



Northern Ireland  
Assembly

Committee for Communities

# OFFICIAL REPORT (Hansard)

Charities Bill: Charity Law Association

30 September 2021

# NORTHERN IRELAND ASSEMBLY

## Committee for Communities

### Charities Bill: Charity Law Association

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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 Stephen Dunne  
Mr Mark Durkan  
Ms Ciara Ferguson  
Mr Paul Frew  
Mr Fra McCann  
Ms Áine Murphy

**Witnesses:**

Professor Gareth Morgan                      Charity Law Association

**The Chairperson (Ms P Bradley):** Professor Morgan is presenting to us today and may well reiterate what I am about to say, but I want to highlight the fact that the Charity Law Association (CLA) has over 1,000 members, mostly lawyers but also accountants and other charity professionals, and that the members of the working party established to look at the Bill serve in a personal capacity. The views expressed should not be taken to be the formal opinion of the organisation that they each represent. Similarly, the views in the submission should not be seen as constituting the opinion of CLA members as a whole. I welcome Professor Morgan. Gareth, you are very welcome to our meeting today. Please go ahead and brief the Committee.

**Professor Gareth Morgan (Charity Law Association):** Good morning, Chair, and thank you very much for the invitation to speak to the Committee. Good morning, members. You have kindly given an overview of the Charity Law Association, and, as you know, our submission is prepared by a working party of five members, all of whom have specific experience of charity law in Northern Ireland. I was not chair of the working party, but I was asked to speak to you today because my background is as an academic comparing charity regulation across different jurisdictions, and some of the points that we want to make today are about how this Bill compares with the equivalent provisions in Scotland, which is where I am currently based, and in England and Wales. I should add that most of us have made submissions to the independent review of charity regulation in Northern Ireland under Professor Oonagh Breen.

There are broader issues that we believe need to be addressed beyond this Bill, but I will focus on the Bill primarily. However, we do want to make one point. We do believe that it is really important to implement charitable incorporated organisations (CIOs), the new structure for charities, in Northern Ireland as soon as possible. At present, Northern Ireland is very disadvantaged compared with England and Wales and Scotland in not having CIOs. Currently, two thirds of new charity registrations

in Scotland and in England and Wales are for CIOs or the Scottish equivalent, Scottish charitable incorporated organisations. Some of the difficulties that charities in Northern Ireland are currently facing in registering because of difficult constitutions might well be addressed if they could use the CIO structure. It is worth stressing that CIOs do not need new primary legislation, so it does not need anything in this Bill. It just needs regulations to be laid by the Department to bring them into effect.

I will focus the rest of my comments on the specific provisions in this Bill. As you know, the Charities Bill is a very simple Bill, comprising just four clauses, but it aims to remedy some really urgent problems with charity law in Northern Ireland.

The Charity Law Association working party fully supports the principles involved in clauses 1 and 2. We agree that it is really urgent to legislate to rectify the omission in the Charities Act (Northern Ireland) 2008 that did not allow the Charity Commission for Northern Ireland to delegate decisions to staff, as emerged from the 2019 McBride case. For more than two years now, the commission has not been able to take any decisions except through formal meetings of its board. That means that a vast number of earlier decisions, including all the charity registration decisions so far, apart from one or two considered by the full board, are uncertain. So we have the situation, 13 years after the 2008 Act was passed, where there is still no legally binding register of charities in Northern Ireland. This puts charities in Northern Ireland at an enormous disadvantage compared to those in the UK, elsewhere or in the Republic of Ireland, where a formal charity register has been in effect for several years. It also means that the numerous cases where the Charity Commission has given permission for something remain in doubt. For example, if the commission authorised a charity to amend its objects in order to take on new work, can that charity legally raise funds within its new objects and undertake work under its revised objects? It is not clear.

The working party urges the Committee and Assembly to move forward with the Bill as swiftly as you possibly can. Every day that it is not on the statute book is enormously damaging for Northern Ireland charities, and hence for their beneficiaries and service users.

Clause 1 gives retrospective approval to the past decisions, and clause 2 gives clear powers of delegation for the future. We fully support the principles here. In all charity jurisdictions that I am aware of, charity regulators have the power to delegate decisions to staff. You cannot possibly have a situation where, for example, every charity registration decision has to be taken at board level.

We have, however, a few concerns of detail on clauses 1 and 2, which are set out in our written submission. We are not clear why clause 1(5) omits a whole list of decisions from the retrospective approval process. It leaves decisions on that list in a rather weird position. It would be simpler to omit clause 1(5) so that all decisions taken by the commission, even if delegated to staff, are regarded as lawful. It is worth stressing that those decisions could still be challenged in the normal way, because subsections 1(7) and 1(8) create refreshed appeal rights, so anybody will be free to take a new appeal to the Charity Tribunal if they are unhappy.

