



Northern Ireland
Assembly

Committee for Communities

OFFICIAL REPORT (Hansard)

Charities Bill: Charity Commission for
Northern Ireland

16 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 Áine Murphy

Witnesses:

Mrs Nicole Lappin	Charity Commission for Northern Ireland
Ms Frances McCandless	Charity Commission for Northern Ireland

The Chairperson (Ms P Bradley): I welcome Frances McCandless and Nicole Lappin to the meeting. You are both very welcome.

Mrs Nicole Lappin (Charity Commission for Northern Ireland): Good morning, Chair.

The Chairperson (Ms P Bradley): Good morning. Frances, is it you who will kick off?

Ms Frances McCandless (Charity Commission for Northern Ireland): It is Nicole who will kick off, actually, Chair.

The Chairperson (Ms P Bradley): Why on earth do I get this wrong every week? *[Laughter.]* OK, Nicole. Go ahead.

Mrs Lappin: Thank you, Chair. Good morning, members. By way of introduction, my name is Nicole Lappin. As you can see, I am joined by the commission's chief executive, Frances McCandless. We are very grateful to the Committee for the opportunity to provide a briefing on the Bill. You have just referred to the written briefing, Chair, which you have been supplied with in advance of the meeting. Very briefly, I will make a few observations in my role as chief commissioner before I hand over to the chief executive, who will take members through the detail of the Bill.

I was appointed in August 2019. At the outset, I am grateful for the clarification that was provided by the Court of Appeal in February 2020 in the McKee and Others case. The clarification that I am referring to, of course, is the fact that the Charities Act (Northern Ireland) 2008 does not give commissioners the power to delegate their decision-making functions to staff. That decision crystallised a seismic shift in *[Inaudible owing to poor sound quality]* responsibility from commission staff to commissioners. The commission had the benefit of a short period after the High Court decision

in May 2019 to implement a new way of working to reduce any risk from the decision that the Court of Appeal took regarding who under the legislation had the lawful right to exercise statutory powers. At this point, as chief commissioner, I pay tribute to the staff and to my commissioners for the manner in which they have stepped up to the plate to ensure that regulation of the charity sector has continued despite the very real challenges that were presented by that decision. I am also grateful to the Minister for Communities and her Department for bringing forward the Bill that you are scrutinising, which will address those challenges. The commission welcomes the Bill.

I will now hand over to Frances, who will speak in more detail about the Bill's content.

Ms McCandless: Good morning, everyone.

The Chairperson (Ms P Bradley): Good morning.

Ms McCandless: We are glad to be here this morning. I will take you briefly through the commission's position. When I refer to the Charities Act throughout, I will be referring to the Charities Act (Northern Ireland) 2008, as amended.

As you are all aware, in February 2020, we had a Court of Appeal decision that upheld a previous High Court decision from May 2019 that confirmed the position that Nicole has just set out about decision-making within the commission. I will just say initially that I raised the issue of delegation with the then Department for Social Development some 10 years ago. Legal advice was taken, and there was a settled position that delegation did exist in the Act as it then stood, by virtue of its reference to the Interpretation Act (Northern Ireland) 1954. The courts have clarified that that is not actually the position, but the commission had designed all its decision-making processes based on that position. That obviously caused a lot of anxiety for charities, not least because it came immediately before the start of a pandemic. At that stage, we sought to reassure charities that they were still charities in law regardless of the legal status of any registration decision and that they could continue to operate. It appears to us that many charities did continue to do extraordinary work throughout that period in the knowledge that they were indeed charitable.

At that point, we put in place an interim solution, because we were waiting to see whether a Bill like this would come forward. Therefore, before turning all our integrated systems inside out with public money, we wanted to wait and see what the permanent solution would be. We have an interim decision-making solution in place, which takes decisions to a committee of commissioners that is convened under schedule 1 to the Act. However, if the Bill passes, we will obviously undertake a permanent redesign of many of our decision-making processes. What were possibly much slower decision-making processes than charities already wanted, because our resourcing constraints have always meant that we could not register or process as many charities as we would have liked every year, have slowed down because decisions now go to a committee of commissioners. We hope to speed that back up again on foot of the Bill once we have certainty.

