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Dr Janice Thompson
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21 June 2021

GM-0867-2021

Dear Janice

THE CHARITIES BILL

I write in response to your letter of 10 June 2021 following the briefing provided by officials on the Charities Bill on the same day.

Please find attached a copy of the NICVA and Edwards and Co submissions received by the Department and provided to the Committee with their agreement in which they advocate for legislation following the McBride/Court of Appeal Judgments. NICVA met with the Minister for Communities and subsequently provided their paper at her request. Edwards and Co met with Departmental officials to press their case on the back of their submission.

As advised, no formal consultation was conducted on the Bill as it is seen as a 'legislative fix' and of a purely technical nature, to return the regulatory framework to its original intent. The Minister's Independent Review will inform any Scheme of Delegation provided for in the Bill and whether the Department should make regulations to introduce a registration threshold. Any subsequent policy changes and regulations would be fully consulted on.

Committee was interested in whether the views of CO3 were sought. As officials set out, CO3 has been and remains regularly engaged in ongoing dialogue with the Department on the Charities Fund and issue such as Full Cost Recovery and fair funding, but has never raised any issues or concerns in relation to the Judgments, or the impacts of these on charities. The difference in our funding relationship between the Department and NICVA is that NICVA is funded to play a supporting role as

‘the voice of the Sector’ and CO3’s stated role is to develop leadership capability in Chief Executives. Focused engagement did take place with NICVA and with Edwards and Co charity solicitors in direct response to the issues and concerns raised by them about the impact of the judgments on charities here.

As requested a breakdown of regulatory decisions which the Bill will make lawful is attached at **Annex A**.

In addition, the Bill will make lawful other staff decisions which were preliminary or subsequent to a decision listed in **Annex A**, or made in connection with the exercise of other functions of the Commission, and (in either case) were rendered unlawful by the Court judgments. The Bill also makes “other things done” lawful. This would include things such as: staff giving a consent, where the giving of the consent is subsequent to an earlier decision that the consent be given; and staff registering a charity in the register, where that is subsequent to an earlier decision that the institution concerned should be registered. Whilst these staff decisions and other things cannot be quantified it is important that they are also regularised. But a decision or other thing is not made lawful if excepted by clause 1(3) to (6) of the Bill (or if also unlawful on a ground other than unlawful delegation).

Details concerning the number of registration decisions that were appealed, information on the criteria for an appeal and the number of appeals that were upheld in terms of decisions being unlawful is attached at **Annex B**.

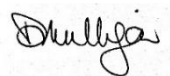
Committee asked whether anyone had raised any legal concerns about the Bill. Officials advised that the Department had not received any comment on the actual content of the Bill as the detail has not been shared publicly, however, a small number of ‘affected parties’ had previously raised issues, including concerns that any proposal for retrospective legislation may potentially cut across their rights. Officials reported that the ‘carve out’ clause in the Bill ensures robust protection of rights and also suggested that a review of correspondence would be undertaken by the Department to provide further information and assurance to Committee on the issues raised in this correspondence. This has been undertaken and confirms that two correspondents have expressed the view that retrospective legislation was neither ‘desirable nor necessary’. One of the correspondents also expressed the view that powers should not be delegated to staff in the future.

As reported to Committee, these views were expressed without the correspondents being aware of the robust protections provided in the draft Bill in respect of rights enshrined in the European Convention on Human Rights, as well as the specific provisions contained within the Bill on any future decisions relating to delegation of decision making powers to staff.

In bringing forward the Bill, the Department has been extremely mindful of the Obiter comments made in the Court of Appeal Judgment, that ‘careful consideration’ should be given as to whether any powers should be delegated to staff. As officials had reported, the Bill does provide for a limited power of delegation, at a future stage, which would have to be set out in a Scheme of Delegation agreed by the Department. It also stipulates that certain decisions that can have a major impact on individuals, can never be delegated to staff.

I trust this response is helpful and the Department is happy to provide further information to ensure Members have a full understanding of the issues.

Yours sincerely

A handwritten signature in black ink, appearing to read "D. Mulligan", written over a light grey rectangular background.

