



Northern Ireland
Assembly

Committee for Communities

OFFICIAL REPORT (Hansard)

Charities Bill: RaISe Briefing

9 September 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Ms Paula Bradley (Chairperson)
Ms Kellie Armstrong (Deputy Chairperson)
Mr Andy Allen
Mr Mark Durkan
Mr Alex Easton
Ms Sinéad Ennis

Witnesses:

Mr Stephen Orme Northern Ireland Assembly

The Chairperson (Ms P Bradley): I welcome to the meeting Stephen Orme. Is Stephen there?

Mr Stephen Orme (Northern Ireland Assembly): Yes.

The Chairperson (Ms P Bradley): Stephen, you are very welcome. I understand that you recently became a daddy and are on paternity leave, so we are very grateful that you are able to brief the Committee.

Mr Allen: Chair, can I declare an interest as a charity trustee, please?

The Chairperson (Ms P Bradley): Absolutely. Thank you, Andy.

Stephen, do you want to go ahead?

Mr Orme: Certainly. I will just check that everybody can see and hear me OK.

The Chairperson (Ms P Bradley): We can indeed, yes.

Mr Orme: OK. This briefing addresses the Charities Bill, as introduced to the Assembly in June this year. I will first cover briefly the background to the Bill, looking at the existing legislation and the court judgements that have informed the drafting of the Bill's content. I will then cover each of the three clauses in the Bill and exactly what they do. As I do that, I will highlight what are called "issues for consideration" in the paper. Those are issues that the Committee may wish to consider as part of the Bill's scrutiny and development. Finally, I will briefly touch on some potential financial implications of enacting the Bill. That is a standard thing that RaISe does with all legislation. It is not a massive issue

with the Bill. Essentially, there are a handful of costs and savings to the public purse that could arise from putting the Bill's provisions into practice.

The Charities Act (Northern Ireland) 2008, which I will refer to as the 2008 Act, is the current foundation of charity law in Northern Ireland. It was passed in 2008 to update and harmonise charity law at a time when that was also happening in England and Wales, Scotland and the Republic of Ireland. That Act established the Charity Commission for Northern Ireland. In 2013, the Executive and the Assembly passed a further Charities Act, which I will refer to as the 2013 Act, and that was to correct technical issues with the original 2008 law.

The 2008 Act established a public benefit test. In essence, that meant that a charity's purposes must be, in some way, for the public benefit. The legal definition of that test was originally taken from Scottish legislation and was not specific to Northern Irish law. The 2013 Act then revised the legal language underpinning the public benefit test to make it more specific and practical in Northern Irish law, and that permitted the Charity Commission to start registering charities.

The key issue with the 2008 Act as it relates to the Bill is that there is no explicit provision in the 2008 Act that allows for the Charity Commission's functions to be performed by its staff as opposed to the commissioners themselves. At the time when the 2008 Act was passed, the law in England and Wales and the law in Scotland had a provision allowing their staff to perform functions. In addition, draft law under consideration in the Republic of Ireland at that time had that provision, and that is now the law in the Republic as well. The first issue for consideration raised in the paper, therefore, is this: why did the 2008 Act differ from law, or draft law, in England and Wales, Scotland and the Republic of Ireland in that specific way? Then, in 2013, when the Department for Social Development, as it was then, went back to fix the 2008 Act in respect of the public benefit test, was that issue recognised or considered at that point?

Post-2013, the issue of staff's ability to perform commission functions was the topic of a High Court ruling in May 2019. I know that Committee members will be familiar with that, but, very briefly, in that case, the Charity Commission and the Department for Communities maintained that the commission had the power to delegate its functions to staff. The court, however, found that, in essence, the commission had no express or implied power to delegate functions to staff. The Court of Appeal then upheld that decision in February 2020. Taken together, those judgements made unlawful around 7,500 orders, directions and decisions taken by commission staff and have prevented commission staff from performing any functions under the current legislation since that point. In practice, that has drastically reduced the scope of the commission's powers and capacity.

The Bill has three clauses. Two directly address the court judgements and work, in effect, to repair the law. The third empowers DFC to create a charity registration threshold. I will discuss each in turn.

Clause 1 amends the 2008 Act to treat commission staff actions taken before the High Court judgement as actions of the commission. In practice, that will make those staff decisions lawful. The clause does not apply to all decisions: there are several exceptions. For example, a staff decision to publish an inquiry report, to remove charity trustees or employees, or to disclose information under commission powers remains unlawful under the Bill. The Committee might want to consider why some staff decisions remain unlawful and whether the Department considered any other categories of staff actions or decisions that could remain unlawful in that way.