We have also got some slight concerns about clause 2, which suggests that it will be the Department for Communities, rather than the commission, that will make the scheme of delegation. That seems rather bizarre to our working party. If the commission is given the power to delegate, we feel that it must be the commission board that makes the scheme, in consultation with the Department, rather than the other way round. We also have some questions of detail about allowing some powers to be delegated but not others.

Our biggest uncertainty is on clause 3. We are all agreed with the broad position that you do not want a situation where very small organisations, which never intended to be charities, are forced to register under the Act just because their aims could be considered charitable. On the working party, we had a number of different views about how that could best be addressed. We are not sure about the approach taken by clause 3 to create a whole *[Inaudible owing to poor sound quality]* charities in Northern Ireland. That could possibly create quite significant difficulties, which I can expand on if you have time in questions. Whilst we support the intentions of clause 3, we would like to discuss other ways forward, and we have three suggestions in our written paper.

Thank you very much.

**The Chairperson (Ms P Bradley):** Thank you very much indeed, Gareth. Before I open the meeting up to members, I just want to ask you some questions.

You mentioned charitable incorporated organisations. Are there any recommendations, or is there anything that the Committee could do at this stage, whether in the Bill, in recommendations or in our report, around that?

I would like you to expand further on clause 3. We have had witness sessions and submissions on clause 3, about charitable status and those smaller charities, the problems and arguments for and against.

If you could address both those points, that would be great.

**Professor Morgan:** To implement CIOs will not need any new primary legislation, so it does not need anything in the Bill. However, in your relationship with the Department, I am sure that it would be enormously helpful if your Committee could make a formal recommendation to the Department for Communities to bring in regulations to implement charitable incorporated organisations without further delay. As I was saying, it puts Northern Ireland at a considerable disadvantage compared to England, Wales and Scotland, where the vast majority of new charities use the CIO structure.

As for clause 3 and the smaller charities, we believe that there are two or three issues. It may be helpful to first expand on the problem. The issue that has emerged is that, because the definition of a charity in Northern Ireland follows a fairly simple definition that is used in England and Wales, any organisation established with charitable purposes — that is to say, if the aims in its constitution fall within the charitable headings in the Act — is deemed to be a charity. There is no lower limit for charity registration in Northern Ireland, so it therefore has to register with the commission. What has emerged is that some very small groups that never really intended to operate as charities, but which have constitutions with charitable aims, are being forced to register.

There are several solutions to this issue that are used in different jurisdictions. One option is what is in the Bill, and that is to allow those organisations to still be regarded as charities without their having to register with the commission. The Bill proposes to do that by allowing some potentially quite complicated regulations to be made allowing for a category of exempt charities in Northern Ireland, so charities below certain income levels and certain assets would still be charities, but they would not have to register with the commission. Some of us on the working party think that that would be good, but others have reservations. Speaking personally, I have some experience of the system of exempt and excepted charities in England and Wales. It causes massive problems in that an organisation can be a charity without having to be registered with the Charity Commission for England and Wales and it does not therefore have a registered charity number.

There is also the whole question of the terminology. If you are going to have that concept, I recommend that you call them "excepted charities", which is a closer parallel to what is used in other jurisdictions, rather than "exempt charities". Excepted charities are excepted from the requirement to register, whereas an exempt charity is normally, if you draw an analogy with England, a body that is completely outside the main framework of charity legislation. Of course, if you have bodies that are calling themselves charities but are not in any way regulated on a day-to-day basis by the Charity Commission, it can cause all kinds of problems. We certainly feel that, if you are going to go down that road, it has to be very limited about which charities are eligible.

A second solution to the problem is to go down the road used in Scotland and many other jurisdictions whereby an organisation can have charitable aims but, so long as it does not claim to be a charity or describe itself as a charitable organisation, is not required to register with the commission. In Scotland, for example, there is a very clear rule. I think that you heard evidence a week or two ago about that from Martin Tyson at the Office of the Scottish Charity Regulator (OSCR). It is a very simple system whereby every organisation in Scotland that claims to be a charity must be registered with OSCR, but there is nothing to stop a general voluntary organisation that does not wish to be seen as a charity from having charitable aims; it just must not call itself a charity. That is quite a simple solution, but it would mean amending the definition of "charity" in the Charities Act (Northern Ireland) 2008.