Diane Mulligan

Departmental Assembly Liaison Officer

Private Office

ANNEX A

Decisions to be made lawful by Charities Bill

Section of Charities Act (NI) 2008	Decision (D), Order (O), Direction (DR) or Other (OR)	No of decisions
16	(D) to enter an institution on the register	6396
16	(D) to not to enter an institution on the register	76
22(3)	(D) (a) Direction to produce documents/ (b) information	83
22(3)	(D) © Direction to attend to give evidence	12
23	(O) for production of information or documentation	44
29	(OR) Making schemes to apply property OR) Making schemes - Gifts for mixed purposes property cy-pres	11
31(1)	(O) Exercising powers as are exercisable by the High Court in respect of schemes of administration, removing, appointing etc. a trustee or employee, vesting or transferring property etc.	2
46	(O) To sanction action taken in the administration of a charity that is deemed to be in the interests of that charity e.g. enter into a transaction, apply property etc.	28
47	(O) To exercise the same power as the A.G. with regard to the application of charity property	2
50	(OR) – to determine the membership of a charity	1
54	(O) – authorising the taking of charity proceedings	1
65(6)	(O) requiring the accounts of a charity to be audited	2

66(2)	(O) – giving directions to the facilities to be provided to an auditor or independent examiner	2
96(2)	(D) – provide prior written consent for any regulated alteration by a charitable company	481
98(1)	(D) - provide prior written consent required for approval etc. by members of charitable companies	12*
99	(D) - provide prior written consent for specified acts of a charitable company	
123(6)	(DR) – to give public notice of a trustee resolution	32**
123(7)	(DR) – for more information in respect of a trustee resolution	
123(11)	(O) – to vest property of the transferor charity in the transferee charity, in its charity trustees or in any trustee for that charity, or in any other person nominated by charity trustees to hold property in trust for that charity at the request of the trustees	
124(2)	(D) objecting to a resolution made by charity trustees under sections 123(2) or 126(2)	
129	(D) not to concur with a trustee resolution made under sections 129(3) or 130(2)	
129(6)	(DR) to give public notice of the resolution	
129(7)	(D) – charity trustees to provide more information in respect of larger incorporated charities spending capital given for a particular purpose	
166(1)	(D) to make/refuse designation as a religious charity	1
175(5)	(O) -Any order made by the Commission may be varied or revoked	8
Total Decisions		7150

* Figure provided for total decisions taken under s98(1) & 99. Further breakdown can be obtained from the Commission if required

** Figure provided for total decisions taken under s123 - 129. Further breakdown can be obtained from the Commission if required

ANNEX B

Registration decisions appealed, information on criteria for appeal and number of appeals upheld in terms of decisions being unlawful

	Registration decision appealed	Grounds for Appeal	Number of Appeals	Outcome	Charity status	Number of decisions upheld as decisions were unlawful
The final decision for organisations A to D were against the wishes of the organisation. There is therefore a possibility of fresh appeal when decisions are made lawful by the Bill						
Organisation A	To Register	Organisation did not believe they were a charity	1	Appeal dismissed	Registered	0
Organisation B	To Register	Organisation did not believe they were a charity	1	Appeal dismissed	Registered	0
Organisation C	Not to register	Organisation believed they were a charity	1	Organisation withdrew, appeal dismissed	not registered	0
Organisation D	To Register	Organisation did not believe they were a charity	1	Organisation withdrew, appeal dismissed	Registered (in suspense)	0
The final decision for organisations E - I were desirable for the charity. There is no obvious reason for appeal.						
Organisation E	Not to register	Organisation believed they were a charity	1	Organisation withdrew, appeal dismissed	subsequently registered - decision reviewed by CCNI	0

Organisation F	Not to register	Organisation believed they were a charity	2	Organisation withdrew, appeal dismissed	subsequently registered - decision reviewed by CCNI	0
Organisation G	Not to register	Organisation believed they were a charity	1	Organisation withdrew, appeal dismissed	subsequently registered - decision reviewed by CCNI	0
Organisation H	Not to register	Organisation believed they were a charity	2	Organisation withdrew, appeal dismissed	subsequently registered - decision reviewed by CCNI	0
Organisation I	Not to register	Organisation believed they were a charity	1	Appeal dismissed	subsequently registered - decision reviewed by CCNI	0
As the following organisation is subject to ongoing litigation these decisions will not be made lawful by the Bill						
Organisation J	To Register	1. Decision was made unlawfully 2. Organisation never operated as a charity 3. Trustees appointed unlawfully so no standing to apply for registration 4. Shouldn't be a charity for various reasons	2	Commission withdrew its opposition to the appeal, awaiting formal disposal by the tribunal	Registered (in suspense)	awaiting tribunal decision on 2

NICVA PAPER ON ISSUES WITH CHARITY REGULATION

Introduction

In February 2020, the Court of Appeal upheld a legal challenge to the delegation of decision-making powers by the Charity Commission to its staff. In light of this ruling, Charity Commission staff are no longer permitted to make decisions on their own, instead, decisions must be made by the Charity Commissioners collectively or by a committee which includes at least one Commissioner.

