



Northern Ireland
Assembly

Committee for Communities

OFFICIAL REPORT (Hansard)

Charities Bill: Mr Trevor McKee

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orders of the commission require that it must act collectively. It is a bit of a jump from that requirement to allowing one senior or junior official to exercise those powers.

Section 6 of the Charities Act (Northern Ireland) 2008 gives the Department a duty to appoint commissioners to ensure that they have the right qualifications to discharge their functions and, in tandem with schedule 1 to the Act, claims an oversight role of commission corporate business. Retrospective legislation should be a harbour of last resort, not an administrative convenience, which this Bill seems to be. Retrospective criminal legislation is forbidden by article 7 of the European Convention on Human Rights. Although essentially civil in nature, charity law and the powers of the Charity Commission can carry criminal consequences. In my view, it is, therefore, certainly within the scope of article 7, at least. By making decisions that are not appealable lawful, the Bill asks the Assembly, albeit unintentionally, to condone illegality with no redress for victims: for example, a direction under section 22(3). I know that you have discussed that already.

The exemptions that are carved out and listed in clause 1(5)(a) to clause 1(5)(f) are fundamentally necessary to protect the civil rights and lawful obligations of citizens. As I said, many of the commission's decisions, orders and directions carry criminal penalties. Therefore, it is essential that those rights are protected from potential abuse. Up to now, the Department has not known exactly what rights have been affected, because it has not looked at all the decisions, just categories of decisions.

Making past decisions lawful is not necessary. I suggest amending the Bill so that any charity that wishes to have certainty in its business interests can simply make a fresh application to the commission, which can then remake the decision via its schedule 1 committee. Alternatively, the exemptions listed in clause 1(5) should be extended to at least those that are covered under section 174 of the Charities Act (Northern Ireland) 2008, which covers orders etc. That would allow the commission to seek punishment for the offender in the High Court. Information-gathering powers that are subject to sanction under section 25 of the Act would also be included.

On clause 2, as per clause 1, certain challenges to the practices and procedures deployed by commission staff have never been subject to proper scrutiny. On each occasion on which those matters were brought before the Charity Tribunal, the commission withdrew its resistance to an appeal or application, or sought to avoid scrutiny by challenging appeals as being out of time or claiming that applicants had no standing to bring an appeal. Without examining each of the impugned decisions subject to retroactive validation, it would be impossible to gauge the impact on and consequences for individuals. Therefore, this does not satisfy the requirement of the Court of Appeal:

"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".

I am relatively content with the delegation of powers of registration. The schedule 1 committee used by the commission appears to be dispensing its business effectively and economically. However, if registration were to be delegated, some 96% of the commissioners' workload would, effectively, evaporate. My suggested amendment is that only registrations be made delegable, not judicial powers, and that, certainly, registrations do not need to be retroactively made lawful.

On refreshed appeal rights, it is a matter of some concern that the Charity Tribunal was and is largely unsympathetic to applications made after the time for doing so has expired. I was forced, at some personal risk, to take a decision of the tribunal to the High Court on that very same ground, and the High Court delivered a scathing rebuke to the tribunal for disallowing my appeal. My suggested amendment is that all decisions, orders and directions that are made retroactively lawful, if they have to be, are made appealable, even if not specifically allowed by schedule 3, and that the 42-day appeal window is extended to a minimum of three months, which is the equivalent period for judicial review, to allow affected persons, first, to be alerted to the potential for challenge and, secondly, to marshal the quite significant resources necessary to initiate the appeal process. I believe that the Department could liaise with the Department of Justice to ensure that any alterations to the tribunal rules that would allow the required extension of the appeal window would be effected in advance of the Bill's receiving Royal Assent.

