
- 10 (a) the institution is a charity and the person is a charity trustee of the charity, or
 - (b) the person—
 - (i) is a trustee, officer, agent or employee of the institution,
 - (ii) holds property on behalf of the institution or of any trustee of it,
 - 15 or
 - (iii) engages in appeals to the public to give money or other property, or in other fund-raising activities, for the benefit of the institution.
- (6) For the purposes of this section, a person is connected with a purported institution if the person—
- 20 (a) makes a representation that the person is a trustee, officer, agent or employee of it or that the person holds property on behalf of it or of any trustee of it, or
 - (b) engages in appeals to the public to give money or other property, or
 - 25 in other fund-raising activities, for its benefit.

Charities exempted under section 16A: consequential provision

- 16C.—(1) Regulations under section 16A may make provision consequential on, or supplemental or incidental to, the possibility of there being—
- 30 (a) not only charities that are registered (or required to be registered), but
 - (b) also charities that are not required to be registered.
- (2) Provision included in regulations by virtue of subsection (1) may (in particular)—
- 35 (a) provide for a statutory provision that applies in relation to charities whether registered or not to apply only in relation to registered charities;
 - (b) provide for a statutory provision that applies in relation to charities whether registered or not to apply with modifications in relation to exempt charities;
 - 40 (c) where a statutory provision is expressed to apply only in relation to, or by reference to, registered charities—

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(i) provide for the statutory provision to apply, with or without modifications, also in relation to exempt charities or (as the case may be) also by reference to exempt charities;

5 (ii) make similar or corresponding provision applying in relation to, or by reference to, exempt charities.

(3) Provision under subsection (2)(b) or (c) may widen the circumstances in which an existing offence may be committed or (as the case may be) create a similar or corresponding offence for additional circumstances, but the penalties or maximum penalties for the widened
10 or new offence may not be higher than those for the existing offence.

(4) In subsection (2) “exempt charities” means—

(a) charities exempted under section 16A,

(b) charities exempted under section 16A that are registered, or

(c) charities exempted under section 16A that are not registered.

15 (5) Subsections (1) to (4) are additional to, and do not limit the generality of, section 179(5) (power to include supplemental, incidental, consequential etc provision).”.

(6) In section 179(2)(c) (regulations which must be approved in draft are not subject to negative procedure), after “section” insert “16A(7) or”.

20 **Short title and commencement [j9]**

4.—(1) This Act may be cited as the Charities Act (Northern Ireland) 2021.

(2) This Act comes into operation at the end of the day on which it receives Royal Assent.

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

12. 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

13. 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

14. 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

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

HUMAN RIGHTS ISSUES

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

EQUALITY IMPACT ASSESSMENT

17. 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

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

DATA PROTECTION IMPACT ASSESSMENT/DATA PROTECTION BY DESIGN

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

RURAL NEEDS IMPACT ASSESSMENT

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

LEGISLATIVE COMPETENCE

21. The Minister for Communities has 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.”