The Department for Communities (DFC) is seeking a permanent resolution to this issue and as such the Minister for DFC has met with NICVA to enquire if there are other issues with charity regulation that should also be addressed.

This paper is based on a recent survey to the sector seeking their views on issues they have identified and informed by previous charity regulation consultations as well as years of experience as a 'helper group' from helping charities through the registration process and advising on complying with charity regulation.

Charities on the register

The current issue with the decision-making powers of the Charity Commission has caused a certain amount of alarm within the charity sector specially to find out that that the register is void for some. Some respondents felt that the Commission should have communicated with charities directly rather than having to find out in the media.

NICVA appreciates that the Department is working out how best to fix this and asks that registered charities will not be required to register again. Respondents to our survey have highlighted how cumbersome they found the registration process in the first instance and would not want to repeat it.

NICVA is encouraging all registered charities to continue with the annual reporting requirements even though at present they are not required to as it could have a negative impact on them given that the charity register is accessible by the public and it may look like the charity has not willingly submitted its annual accounts and reports.

De-minimis threshold for charity registration is needed

Since the enactment of the Charities Act (NI) 2008, NICVA has identified that a de-minimis threshold is needed so that very small charities are not required to register, and we have highlighted this many times to both the Charity Commission and DFC over the years. Most of the respondents to the recent survey have also highlighted this as an issue and have called for a de-minimis threshold to be introduced for charity registration.

The current charity regulations require all charities to register with the Commission regardless of income. When the regulations were being consulted on in 2005 it was not apparent that this was going to be the case otherwise the sector would have asked for a de-minimis threshold as is the case in England and Wales.

NICVA notes from its own experience in helping and advising organisations with the charity registration process, that there has been resistance from smaller organisations about having to register. Organisations that meet the charity definition, but which don't identify as being charities and never sought charity tax status with HMRC such as small historical societies, environmental groups and sporting organisations, do not all want to be registered or benefit from being a registered charity.

There is a real danger that existing small organisations are going to wind up rather than having to register and/or report annually to the Commission. Trustees of smaller organisations have told us, and other helper groups, that they find the regulations overwhelming and it all just seems a bit "too much" for them. The Department should be mindful that these very small organisations do not have the benefit of staff to help them and many of the small charities that are/have been 'in default' on the register have older Trustees who sometimes find the process of reporting online quite difficult.

NICVA is also concerned that it is discouraging new organisations from forming as once they realise that if they constitute, they will then be required to register it is not something that they are prepared for.

NICVA recommends that a de-minimis threshold of £20,000 be introduced so that organisations under this income level are not compelled to register. Some small organisations may still want to be registered to receive the benefits of charity registration and should still be allowed to do so, as is the case in England and Wales.

Accounting and reporting requirements

While survey respondents identified that charity accounts and reports are important for accountability and transparency, some felt that the requirements needed to be more proportionate for smaller charities.

Some respondents questioned the need for small charities being required to have an independent examination and suggested introducing a threshold for small charities with an income under £10,000 so that they would not have to file annual accounts. Some felt that if you costed out the time and effort that went into accounting for the income of small charities it would work out more than the income received in the first place!

It is very clear from some of the respondents to the survey that there is still a lack of understanding about the external scrutiny requirements for charity accounts. Some referred to the burden of having to have an audit when they would only be required to have an independent examination.

For small charitable companies, there is also the burden of having to prepare accrual accounts, which usually require a financial outlay for the charity in addition to the cost of external scrutiny. This could be rectified if the CIO legal structure was introduced.

CIO needs to be introduced

The Charities Act (NI) 2008 provides for the Charitable Incorporated Organisation (CIO) but secondary legislation is required to make this a viable legal structure for charities in Northern Ireland. NICVA has stressed the importance of making the CIO available to the Charity Commission when it consults on its strategic plan every three years but unfortunately the Commission and/or DFC do not appear to see the importance of introducing this legal structure.

We understand that the Commission has limited resources, but the introduction of the CIO is very much needed. Charities are converting from unincorporated associations into companies Ltd by guarantee to benefit from the limited liability aspect of the company. They are doing this without fully realising that companies must prepare accrual accounts that must comply with the charities SORP.

For smaller charities, the cost of doing this is significant in comparison to preparing receipts and payments accounts which does not require the same specific expertise. If charities under £250K could register as CIOs they could benefit from both limited liability and prepare R&P accounts.