I have a supplementary point that is not about the Charities Bill but about charities themselves. Much has been made of the registrations rendered unlawful by the judgement. However, there is a backstory comprising the 3,500 charities that were forced to close or simply gave up. I can speak authoritatively only about my experience and about the town in which we are based. Both the pensioners' dinner club and the mums and tots group have disappeared from our local community centre. Both raised funds

annually to provide a Christmas dinner for the elderly of the estate or after-school snacks for kids in the area. Both funded their activities by receiving small private donations or from bring-and-buy events. Both were subject to regulation by the commission, and both were subject to the reporting regime. Neither had the resource or the commitment to be the subject of the restrictions imposed by registration, and this is a scenario that must have been repeated countless times over the 10 years of regulation. My simple question to the Assembly is this: who stands for these clubs? Who stands for these groups? Where is their charities Bill? Who debates their passing? Thank you, Chair and members, for your time today.

The Chairperson (Ms P Bradley): Thank you, Trevor, for that. I have a couple of questions. If members want to ask anything, will they indicate that to me?

Trevor, your paper states that the retroactive making of past decisions lawful, as provided for in clause 1, is not necessary and that any charity can make a fresh application to the commission, which can remake the decision via its schedule 1 committee. Why do you feel, then, that the Department has not pursued that method but gone for the proposals in clause 1 instead? What is your thinking?

Mr McKee: It seems to me to be a catch-all Bill that looks at all the mistakes and decisions of the Charity Commission and tries to deal with them all in one fell swoop. In the earlier session, a point was made with Mr Crawford about the retroactive registration of charities. I will talk about that slightly, and it might explain my position on the retroactive aspect of the Bill.

Since May 2019, the Charity Commission has adopted the process of working through a schedule 1 committee, which is a lawful way for it to take decisions. It has made charities that were registered prior to the McBride judgement charities again. It has retaken those decisions. If it can retake those decisions for a small number of charities that were subject to litigation, for example, it is a simple stretch to bring not just one or two charities but a group of charities to the meeting. I believe that a member made that point earlier and asked whether that was an option. Yes, it is, because that is exactly what it has already done. There is no necessity for any retroactive aspect to fix the woes of the Charity Commission. Those processes are all in place with the schedule 1 committee. It does not have to take a decision to re-register each charity; it can take a decision to re-register a number of charities.

Look at the Scottish experience. When Scotland began regulation, the deemed list was received from HMRC. We also have a deemed list here. It lists all charities or organisations that claim tax exemptions. In Scotland, they were all simply put on to the register. Then, as the year went by and those charities were subject to some sort of scrutiny, a decision was made: either, "You are not a charity, so we will remove you from the register" or "This is what you need to do to become a proper charity".

Being a charity should not have to be a contest. It should be intuitive; a category that organisations naturally fall into. If they do not, and if they do not want to be a charity, they should be able to opt out of the process. That is logical, fair and proportionate regulation. In Northern Ireland, we had a contest to get on to the register, and stringent requirements were imposed on small charities. That simply stripped away the fabric of society. I spoke about the pensioners' club and the mums and tots group. How many of those organisations have simply disappeared? What impact has that had on local communities?

That brings us to another question. I do not want to pre-empt what we will talk about — the de minimis level, for example, is very important — but are those 3,500 charities simply forgotten about?

I am sorry for going on.

The Chairperson (Ms P Bradley): No, you are all right, Trevor. This is an emotive issue for you, and I know that you are passionate about it. You mentioned the effect that all this has had on charities in our communities. Do you feel that clause 3 could be amended in some way to make it easier for smaller charities or groups that do not wish to be registered?

Mr McKee: Of course. There has been no issue with that. England and Wales have approximately five times the number of charities that Northern Ireland has, and they have no issue with having a £5,000 threshold: a charity that falls under that threshold does not have to register. There is no public clamour to have those charities registered. There are no massive calls about abuses, misconduct or mismanagement in those small charities. It simply allows those charities to exist without a regime of regulation. That regime is stringent and strict. Up to 2012, before we had registration and a regulator,

was there widespread abuse or criminality? Bringing the Charity Commission into being did not stop criminality. The commission, as a non-departmental public body, cannot investigate criminality. That must always fall to the PSNI.