Where a staff decision is made lawful, and it would ordinarily be an appealable decision, the appeal window will be refreshed to start on the day that the Bill receives Royal Assent. That effectively allows six weeks from the date of Royal Assent for a fresh appeal to be lodged. The Committee might want to consider whether that is long enough for appeals to be lodged and whether the Department or the commission intends to notify any affected persons or charities of their refreshed right to appeal and the time frame for that.

Finally, on clause 1, where a staff action is the registration of a charity, that charity will have to submit accounts and reports only from April 2022. Charities will not suddenly have to jump back and provide accounts from previous years. I know that charities, the Northern Ireland Council for Voluntary Action (NICVA) and the Committee have raised that issue previously, and that is addressed in the Bill.

Clause 2 amends the 2008 Act further and explicitly allows for commission functions to be performed by staff in the future. Again, there are a couple of restrictions. First, any delegation to staff must operate within a scheme of delegation published by DFC. That can be understood as statutory guidance from DFC. Moreover, the Bill establishes several things that staff can never do and that are,

effectively, reserved for the commission. Those may sound familiar from clause 1: starting or publishing an inquiry into a charity; suspending or removing charity trustees or employees; and making commission regulations. Those remain things that only the commission can do in future under the Bill.

It is worth noting that having specific exceptions to such a staff delegation power would be unique to Northern Ireland. In England and Wales, Scotland and the Republic of Ireland, there are no such exceptions in the law. When the Court of Appeal upheld the High Court's judgement in 2020, it advised:

"careful consideration should be given as to whether any of the powers and functions"

in the 2008 Act

"can properly be discharged by the staff"

and, if so, that should be reflected in what it calls "unambiguous language". That appears to be why there are specific exceptions to staff powers in the Bill: the Court of Appeal specifically advised the Department and the commission that any change to the law should be clear and unambiguous. Still, it is worth noting that we would remain different from the law in Great Britain and the Republic of Ireland on that.

The Committee might want to consider a few things regarding clause 2. In particular, can the Department confirm why certain functions are permanently excluded from staff when that is not the case across GB and in the Republic? Was consideration given to any other functions being excluded from staff? Secondly, where a function is excluded from staff and is therefore reserved to the commission, how will that work in practice? Will staff be involved in supporting commissioners to reach decisions in those areas, for example by providing advice, information or staff support services? If so, will that be covered by any scheme of delegation that DFC is required to produce? Finally, are the Department and the Charity Commission happy to consult the Committee on the detail and operation of the scheme of delegation?

Clause 3 empowers the Department to pass regulations establishing a charity registration threshold. It is important to understand that the Bill does not create a threshold; it just gives the Department the power to do so at some point in the future, with the Assembly's consent. Basically, charities having less than a certain level of income or assets would not have to register with the commission and could then be exempted from other requirements, such as submitting accounts. Those regulations would initially be subject to the affirmative resolution procedure in the Assembly, and that means that the Assembly must actively approve them before they come into force. Once the threshold is in place, however, the Bill would allow the Department to change the level of the threshold in regulations using only the negative resolution procedure. Under negative resolution, regulations automatically come into force unless a Member brings a motion to the Floor and the Assembly actively votes the regulations down. In practice, that happens very rarely. Therefore, the Committee might want to consider whether it is happy with the Department being able to change the level of any threshold, once it is created, by a negative resolution, or whether it prefers a procedure that requires active Assembly approval for a change in the threshold. Immediately before my agenda item was taken, the Committee gave its reactions to some correspondence with the Examiner of Statutory Rules. That is the person to ask about that, if it is something that the Committee is interested in.

Finally, on clause 3, the Committee might want to consider whether clause 3, permitting the Department to create a registration threshold, is appropriate to include in the scope of the Bill. The Bill's primary aim, as I have said and as the Department said at the outset, is to repair the law in the light of the 2019 court judgement, which was upheld by the Court of Appeal. Clauses 1 and 2 set out to do that. As I said, clause 1 fixes the law, looking back, and makes staff decisions lawful in retrospect. Clause 2 would allow staff to perform functions henceforth. Clause 3, however, would empower the Department to create a registration threshold in advance of any formal policy decision by the Minister as to whether a threshold should even exist. The Minister has stated that the creation and detail of a threshold is being considered by the broader independent review of charity regulation, and it may be possible that, if the Bill is passed, the registration threshold clause — clause 3 — may need to be amended further, depending on what the independent review recommends to the Department and what the Department decides to take forward from that.

