



**Level 9
Causeway Exchange
1-7 Bedford Street
Belfast
BT2 7EG**

Telephone: (028) 9082 3476
e-mail: private.office@communities-ni.gov.uk
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Dr Janice Thompson
Communities Committee Clerk
Parliament Buildings
BELFAST
BT4 3XX

Dear Janice

RE: CORRESPONDENCE RE CHARITIES BILL

Thank you for your correspondence of 13 September 2021 in which you enclosed a number of questions posed by the Committee following their briefing from a member of RaISe on the Charities Bill. I will address each one in the order that they have been raised.

- 1. When the Charities Act (Northern Ireland) 2008 was being developed and passed by the Department for Social Development ('DSD') and the Assembly, legislation in England & Wales and Scotland expressly permitted charity regulator staff to perform functions. In addition, draft ROI legislation was under Oireachtas consideration and included a similar provision. Given this, why was a similar provision not included in the 2008 Act.**

DSD did not consider it necessary to include such an express power of delegation to staff due to provisions within the Charities Act (Northern Ireland) 2008 (the 2008 Act) and the ability under section 19 of the Interpretation Act (Northern Ireland) 1954 for a corporate body to regulate its procedures, which it was believed included the delegation of functions to staff. Legal advice received in 2011 when the issue was raised by the Commission confirmed this interpretation.

The 2008 Act was largely based on the England and Wales legislation, however, importantly there is no equivalent to section 19 in England and Wales which explains their need for an express power. Drafting at that time in NI commonly relied on section 19 and an exercise conducted following the McBride High Court Judgment uncovered numerous bodies with similarly framed legislation. The

Department of Finance is currently drafting a Public Bodies Bill which will amongst other things address this issue for other affected bodies.

- 2. Passage of the Charities Act (Northern Ireland) 2013 was in response to technical issues with the 2008 Act. Specifically, the “public benefit test” provision had been transposed from existing Scottish charity legislation and caused legal uncertainty for the Charity Commission. During development and passage of the 2013 Act, did the DSD consider the fact that Northern Ireland uniquely did not have a specific provision permitting staff to perform functions? If so, was addition of such a provision considered within the scope of the 2013 Act?**

As advised in the Department’s letter to the Committee of 20 May 2021, the question of whether an express power of delegation to staff was required was raised by the Charity Commission with DSD in July 2011 when the Bill, which subsequently became the Charities Act (Northern Ireland) 2013 (the 2013 Act), was being drafted. DSD took legal advice which stated that provisions within the 2008 Act, taken together with section 19 of the Interpretation Act (Northern Ireland) 1954, provided sufficient power to authorise Commission staff to discharge functions on behalf of and in the name of the Commission, and on the basis of this no legislative action was deemed necessary. DSD decided not to progress an amendment in this regard on the basis of its legal advice and the fact that the Commission was also content. This interpretation was found to be wrongly relied upon by the Department in the McBride High Court Judgment of May 2019 and confirmed at the Court of Appeal in February 2020.

- 3. Clause 1 of the Bill makes the actions of Commission staff, prior to May 2019, lawful. However, certain staff actions are excluded from this provision. Why is this? Did the DfC consider excluding any other actions or decisions from being made lawful?**

The Minister was clear from the outset that no action should be taken that could impinge on the rights of individuals under the European Convention on Human Rights (ECHR). On the advice of the Attorney General an exercise was undertaken to identify the particular categories of decision that if made lawful could impinge on those rights. This has led to the protections afforded by Clauses 1(3) to (5).

- 4. Is the refreshed six-week timeframe for appeals, starting from the date of Royal Assent – equivalent to the standard appeal timeframe – sufficient for affected persons or charities?**

In addition to the protections afforded by Clauses 1(3) to (5) the Minister is determined that fresh appeal rights should be afforded in accordance with Schedule 3 of the 2008 Act for those decisions that the Bill will make lawful. Such appeal

rights would be subject to the standard appeal timeframe thereby ensuring that there would be no difference for affected parties in bringing forward appeals arising from the Bill than any other decision of the Commission which is to be appealed. It should be noted, however, that the Department does not expect there to be many appeals due to the limited number that were raised when the decisions were first taken by Commission staff.

The Minister recognises that it will be crucial that all aspects of the Bill are communicated as widely as possible including the fresh appeal rights and will work with the Commission, sectoral interests and representative bodies to ensure that this is the case. In addition the Charity Tribunal rules allow for appeals that are submitted outside the required timescale to be considered if the Tribunal deems it appropriate. The Department will contact the Charity Tribunal to appraise them of the issue.