I will take you through it clause by clause. Clause 1:

"Actions of Commission staff treated as Commission actions",

is especially welcome as it effectively reinstates the register of charities. That will be important for charities, their funders, the public and all those organisations that work alongside charities. It also covers a range of consents given to charities, many of which will have been the basis for charities to take other actions about which they currently have very little legal certainty. Those consents might have covered permissions to carry out transactions with land or any of their property, or they may have allowed changes in the governing document of a charity, so it will be extremely welcome that charities gain certainty on the status of those commission decisions upon which they may have taken further actions. The safeguards in the Bill really ensure that additional strain will not be placed on charities when those decisions are reinstated.

In the circumstances where deeming is restricted or excluded, we recognise that there are certain kinds of decisions that have human rights impacts, and so those have been set out in clause 1(5) and have been excluded. I cannot pretend that that will not cause complexities for the commission, because those decisions will remain unlawful in perpetuity. That affects around 250 decisions. We consider it likely that any appeals against those decisions may already have surfaced, since the position effectively has not changed since the Court of Appeal delivered its judgement in 2020. However, additional challenges may arise, and that will be one of the consequences for us.

It is extremely helpful that the Bill sets out, in clause 1(3), that it does not alter the outcome of already-concluded court or tribunal proceedings, as that will provide genuine certainty for any charities that were engaged in those. A small number of decisions were actually remade or validated, if you like, by commissioners after we received the judgement in order to allow charities to go on and do certain other things on foot of those decisions, and it is very helpful that clause 1(6) confirms that those "fresh decisions", as they are referred to, are also outside the scope of the Bill.

Moving on to the refreshed appeal rights, we agree that it is appropriate that fresh appeal rights should attach to the decisions affected by the Bill. We will work very closely with everyone we can, including with the Department, with bodies like NICVA and with other umbrella and helper groups in the charities sector, to get the message out there that these appeal rights exist once those decisions are reinstated. Our IT systems will allow us to contact directly anyone who was previously registered by staff. We do not have such a direct contact to people whose decisions were, for example, refused or to those who may be affected parties — so, those who are not charities themselves. Again, we will work on getting a public message out there.

Our view is that the 42-day time limit for appeals creates an appropriate level playing field for those whose decisions are affected by the Bill and for those whose decisions are not affected by it. Charities that were registered subsequent to the Court of Appeal decision or charities that receive a decision from the commission this week or next month have 42 days to appeal, and that will be exactly the same right. There will no disadvantage to anyone there.

You will appreciate that this is somewhat hard to judge, but we do not think that there are likely to be a large number of new appeals, based on the thinking that, if charities were unhappy in the first place, they would have appealed then. Some 72 commission decisions have been challenged since our powers were brought into force in 2011, but the vast majority of those relate to a very, very small group of big statutory inquiries. Of those 72, only 26 challenges to our decisions did not relate to those statutory inquiries, so that is 26 decisions in 10 years, and, of those, only two were registration decisions that made it to a tribunal, and they were both upheld, so you will see that the numbers of previous challenges are not big, and we anticipate that that will continue.

A very important provision in the Bill is the disapplication of accounting and reporting requirements during what we might call the gap period. The Court of Appeal judgement in February 2020 had a very significant impact on the annual reporting regime, and one of the main vehicles for transparency for the public in the Charities Act is that the charities supply us with accounts and reports every year. The inclusion in the Bill of a section relating to the disapplication of accounting and reporting requirements is a really important safeguard that protects charity trustees, because the effect would otherwise have been, in conjunction with the existing text in the Act, that an offence would have been created. It is an offence for trustees not to comply with the annual reporting requirements, so it is extremely important that those requirements have been disappplied for those gap years. For the majority of charities, if the financial year ends in March, this will affect the financial years ending in March 2020, 2021 and 2022.

The Bill introduces a requirement to begin complying with the accounting and reporting requirements again for financial years beginning on or after 1 April 2022. Again, that is a really helpful date to have in the Bill. Charity trustees need certainty, in advance of a financial year beginning, about whether they will have to report on that financial year, because they have to account in a certain way and to gather certain information. If the legislation goes through the Assembly, it will enable us to begin to communicate with trustees about what their obligations will be. The date of Royal Assent becomes slightly less important in that regard, because charity trustees will have certainty that it will at least be 1 April 2022.