It seems to me that we have simply made ourselves busy fools. We have regulated a sector that, potentially, does not need to be regulated. That question has never been properly debated. Why was the Charities Act enacted and this Charities Bill introduced? Are they necessary, or are they simply over-regulation? That is a question for another day, and it is not particularly relevant to the Charities Bill, but the whole question of the regulation of charities is, as the Appeal Court said, a matter of some public potency.

The Chairperson (Ms P Bradley): Thank you for that, Trevor. Have members any questions at this stage?

Mr Frew: Trevor, thank you very much for your attendance. I read your briefing notes and found them very interesting. I have been on the Committee for only three weeks, so please give me a fool's pardon on some of this stuff.

I am trying to get my head round the Bill, and I see glaring dangers, if that is not too strong a phrase, in the retrospective element applied to decisions taken. They go into detail about restricting some of those decisions. You heard the talk that we had with the previous witness and the debate about taking away the retrospective registration of charities and doing it another way, either by a commission action in a meeting, in a practical sense, or by putting in the Bill a schedule that lists all charities. My primitive mind has been thinking about a discussion that I had with the Deputy Chair on how we could do that practically in a Bill. We would need a clause that would make sure that it was set at a specific date and time.

My question is whether it is feasible for all those charities to be listed in a schedule? The departmental officials listening may be horrified by some of this stuff, but let us tease it out. We would put a big list of charities — there would be thousands of them — in a schedule and have a clause that deems all those charities to be registered at a certain date and time — 16 May 2019 or whenever. Do you see that as a practical way forward, or do you think that it is not needed because the commission can meet and agree, wholesale, on all the charities that are involved and deem them to be registered?

Mr McKee: It can be done exactly as you have articulated. The schedule can be brought to a schedule 1 committee, or a meeting of the commission as a whole, and those charities can simply be deemed to have ticked all the boxes and be validly re-registered as charities, as the commission has done already, with a number of charities, by retaking the decision via its schedule 1 committee. There is no necessity for retrospective legislation to bring those charities back on to the register. The danger is that you might be bringing on to the register charities that may be excluded further down the line, when the de minimis level is set. The Department said that it is going to do that.

I do not see the point in pushing through a Charities Bill that will register a charity that does not need to be registered in the first place. The majority of charities in Northern Ireland are small. We are a different jurisdiction from England and Wales. A lot of those charities have probably welcomed the fact that they have not had to do annual reporting or been subject to regulation. The chief commissioner said, on 'The Nolan Show', that a charity does not have to be on the register of charities to be a charity. Its governing document makes it a charity, not being on the register of charities. Its being on the register of charities enables the commission to have an oversight of what a charity does and that might give confidence to funders etc.

The funders have been discharging their functions for the last two years, from May 2019. I have heard no large public outcry. Somebody might tell me something different or have an alternative opinion. However, my opinion is valid. The retrospective registration of charities is not necessary, and it is actually dangerous. I can see the difficulties with putting a list of charities in the Bill. Making it time-limited might not work. It might not be something that you can do in statute. That is something for the Departmental Solicitor's Office. However, it should be explored and then discounted if it will not work.

The easy option is to bring that schedule before the full board of commissioners and, if it is happy, to re-register those charities, but with the caveat that quite a substantial number might not want or need to be registered. Do not forget that there has been a small number of aggressive registrations over the years, where charities that did not want to be a charity were forced to become one. They were organisations that had charitable purposes but did not exist exclusively to be charities. They did not

want to be on the register but were forced to be. Those types of aggressive registrations must be rescinded. I cannot think, off the top of my head, of an appropriate example, but I am sure that they are out there.

These are things that the Department has not looked at yet. It has looked at the broad panoply of decisions and registrations that require to be done again, in its view, but it has not sat down and gone through the minutiae. It is entirely necessary that the process that we are going through today — I am grateful to be a part of it — is extended. It is not necessary for the Bill to go through in this mandate. I do not believe that charities need that reassurance and no one has told me to the contrary.

Mr Frew: Trevor, you talk about section 1 powers or actions that the commission is currently operating under. What does that mean for these decisions being taken? Registration of charities is already taking place.