Anecdotally we are hearing that people are unwilling or anxious about sitting as trustees because they are concerned about their personal liability. The limited liability that is provided by both the CIO and company structure is comforting to many trustees. There is potential that charities here could start to seek CIO registration in England and Wales which we do not envisage that the Commission or DFC would want to see.

Issues with the Charity Commission

Concerns not being investigated

One of the respondents to the survey (a charity working overseas) felt quite frustrated that the Commission did not appear to take on board concerns that it raised about another charity that is working with the same person that they had serious concerns about in their work overseas.

It may be the case that it is not the Commission's policy to communicate back to complainants about the progress of a concern or indeed the concern may not have rated highly enough on the Commission's list of complaints if it only investigates 'highest risk concerns'. If the latter is true then it is very alarming for charities that are doing everything that is required of them only to find out that the Commission doesn't appear to care about the vital information that they have concerning another charity that is in danger of losing charity money.

This is probably true for other whistle-blowers reporting concerns about charities to the Commission if it is not possible for all concerns to be investigated. There is a danger that future concerns may not be reported to the Commission if people feel that the Commission is not interested in it.

Other issues

Some respondents felt that the tone of the Commission's communications was too legalistic and regulatory. While we understand that the Commission is the regulator, the tone of emails should not be so that it frightens trustees into wanting to leave the charity.

Some helper groups have reported that charities they work with have said that communication with the Commission is poor as staff do not always return calls. This may be because NI Direct takes the calls for the Commission.

Finally, some charities want a charity registration certificate as this is sometimes asked for by businesses that provide offering to charities. An electronic version of this could easily be offered and the charity could print it out at its own expense.

NICVA

20 August 2020

Briefing paper from Edwards & Co. Solicitors DFC meeting, 4 September 2020 via Zoom

Introduction

This briefing paper relates to the Court of Appeal decision in the case of Trevor McKee and others versus the Charity Commission for Northern Ireland [2020] NICA 13.

Edwards & Co. is concerned about the potential repercussions for the charity sector which could arise out of this case and the subsequent statement made by the Charity Commission for Northern Ireland ("the Commission").

As experienced company and charity lawyers, Edwards & Co. has a unique contribution to make to this discussion. We have a clear view of potential issues for charities constituted as companies limited by guarantee.

We have set out indicative case studies, highlighting live legal issues, for further consideration by the Department.

The sector and the public must have certainty around the legal status of charities. They must be confident they can rely upon the registrations, the decisions and the orders, determinations and consents already made by the Commission.

It is imperative that an immediate statutory legal solution is found for charities so that issues arising from the Court of Appeal decision are resolved.

The impact of the Court of Appeal decision

- Means that a member of the Commission staff, acting alone, cannot take a decision or exercise a power or function of the Commission.
- There was no implied or express power of delegation of the Commissioners' statutory powers or functions.
- Means that a number of the Commission's decisions, such as orders for removal of trustees or determinations of membership, are considered void.
- Other decisions, such as consents to amend objects of the Charity, may also be voidable but will remain in force until successfully challenged.

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- Registration, once seen as a badge of authenticity and pride by donors, beneficiaries, funders and charity trustees, is now in question.

We contend that the Court of Appeal decision calls into question the validity of the registrations of over 6,000 charities - almost half of the perceived charity sector. The registration process has already taken approximately 7 years to get to this point.

It is devastating for the sector to find that considerable registration work already completed has no legal standing and, as the charities are still charities at law (as per their legal governing document), it is difficult for charities, funders and the public to fully understand the implications of the case.

Questions and issues

Edwards & Co. wish to highlight a number of issues that go to underpin the request for urgent departmental and Ministerial intervention.

1. Charity trustees are seeking clarification around their roles, scope and legal status in respect of mergers and Commission consents. Trustees fear they could be acting in breach of trust if they continue to conduct charitable purposes on the basis of consent under, for example, section 96 (s.96) of the Charities Act (NI) 2008.
2. The effect of s.96 means that such an alteration to objects is ineffective without an order of the Commission. Where a charity is a company, amendments made to regulated alterations are ineffective if such consent has not been obtained. This has resulted in charity trustees being concerned about personal liability if they act in breach of trust.
3. In restructuring cases involving unincorporated associations and the creation of new charity companies, there are issues involving the transfer of non-cash assets. If a company carries out such a substantial property transaction with the director (who is also a trustee of the unincorporated charity), this is ineffective without the prior written consent of the Commission. The effect of this may be that the asset has not been legally transferred. Often the unincorporated association will have been wound up so it no longer exists, so it would be impossible to reverse the transaction.
4. The Cy-près doctrine provides that when a charitable trust has failed, the High Court of Justice or the Commission can make an order redirecting the trust's funds to the nearest possible purpose.