I will give the Committee a sense of what the size of that gap period, if you like, will be. It is likely to be about three years. We will not start to receive accounts and reports that are not submitted voluntarily until around January 2024. We may have three financial years unaccounted for on the public register of charities, but the good news is — and I think that it is really important that you are aware of it — that charities have been doing extraordinary work in the interim by continuing with transparency. About two thirds of charities have continued to submit their annual reports and accounts voluntarily. Those are on our website. That is extraordinary, because our system automatically reminds charities three times a year, during the 10 months that they have to submit those accounts after the end of the financial year, that they are going to be due. We have switched those reminders off, because there is no legal obligation to provide that information, and charities have been doing it anyway. They have been encouraged by NICVA, the Department, other bodies and us, and they have kept doing that. That shows really good compliant habits and a willingness on the part of charities to keep complying with the legislation and being transparent for the public.

We welcome the certainty of that date of 1 April, not least for charities that provide a certain kind of accounts to us, as required by the regulations under the Charities Act. Charities that provide accruals accounts under the charities statement of recommended practice have to provide comparative year figures, so they need to know in advance. It is highly unlikely that, if they were already preparing accruals accounts, they will have stopped doing so in the interim. For one thing, if they are a company charity, they are required by company legislation to prepare accruals accounts. The vast majority of those charities will not have changed their accounting format in the interim, but it is an issue to be aware of. That date helps with that and gives some certainty.

This creates a somewhat complex double-scenario situation, because there is one set of rules which will apply to charities affected by the Bill and another set of rules that apply to charities that were subsequently registered by commissioners in a schedule 1 committee. We will have to draft new guidance to walk charity trustees through their responsibilities without creating too much confusion. We will also want to do a bit of public awareness to reassure the public that transparency and regulation continue. We have never had really the resources for that. We look with envy at our colleagues in Ireland, for example. We hear their campaigns on the radio. We have never really been able to do that, because we are very small, but we are going to have to make an effort to get messages out there to reassure the public and to help charities understand what they are meant to be doing. We will also have to change our IT system — I suppose that goes without saying — since all of the submission of accounts and reports is done online.

We welcome the provisions in clause 2 for delegating certain decisions to staff. I will give the Committee a sense of the balance of the kinds of decisions that the commission makes. Take the period up to the Court of Appeal's decision. Regardless of who the decision maker was, if the delegation set out in this clause had been in operation, staff made around 98.5% of the decisions, and commissioners or those operating in a schedule 1 committee, which can be both staff and commissioners, made around 1.5% of the decisions. That gives you a sense of the mix of decisions in the commission. We welcome the fact that the Bill clarifies our original understanding that staff can act as part of a decision-making committee under schedule 1 to the Charities Act. Also, the Court of Appeal judgement very helpfully clarified what the role of staff is when they are not acting as decision makers, and I note that that came up at last week's Committee discussion. What do staff do, if they are not making decisions? The Court of Appeal's judgement sets out that the role of:

"its staff is one of research, information gathering, briefing, advice and recommendation".

I think that that helpfully clarifies that, if staff are not acting as decision makers, those are the roles that they can perform in support of decision makers.

Any scheme of delegation is, obviously, to be consulted upon. Decision-making processes that are not to be delegated will have to be permanently rewritten. Manuals will have to be rewritten, information technology systems will have to be changed and staff will have to be trained. What we hope to move back to is a much more streamlined and efficient process for making decisions, like the ones that we previously had, which were very IT-dependent. Obviously there are resource implications for that, and I will talk a bit more about that at the end. There are also implications for the future recruitment, remuneration and induction of commissioners, because, going forward, they will permanently have a slightly different job.

Clause 3 inserts new sections that provide a power to introduce a registration threshold through regulations at a future point. We know that the current independent review of charity regulation established by the Minister is looking at that issue, so we anticipate that there would be a large consultation on it in future if it were going to be introduced. The commission is neutral on that point. As a delivery body, we will implement whatever legislation we are given by the Assembly and the Minister.