Mr McKee: Schedule 1.

Mr Frew: Schedule 1, sorry.

Mr McKee: A schedule 1 committee is the upper level of delegation permitted by the Charities Act (Northern Ireland) 2008. The Charity Commission can take decisions in one of two ways. The first way is by a meeting of the full board, and the second way is by delegating powers to an officially authorised schedule 1 committee. That schedule 1 committee can be constituted by at least one commissioner and a number of others.

There is an argument — I have a particular view — around how that committee should be made up. The make-up of that committee has changed over the years. The committee that was established post-May 2019 is different from the committee that is in situ now. I believe that the current committee comprises three commissioners and no staff. We could get into a conversation about rubber-stamping and whether staff could be members of a schedule 1 committee. That schedule 1 committee can lawfully take decisions and take registration decisions, and it has done on at least one occasion that I am aware of. That particular decision was subject to a challenge in the Charity Tribunal.

Mr Frew: Can the schedule 1 committee delegate power to individual staff?

Mr McKee: No. The schedule 1 committee is the decision-making function of the commissioners who are delegated to it. It becomes very dangerous whenever you delegate powers and allow those powers to be subdelegated. That brings in another raft of difficulties. The decision-making should remain with the person with the power to make that decision. If it can be delegated lawfully, the statute will make clear that it can be delegated lawfully. Subdelegation is a very dangerous game, I believe.

The scheme of delegation will probably allow that, and I know that the Charity Commission has now commenced succession training, which is simply a way of instructing members of staff to take certain decisions. The question of the scheme of delegation came up in a previous meeting, around how that will be a power of the Department. That is right and proper, because section 6 of the 2008 Act gives the Department the power to make alterations to the powers of the commission. Therefore, it would not be appropriate for the commission to devise that scheme of delegation.

What has not been thought about or talked about up to now is that the scheme of delegation, regardless of what anybody else has said, has been set. If you have a schedule of orders, directions and decisions that will be made retrospectively lawful, those form the scheme of delegation. How could you make, say, a direction under section 22(3) retrospectively lawful and then not have it in the scheme of delegation? The Department has not looked at that difficulty, which will arise further down the line when talk starts about the scheme of delegation. Any clever lawyer would make mincemeat of a scheme of delegation that did not reflect the retroactive making lawful of decisions that had already been enshrined in the Bill.

Mr Frew: You are clear in your statement that the only delegated power should be the registration of charities. Am I picking you up right?

Mr McKee: You are correct, but, to qualify, that means the delegation to staff the power to register a charity in the benign rather than the aggressive sense. A member of staff could register a charity that

has ticked all the boxes, but not retrospectively. The Court of Appeal decision was not about retrospective legislation; it was about how the commission might work going forward.

The Department is trying to deal with difficulties by rewriting history, but those things happened. They had practical and, for some individuals, dire consequences. You cannot erase that; you cannot simply lift the carpet and brush it under. It has to be exposed, brought into the light and examined. At some stage, the commission has to — I have talked about section 22 inquiries — acknowledge that all the inquiries until May 2019 were unlawful because the decisions to institute them were not taken by the commission as a corporate body at a quorate meeting nor through a schedule 1 committee, as no such committee existed prior to May 2019.

Mr Frew: That brings me to my next point. I am reading section 22(3) of the 2008 Act. Why do you think that the Department is leaving out of the Bill refreshed appeal rights in relation to that subsection?

Mr McKee: It is not listed in schedule 3 to the 2008 Act. Mr Crawford gave you an overview of schedule 3 and the powers that it contains. Put simply, a number of decisions, directions and orders of the Charity Commission are appealable, but a number are not. They are not appealable because they are not listed in schedule 3. That is an inconsistency, and the Department of Justice needs to get involved there. If a decision that has criminal consequences is made retrospectively lawful and it is not appealable, it is inconsistent with the European Convention. Article 6 gives you the right to a fair trial. If you do not have the right to a fair trial because the direction that you were given is not appealable, you have a difficulty.