Given that, the Committee may wish to consider two alternative approaches: a greater and a lesser alternative. First, the clause could be removed from the Bill, which would be a maximalist approach. It

could then be included in any future legislation that arises from the broader independent review of charity regulation. That could absolutely ensure that, whatever that independent review recommends about the threshold, it is definitely covered by the law that is passed to inform and enforce it. The other option is that the Committee could seek assurances from the Department that clause 3, as it stands, covers everything that the independent review could possibly recommend about the registration threshold and there would be no need for further amendment.

That is the Bill. I will briefly touch on some of its potential financial implications. If enacted in its current form, there would be some additional costs arising from the Bill. Development and consultation on a scheme of delegation for commission staff, creating and altering commission procedures to align with that scheme and then training commission staff to work within the scheme of delegation would all have some initial cost and maybe some recurrent costs as well. They would probably be relatively minor. However, staff delivery of commission functions would probably be a saving on the current situation. At the minute, the commissioners themselves are taking a small number of decisions and actions on an ongoing basis, but it is not a particularly efficient way for them to be operating, which is why the Bill is being introduced.

I mentioned earlier that the Bill would refresh the appeal window for some commission staff decisions. That may result in additional appeals to the Charity Tribunal in the immediate wake of the Bill's enactment, so there may be associated one-off costs to the public purse in addressing those appeals and processing them through the Charity Tribunal, the issuing of decisions and that sort of thing.

I am happy to take any questions, to revisit anything or to go into more detail on any particular area. Thank you very much for your attention.

The Chairperson (Ms P Bradley): Thank you, Stephen. I appreciate that. Members should indicate if they want to ask Stephen any questions.

You have raised lots of issues. More broadly than the scheme of delegation, when we look at the independent review and see the number of matters that it is considering, do you think that that could create any further issues while we are considering the Bill? You mentioned clause 3. Are there any other issues that that could flag up?

Mr Orme: I could not spot any issues with clauses 1 and 2. Clause 1 just fixes staff actions going back the ways, and clause 2 permits the Department to create a structure to allow staff to perform functions going forward.

Clause 3 does seem to be very broadly written. It is something probably for the Department to advise on, but it does seem to do everything that you could possibly imagine a charity registration threshold would need. The detail is in the paper. It allows the Department to create an income threshold or an asset threshold that defines "income" and "assets". It allows the Department and the commission to create differential rules for registered and unregistered charities. It would allow a charity that is not required to register to register anyway if it wanted the badge — the seal of approval, as such. I could not spot anything that was missing. It may be overcautious, but the clause could be taken out. Alternatively, the Committee could just seek assurances from the Department that it does the job.

The main concern that arose in doing the research was that it is a bit of a sore thumb in the context of the Bill. Clauses 1 and 2 fix the law in the light of the court judgements, which is the point of the Bill. Clause 3 kind of tacks on that other power for the Department. It does seem that most parties and stakeholders support having some sort of registration threshold in future, but the detail of that has not been worked out. Given that there was a 2008 Act, and then a 2013 Act that fixed the 2008 Act, and then this Bill, which will fix the Act again, you would not want a situation where you are going back in to fix the charity registration threshold clause if it could be avoided.

I know that that is not massively helpful, because I could not spot any individual, specific issue. It is as much that it does not seem to be of a piece with the rest of the Bill, and you would not want to make a mistake through being hasty or putting the cart ahead of the horse, if you see what I mean.

The Chairperson (Ms P Bradley): Thank you for that. I fully understand. I sat on this Committee in 2013, when it was looking at the Bill. I remember quite a lot of evidence-gathering and long sessions when we were debating it, and we are still in this position, so, yes, we want to make sure that we get this right.

Ms Armstrong: Thank you very much, Stephen. Congratulations. I hope that you are getting some sleep.

I want to go back to clause 2. Where staff cannot have delegated powers and the commissioners have to take those decisions, you made the point about whether they are being advised by staff. There is nothing here that says that the commissioners have to be transparent in the papers that they are using in order to make their decisions. Is there anything there that we should be thinking about? If staff are advising the commissioners, and they will probably have done the work on that, under data protection, can those sorts of papers be produced publicly and be on public record? How can we make sure that the process is as transparent as possible?