In the statistical annex to our submission, I set out what the implications of various sizes of threshold would be for regulation. Briefly, if there were to be a £5,000 income threshold, that would take about one third of charities out of regulation, based on those that are already registered, if we take those as a representative sample of the charity population. A £5,000 threshold would take one third of charities out of regulation. A £20,000 income threshold would take over half of charities in Northern Ireland out of regulation, because the sector tends to comprise smaller charities. We do, however, welcome the inclusion in the Bill of the assets of a charity, along with its income, being taken into consideration. I will give you one example. There is a charity currently on the register whose income is £17,000 but whose assets are £1.3 million. Obviously, one of the principles that underlies regulation is that charities are entitled to a range of tax exemptions funded by the public purse, and regulation is, in

some ways, a quid pro quo for that. Transparency around the wealth of charities is included in the legislation, and that wealth lies not just in income. Obviously, there would be resource implications for the commission in introducing a threshold for registration, and we will explore that in future. There will be questions about whether charities could bounce on and off the register as their income went up and down or if they chose to do that. We would have to rewrite all of our guidance. There are some 40 pieces of guidance relating to registration and annual reporting, because we work really hard to help charities through those complex pieces of legislation. As I say, we would anticipate the Department holding a thorough consultation were that sort of change to be introduced in future.

I will briefly touch on the resource implications. I have already mentioned that this Bill will require significant information technology redesign of the commission's systems, as well as redesign and permanent changes to our decision-making processes, the manuals for staff that underlie those and the guidance for charities and the public that sits on top of those. We will have to train staff. We will have to deal with any new appeals that come as a result of the Bill. We will have some very challenging communication messages to try to get across to charities and the public. We are very small. We have 28 permanent staff posts, and our permanent baseline budget is £1.6 million, although, luckily, we have had a temporary uplift in recent years, but that is ending this year. Public money is tight; we know that. If no additional money can be made available, we will have to reduce what we do in other areas of our work, such as registrations, casework decisions, investigations and inquiries, so that the same small number of people can turn their minds to making the changes that will be required by the Bill. Chair, I will leave it there and take any questions.

The Chairperson (Ms P Bradley): That is great. Thank you, Frances and Nicole. I have a few questions, and they are mainly based on some of the responses that we have had. We are starting to go through our evidence gathering. Some of the respondents said that they felt there were other options when it came to clause 1 as drafted. Do you feel that clause 1 as drafted is the only option?

On clause 2 and delegating certain decisions to commission staff, you talked about what roles staff have in the commission. We have received evidence indicating that it is the commissioners and not necessarily the staff who are recruited with the detailed knowledge of charity law and operation. That therefore queries staff's making some of those decisions. What is your view on that?

Finally, the independent review is ongoing and will overlap with some aspects of this Bill. Do you think that that raises any cause for concern at this stage?

Ms McCandless: Nicole, if you are content, I will pick up on those questions.

Clause 1 as drafted looks sensible to us. I think that there is a clear rationale for the decisions that are, if you like, carved out — those that may affect individuals as opposed to charities as bodies and institutions per se. It was a decision of the Department and the Minister, not the commission, as to which clauses were introduced, but we can absolutely see the clear rationale for those being the decisions that are restricted or excluded from the scope of the Bill.

On clause 2, the staff are very experienced and well trained and very well able to make these kinds of decisions. They are recruited to a specific job specification relating to the kind of decision-making role that they perform. Staff in all of the other charity regulators on these islands, both in the United Kingdom and in Ireland, do perform decision-making functions. That is the norm, so our staff are every bit as capable of making any decisions that the legislature wishes them to make as they are in other commissions.

On the overlap on clause 3, obviously the independent review is looking at this in great detail, so I suppose that these two things could helpfully run in conjunction, because we do not know what its recommendations will be. I know that the review team is going to come to present to you, and they are looking at this in a great deal of detail. If it were to recommend no threshold but the legislation went through making provision for a threshold, you can see where the complexity would be, but hopefully the timing of this will work.

The Chairperson (Ms P Bradley): Yes, we hope that the timing of that will work for us also before we do our report, because we do not want the review to cause any major problems with any of the decisions that we make here and any of the legislation that we put forward. I have no doubt that we will have you both back in again at stages throughout our evidence gathering. I will open it up to the floor. Only one member has indicated that they want to ask anything, so I remind members to put their hands up.