A third possibility is to allow those small organisations that have charitable aims but which never intended to be charities to amend their constitution in such a way as to make it clear that they are not a charity, but without having to go through the process of getting the permission of the Charity Commission for Northern Ireland to do so. For example, if you have an organisation whose objects are to provide some local facility, but it does not want to be a charity, all that it would need to do is add a clause to its constitution: "However, nothing in this constitution shall require the organisation to operate exclusively as a charity." Provided that it was allowed to have a provision like that in its constitution, it could opt out of charitable status. That, again, would require an amendment to the 2008

Act to make it legal, because, as it stands, a charity is not allowed to just amend its constitution to become a non-charity without the permission of the commission.

Those are some other ways in which the issue might be addressed.

**The Chairperson (Ms P Bradley):** Professor Morgan, thank you for that. I will read the Hansard report of this with great interest. You have given us lots of ideas on clause 3, and we can certainly consider putting the formal recommendation on CIOs in our report. Thanks for that. Do members have any questions for Professor Morgan?

**Ms Armstrong:** Professor Morgan, on the status of smaller charities, does the opt-out option for charitable status mean that an organisation with an income of less than £5,000 or £25,000, for instance, could opt in? I am thinking of how funding streams work in Northern Ireland; they require charity registration in order to access funds. There is nothing in what you propose that would prevent those smaller organisations from actively becoming registered charities; it is an opt-out system?

**Professor Morgan:** Thank you for the question. I fully agree with what you say. We say very strongly in our written evidence to the Committee that there must not be any exclusion of organisations below a certain level of income from registering with the commission if they want to do so, for precisely the reason that you give: many funders require organisations to be registered charities.

To make an analogy with another jurisdiction, I strongly recommend that Northern Ireland not go down the same route as England, where most charities with an income of under £5,000 cannot get registered with the Charity Commission even if they want to. Now, that does not apply to CIOs, because a CIO does not exist until it is registered — that is one of the attractions of the CIO form — but is very difficult for a charity with an income under £5,000 to persuade the Charity Commission for England and Wales that it wants to be registered. We say clearly that any organisation that has charitable aims, no matter what its size, must be allowed to register with the commission if it wants to do so.

**Ms Armstrong:** Thank you.

**The Chairperson (Ms P Bradley):** OK. Does any member want to ask further questions of Professor Morgan?

I will go back to clause 2 on the power of delegation and the issues about the Department. Will you go over your concerns about clause 2 one more time?

**Professor Morgan:** Thank you for that. We find it curious that, although clause 2 is all about allowing the Charity Commission to delegate powers to its staff, which it does by inserting a new paragraph 9A into schedule 1 to the 2008 Act, new sub-paragraph 9A(3) says:

*"The Department may make a scheme describing"*

the delegation details, so it is actually the Department for Communities that is allowed to delegate the Charity Commission's powers. We think that that seems really strange. In any normal framework for any organisation, the organisation itself works out the scheme of delegation and what powers it wishes to delegate to staff or not. We suggest that it would be more logical for the power in clause 2 of the Bill to rest with the commission itself.

We also have questions about sub-paragraph 9A(2), which says:

*"The following may not be delegated"*

and lists various powers in the 2008 Act that cannot be delegated. Again, we think it is slightly odd to propose restrictions of that kind. I am sure that, when the Charity Commission for Northern Ireland comes to make its scheme of delegation, it will say that certain decisions need to be made at board level, but we think that it is a little bit strange to write those sorts of things into the Act.

It is worth saying that even a decision to use a major power such as opening an inquiry is not always going to be clear-cut at the board meeting. I can envisage a situation, for example, where a charity causing particular concerns comes to the board, and the board passes certain resolutions saying to

staff, "Please engage with the charity on the following issues, but, if you do not get a satisfactory response, we authorise you to open an inquiry". In that sense, the issue has been discussed by the full board, but you might want to delegate the detailed implementation to a member of staff. If you say that certain things cannot be delegated at all, you rather inhibit the way in which things could work, and, in some cases, it could impose significant delays. Where there is significant wrongdoing in a charity, sometimes you need to act very quickly rather than wait for the next board meeting.

These are our two issues: one is whether the commission itself should be able to delegate, and the second is whether the exceptions in sub-paragraph 9A(2) are needed.

**The Chairperson (Ms P Bradley):** Thank you, Professor Morgan. You have left us with plenty of questions that we need to ask the Department for clarification on why certain things are in the Bill and other things are not. Thank you for your time today. No other member has indicated that they want to ask questions at this stage. When the Hansard report of this briefing comes out, I will certainly read it in detail, because there was an awful lot of information there, and I appreciate that. Thank you for your time today.

**Professor Morgan:** Thank you, Chair.