Mr Orme: I am conscious that I did not thank the Chair and Kellie for the congratulations. She is pretty cooperative, so I am sleeping OK.

In terms of how commission decisions would work in future, and how those decisions must be taken by the commissioners but staff could possibly support them, the Bill itself does not say an awful lot about transparency or that sort of thing. That is really only a function of the fact that this Bill amends. This Bill does not replace in full the 2008 Act; it amends issues in it. The 2008 Act, for example, commits the commission to upholding the highest standards of transparency and diligence and those sorts of standards in the conduct of its duties. That is a specific measure in the 2008 Act.

I do not want to get ahead of the Department, but I think that it should be pretty clear, between the existing requirements in the 2008 Act for the commission as a corporate entity and, in this instance, the commissioners themselves to uphold those standards; the detail that you would hope will be in the scheme of delegation, laying out how staff can interact with the commissioners in the context where the commissioners have to take the final decision; and, separately from that, the existing data protection legislation. Between those three, it should be pretty clear. Any detail is hypothetical at this stage. The detail of the scheme of delegation will be important for laying out what staff at different levels can do, particularly where decisions are reserved to commissioners. Who is permitted to offer information or to apply for sight of material — a chief executive or a unit head? That is a question for future scrutiny, as much as anything else.

Ms Armstrong: I have a question on your point about clause 3, Stephen. I have concerns about thresholds. When you set a threshold for a charity, it is a case of "how long is a piece of string?". The value of a housing association's assets will be enormous, because it is dealing with property. Transport companies' assets could be huge, because accessible buses cost a fortune. There may then be others that do not have any assets. I am wary that, if it goes through, there could be a temptation for funders to use the threshold to restrict access to funding. We have already seen that through the impact that COVID had in restricting access to funding for national charities that deliver services here. I am a bit concerned about that and would like to tease that out further with the Department. Are you saying that the threshold is not set elsewhere in the UK?

Mr Orme: Yes. I will refer to a couple of notes on that. In Scotland and the Republic of Ireland, there is no threshold. In England and Wales, there are charities that are exempt on a broad range of grounds, and that includes a registration threshold. The Charity Commission for England and Wales and the Secretary of State over there can specifically exempt individual charities by order if they have an income of less than £100,000 per year. If a charity's gross income is less than £5,000 per year, they do not have to register at all. That is a flat threshold that applies to everyone. If you have less than £5,000 per year, you are exempt from registering. You can register, if you want to, but, in effect, there is an income threshold below which a charity is not required to register in England and Wales. That threshold is £5,000. The commission and the Secretary of State can exempt other individual charities if their income is less than £100,000. That is the only place in Great Britain and the Republic of Ireland where that kind of threshold exists.

In the light of what you talked about, there is some recognition of the fact that a charity with less than £5,000 per year — I imagine one that always comes to mind is the parent-teacher association, which, depending on the size of the school and if it is doing well, may do only three or four grand's worth of fundraising activities per year — still has all that paperwork. Whereas there could be a charity that, like you said, appears much larger, but it is a community transport network that happens to own a dozen buses with only three or four volunteers to run them, or something like that. In that context, it looks like they have a lot more, but it could still be quite disproportionate.

As I said, in England and Wales, if your income is below £5,000, you are flat-out not required to register. If your income is below £100,000, the commission or the Secretary of State can individually and deliberately exempt you. That kind of set-up might go some way towards acknowledging the sort of difference that you are talking about.

Ms Armstrong: OK. I understand that. Small charities, especially those that are completely run by volunteers, do not have the capacity to deal with as much red tape. That poses the question of whether we should allow them to register with much less red tape so that they can access funding going forward. I am sure that we will tease that out in our investigations with groups that come forward.

Thank you very much, Stephen. I wish mine was as good as yours is when she was wee. For the first three weeks, I do not think that I slept for one minute. Thank you.

The Chairperson (Ms P Bradley): Thanks, Kellie. Does any other member want to ask anything of Stephen? Nobody else has indicated.

Thank you very much, Stephen. You have raised lots of questions that we will fire on to the Department. RalSe has delivered a very comprehensive piece of work. Thank you, Stephen. Go and enjoy that baby.

Mr Orme: Thank you very much.