Ms Armstrong: Thank you very much, Nicole and Frances. This has been a long drawn-out process, and I am glad to see that we have the draft legislation on a page now. Frances, I will ask you a couple of questions, and, Nicole, I have one for you as well. Frances, you sort of answered one of my questions, so I will turn it around. I was looking for information about how the Charity Commission would contact affected parties or let them know or provide them with clarification about the changes that are coming in and so on. Do you have enough resources available within the commission to provide the public with the clarity about appeals and about the date of the accounts? Do you have the resources for this new IT system? I am very aware that this legislation will put additional resource implications on you.

Ms McCandless: We always struggle for resources, Kellie. We have one communications person and one IT officer, and we have always struggled with being able to communicate with the public and with charities in the way that we would really like. Obviously, all of this is to do with prioritisation. Do I take money away from doing more registrations and put it into more communications? That is the same kind of choice that every public body has to make. I think that we will be able to cope with the capital elements of the IT changes, because we already have a transformation project ongoing that our sponsor Department has agreed. The problem is that the IT is the last bit of the jigsaw, if you like. We actually have to design the decision-making systems that the IT will deliver, and it is that process of turning the staff away from making the decisions to designing the new ways of making the decisions that is really going to eat into our resources.

Ms Armstrong: Just to check, how many charities are currently on the waiting list for registration?

Ms McCandless: To the best of my recollection, there are about 2,500 charities that we are aware of waiting for registration. There is a list on our website, called "the combined list", which shows all those that have submitted an expression of intent to register. That is the main bulk of the waiting list. However, there are also others on that list, that we know need to register, either because they have ignored our calls to come forward and register in the past, or our contact details for them were out of date and we could not contact them in any other way, but they were deemed as charities under a previous deeming provision because they were registered with HMRC.

That combined list on our website sets out all those different categories of charity which are waiting to be registered, if you like, whether they need to or not. I will confirm the exact number.

Ms Armstrong: Part of that public awareness will need to go to funders in Northern Ireland, or even beyond, to assure them that, when they are making decisions about applications for funding for a charity that is on the waiting list, the charities may well still be registered at Companies House.

Moving on, I want to seek your opinion on this, Frances. In clause 1(8), when we talk about the 42 days to file an appeal, in your experience of previous appeals that have come forward, what has been the average length of time that charities take to file an appeal? Is 42 days way over that period, or would they struggle to meet that time limit?

Ms McCandless: They do not seem to have struggled in the past, Kellie. Where they have, the tribunal has taken a very sympathetic approach to the fact that charities may have a good reason for bringing an appeal out of time, and the tribunal can hear such appeals. What tends to happen, particularly with things like a registration, where the charity receives a decision directly, they know immediately whether they are happy with it. A lot of those tend to go in fairly promptly to the tribunal to make an appeal. The paperwork is fairly straightforward to fill in and send to the tribunal.

Among the others, there is a category of appellant which is called "affected parties", so they may be members of a charity. They may not be the people who initially receive our decision in a letter or email. If they have good cause, they can go to the tribunal. Even though the decision might have been published on our website, they may have had no reason to go looking for it. They can go to the tribunal and say, "I only became aware of this decision on this date, this is why it affects me, and will you still hear my appeal out of time?", and the tribunal has the jurisdiction to agree to that.

Therefore, there are mechanisms and safeguards in the tribunal process itself, which allow the tribunal to look at appeals that are brought beyond the 42 days, if it thinks there is a reason.

Ms Armstrong: I am just worried about the wording in clause 1(8)(a), where it says:

"an appeal notice under rule 17(1) must be filed within 42 days".

So, under the law that we are bringing forward, they must do it. I wonder whether that might have a future impact on the appeals process.

I turn to clause 3. We do not know when the independent review is going to report and how it is going to impact on this legislation. The whole of clause 3 could be amended in the future. Would you be concerned if clause 3 was not there, or would you prefer that it goes through at this stage and is amended at a later date? It would hold back a lot of decisions. If we were to decide that it was a threshold of £5,000 or £20,000, it would hold that back until such time as the independent review is done. Do you think it would be worthwhile to wait and put the whole of clause 3 in as an amendment at a future date?