5. Will the DfC or the Commission actively contact all charities and persons subject to appealable decisions, to notify them of this timeframe and their right of appeal?

The Department will work with the Charity Commission and sector representatives such as the Northern Ireland Council for Voluntary Action (NICVA) to ensure that the provisions of the Bill and what they mean are communicated as widely as possible.

The Commission, during its briefing to the Committee on 16 September, advised that it has the facility to contact individual charities but indicated that it would not have the details of all parties that could be affected e.g. trustees or members of those charities. Therefore the Department and Commission will also use their websites, social media and usual press outlets to communicate as widely as possible the key messages in respect to the Bill and will contact the Charity Tribunal to appraise them of the issue.

6. Clause 2 of the Bill explicitly allows for Commission functions to be delegated to staff. However, it further establishes that certain actions can never be delegated to staff. Why is this? What consideration was given to any other functions being excluded from being delegated to Commission staff?

The vast majority of appeals made to the Charity Tribunal concern orders made during the course of a statutory inquiry. Such orders can have a huge impact on individuals in terms of their reputation and their ability to continue to act within the charity sector. Although such orders can be made by staff in other jurisdictions throughout the UK and Ireland the Minister has taken the view that in order to restore confidence in the process here, such decisions are better taken by the Commission or a Committee established by the Commission under Schedule 1 of

the 2008 Act. Such decisions account for a small percentage of the decisions required of the Commission.

The issue could have been addressed in a Scheme of Delegation, however, the Department felt it important to make legislative provision in that regard to help restore trust and confidence. In addition, the Minister has taken the view that the powers contained within the Act for the Commission to make statutory regulations should be more properly discharged by the Commission or a Committee established for those purposes.

The approach the Minister has adopted does not make it inevitable that all other decisions will be delegated to staff as they must be set out in a Scheme of Delegation made by the Department. Any such scheme will be fully consulted on and reviewed should more of the Act be commenced and the Commission take on additional powers, or the Department decide to review it for any other reason.

Clause 2 also requires the Department to publish any Scheme providing full transparency on how the Commission will discharge its statutory functions going forward.

7. Will staff be involved in supporting Commissioners to take decisions in the areas reserved to the Commission: for example, through providing advice and information? If so, will this be included in a Scheme of Delegation?

Clause 1(10) re-affirms that staff can act as members of decision making committees, however, those committees must include Commissioners as decision makers.

Staff may also support Commissioners by, for example, conducting research, gathering information, providing briefing, advice and recommendations. This is recognised at paragraph [44] of the Court of Appeal Judgment. It is therefore not envisioned that such administrative tasks would be covered in a Scheme of Delegation but the decisions required to be taken by the Commission in the exercise and discharge of its statutory functions will be stipulated.

8. Are DfC content that Clause 3 – establishing the framework for a registration threshold and associated measures – does everything required, at the level of primary legislation, to ensure a robust and functioning threshold can be established in Regulations and in practice?

The introduction of any future threshold would require a full stakeholder consultation as it throws up complex issues and some clear policy options. The Department is content that the power in clause 3 is wide enough to respond to each of these policy options which include for example:

- The level at which the threshold should be set and whether it includes a consideration of a charities assets;
- the mechanics and operation of such a threshold, such as the calculation of it and any evidence requirements;
- The ability of a charity that is on the register to be removed from it if it so wished because it fell below the threshold or for a charity to register whether it fell below the threshold or not;
- The need to amend other legislation to take account of the new category of charity that a threshold would create; and
- The extension or modification of offenses contained with the 2008 Act so that they may apply to those that fall below the threshold.

9. What is the DfCs rationale for adding Clause 3 to this Bill, which otherwise exclusively responds to issues raised by the High Court and Court of Appeal decisions? The Minister for Communities has advised that the existence and level of any threshold will be considered as part of the broader Review of Charity Regulation. Given this, would it be more prudent to include this sort of clause in any future legislation which follows that Review?

Clause 3 provides a power to introduce a registration threshold, should it be desirable at some point in the future, via regulations which would be subject to the draft affirmative procedure thereby providing for Assembly scrutiny before introduction. This provides a vehicle to respond promptly to an issue which has long been called for by the community and voluntary sector but which would be fully consulted on so that views and impacts are determined prior to introducing such change to the current regulatory framework.

The independent review of charity regulation which is due to report in the coming weeks is also considering this issue and its recommendations will also inform policy considerations.

NICVA has lobbied strongly for such a provision and subsequent policy change and when it briefs the Committee it is expected that it will advocate strongly for such a threshold at that time.

Yours sincerely



Louise Anderson
Private Office