These cases require a decision on whether the purpose has failed and, also, on whether the funds should be subject to Cy-près or returned to the estate in a resulting trust. The decision is based on the charitable intention of the settlor, determined on

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the facts of each individual case. This is a complex area of law and any Cy-près schemes granted pursuant to the 2008 Act are potentially voidable.

Registration

Charity registration is very important as it underpins confidence and trust in the sector and is a recognised standard throughout the UK, taken as evidence that a charity is under the scrutiny of a regulator and in good standing.

There is already confusion about charity registrations. Many UK-wide foundations/ trusts have eligibility criteria stating that they will only fund 'registered charities.' This has already unfairly disadvantaged charities which have not yet been called forward to register.

Edwards & Co. has seen examples of funders which will not provide funding even on evidence that the body is a charity at law and is registered with HMRC for charity tax reliefs.

Recently we have seen a case where a local bank would not open an account for a new charity company because it was not yet registered with the Commission. The Commission has been informed of this situation.

For those charities which have received funding on the basis of their 'registration', it could be that the outcome of the court case will result in that funding being withdrawn or will perhaps need to be repaid. It may also affect the entitlement to future funding payments.

Reporting obligations

If it is the case that the 6,000+ charities in question are not validly registered, then it calls into question their current obligations to continue to submit accounts and annual monitoring returns to the Commission. These obligations provide evidence that trustees are governing their charity appropriately and enable donors and the public to see the financial health of the charity and the work that it is doing for the public benefit.

There is concern that some charities may take advantage of the situation and not submit accounts or reports to the Commission. This could result in the undermining of trust and confidence in the charity sector.

Removed trustees

Some charity trustees, removed from office by order of the Commission, have appealed this decision to the Charity Tribunal. This has led to an uncertain situation for both charities and the trustees. It is not immediately apparent whether trustees have been removed for good reason or purely as a result of procedural irregularity. This matter needs to be reviewed and clarified as a matter of urgency.

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Company law implications

Certain charities are constituted as companies limited by guarantee, under the Companies Act 2006. If a charitable company wishes to alter its object clause, dissolution clause or the provisions in its governing document relating to benefits to members/directors, a legal procedure must be followed to ensure that any amendment is authorised by way of a special resolution of the Company members. The consent of the Commission is also required before the change legally comes into effect. The Court of Appeal decision means that company directors, who are also charity trustees, are concerned that they are acting beyond their powers with the potential for personal liability.

Solution

We urge the Department to take action as quickly as possible. In the judgment, at paragraph (47) of the conclusion, the Judges refer to an amendment of the 2008 Act and say "*careful consideration should be given to the question of whether any of the powers and functions therein enshrined can properly be discharged by the staff of the Commission and, if appropriate, to reflect this in unambiguous language. We agree that the business of administering and overseeing charities in Northern Ireland is a matter of significant public importance engaging a public interest of some potency*".

We suggest amending legislation as soon as practicable to provide clarity and certainty for the NI charity sector. Charities are a vital component of our economy whose services are even more in need due to the Coronavirus pandemic, particularly for vulnerable communities and persons in our society. The public must have trust and confidence in charities and in their regulation.

A possible solution is to implement amending legislation, with retrospective effect, to legally ratify the registrations, orders and decisions already taken by the Commission staff.

It may be considered to be fair to offer anyone affected by an order or decision to allow a specific time for appeal against those decisions (where they are capable of appeal) to the Charity Tribunal for Northern Ireland or to the High Court Chancery Division. This would afford those who are at odds with the Commission the opportunity to challenge a decision already taken.

We would expect that a minority of people would wish to avail of an appeal process. However, the Department could perhaps consider where a matter has already been reconsidered by the Charity Tribunal but not on the grounds of the process of the decision-making but rather on the reasons given.

It is clear that charities are in need of direction, an end to uncertainty. Should they refer possible funders to the Court of Appeal case; advise they are no longer a registered charity;

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or they say nothing and continue on with obligations to deliver the project on the basis that they remain charities 'at law'.

This is a situation which must be rectified immediately to give all concerned confidence in the law. Having much experience in this area, we would be more than happy to assist to achieve the best possible outcome for charities in Northern Ireland.

A handwritten signature in dark ink, appearing to read 'Edmund Ho', is positioned above the company name.

Edwards & Co. Solicitors

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