Ms McCandless: We are neutral on clause 3, Kellie. We will take what we are given. Whether it is legislated for now or later is not something we have a view on. It is really a matter for the Committee, the Minister and the Department.

Can I just correct myself? One of my colleagues has very helpfully — this is the beauty of not sitting in front of you in the room — told me that there are 3,900 charities on that combined list, waiting to register. So my apologies: I slightly underestimated.

Ms Armstrong: By the power of the internet. Thank you very much for that.

My last question is for Nicole. As a commissioner, obviously, there are certain decisions that you have to make directly, and you will. As Frances has kindly clarified, staff can provide guidance to commissioners through research and so on. I wonder whether that is taken as advice by commissioners? I just want to ask this question: will commissioners ever disagree with the guidance? Is it guidance that staff provide to them, or is it just research? How do you see that working as we go forward, Nicole?

Mrs Lappin: That is a very interesting question, Kellie. At the minute, staff come to a panel of three commissioners with recommendations. They have carried out the research and looked at what the law suggests the outcome might be. From my role, I can tell you that the commissioners do not always agree with those recommendations, so it is not simply a rubber-stamping decision-making panel. In my experience, the commissioners have been very diligent when reading the papers. There are often copious papers. For these panels, up to 1,000 pages can be presented to us to prepare us for the decision-making that we have to take. The commissioners listen to those recommendations and discuss them as a panel, and they will often ask a lot of questions. I have been on panels on which we have refused to go with the recommendation that has been made. I expect that to continue, because that is good decision-making. That is especially the case under the Bill. Frances touched on the fact that it is the types of decisions where it is envisaged that we will not be able to delegate our powers to staff that will either impact on the reputation of the commission or may be controversial.

Ms Armstrong: I completely understand that. My example of that is as councillor. Staff would provide us with information, but ultimately it would be the councillor who would take the decision, and it is up to them to carry that responsibility.

That was a bit of clarification for me. I absolutely appreciate that everybody is professional in their organisation and that they have a job of work to do. At the end of the day, it is your own personal reputation that would be called into question if a decision was just knocked through, and that is not what we want to happen.

That is all from me, so far, Chair. There is a lot to get on with, guys. Thank you very much for your patience with my questions.

Mr Allen: I have one question. I look forward to hearing all the evidence as it comes through and the further questions that may come out of that.

Further to Kellie's point about clause 1(8), on the proviso that the Bill is approved and receives Royal Assent, is it the intention of the commission, or has the Department conveyed to you its intention to contact all persons and charities that would be affected by the refreshed appeal rights?

Ms McCandless: Thank you for that question, Andy. We do not know who all those people are to contact them directly. We would be able to directly contact all the charities that were affected by registration decisions — that is, decisions to register. We will try to contact all those whose

registrations we refused, although we will not necessarily have up-to-date contact details for them because those are through the register as time goes on.

The persons who are affected could be, for example, members of a charity. If a company charity wants to change certain parts of its objects, it has to come to us for consent. The members of the charity may have views on that decision, but we would have absolutely no way of knowing who all those people are. That is where the public information campaign comes in. We have worked very hard with the Department and other bodies to try to get that message out there.

Mr Allen: Thanks very much.

The Chairperson (Ms P Bradley): No other members want to ask any questions at this stage. Thank you very much, Frances and Nicole. As I said earlier, we may need to get you back. In fact, we probably will need to get you back as more questions arise as we go through the evidence. Thank you for today.

Mrs Lappin: Thank you, Chair.

Ms Armstrong: Can I ask that we make a note, Chair? I am a wee bit concerned that the Charity Commission for Northern Ireland, like all organisations, receives a certain level of funding. As a Committee, we will be keen to see that they have a public message. I just have a concern that they do not receive enough funding to do that; that will be quite a limited amount of funding. I do not know whether we could mark, for our future report, that we should make a request to the Department for Communities to ensure that funding is made available for that public communication. As Andy found out through his question, it is not just about charities, for which we know the names and addresses; it is about individuals, too. The public needs to know that.

The Chairperson (Ms P Bradley): That could arise as we go through the evidence-gathering but the Committee Clerk will certainly make a note of that.