Mr Frew: Section 22 is the general power to institute inquiries, and it specifies a list of powers. Are there any other schedules to or sections of the 2008 Act that need to be included in the Bill, as in column 1 of the table in schedule 3 to the 2008 Act? Section 22(3) might impact you, given your experiences over the years, but is there anything else that we need to be cognisant of and make sure is in the Bill?

Mr McKee: You have started to read the Bill, getting to grips and coming to terms with it. It is a considerable piece of legislation. It needs a lawyer to go through it to determine all the matters that need to be in the Bill. As a private citizen, I see in relation to the Bill that section 174 of the Charities Act (Northern Ireland) 2008 lists a number of orders and decisions of the Charity Commission that can be pursued in the High Court by the Charity Commission if there is a failure to comply with a particular order, direction or decision. As a minimum, the carve out that is already listed in clause 1 needs to be supplemented by sections 174 and 25 of the Act.

There may be many others that I have overlooked. I can talk only about those of which I have had some personal experience. I am, by no means, an expert on the Charities Act 2008 or the Charities Bill, but there are glaring inconsistencies, and you have just pointed one out. From our collective look at the Charities Act, you, the Committee and I have already decided that there is, at least, a question hanging over that particular issue.

Is there anything else that needs to be in the Bill? Yes, but it is much more than that. If the commissioners have the decision-making power under the Charities Act and their standing orders say that they must act collectively and they can only lawfully discharge their functions through a schedule 1 committee, where are the alterations in the Charities Bill to deal with those amendments that need to be made? If the Charities Act is to be altered in any way, shape or form, that has to be done all at once; otherwise, we will be in the same boat further down the line. We have already been in that situation in 2013 in relation to the public benefit test. We are now in the same boat because the Charity Commission misunderstood the law.

Mr Frew: I have one last question. In your statement, you say:

"the retroactive making of past decisions lawful is not necessary, as was advised by the Ministers own charities team and the former Attorney General. The necessity to do so only serves to protect the commercial interests of affected law firms."

Mr McKee: Correct.

Mr Frew: How do you know that the Minister's own charities team and a former Attorney General advised against that?

Mr McKee: I believe that that was in an FOI response that was released to Mr Crawford relating to the advice given to the Minister at that time about retrospective legislation. The Attorney General certainly said that retrospectively making lawful decisions of the Charity Commission should not happen. He may have been happy that the registrations went forward. Mr Crawford could probably talk more about that, because it was his FOI request. I understand that the charities team advised the Minister not to go for retrospective legislation and to be very wary about the delegation of any authority to staff. The Court of Appeal was very clear in warning that any of the powers:

"therein enshrined can properly be discharged by the staff".

Mr Frew: Thank you very much, Trevor. Chair, can the Committee ask the Department to release all freedom of information requests and answers on that subject?

The Chairperson (Ms P Bradley): We can certainly ask for that.

Mr Frew: It would be interesting to see those.

Ms Armstrong: Thank you very much, Mr McKee. As I said earlier today, I worked in the community and voluntary sector for many years before becoming an MLA. You said that the Bill does not need to go through in this mandate. From my point of view, I do not find that acceptable, because a lot of charities will then have no recourse to government funds and will cease to exist if they cannot access grants. Do you understand why it is the Committee's responsibility? The legislation is coming through, and we are going through our legally required Committee Stage; it is not going to stop. We have to take it through. Do you understand why many charities are waiting patiently for that, so that they can be assured that they can access government funding or other funding?

Mr McKee: First, my understanding is that, for any charity that has any difficulty with applying for, seeking or receiving funding, if it was previously on the register, the Charity Commission would vouch for the validity of any application, and, therefore, there should be no restrictions — certainly not on money coming from government.

Ms Armstrong: That is not necessarily true, Mr McKee. There are moneys from outside Northern Ireland that charities are unable to apply for unless they are formally on the charity register. That is why the Bill is required.

I know that Mr Frew asked a lot of questions, so I will not keep you too long. You have spoken a lot today, and I thank you for that. One of the issues — I have lost my train of thought now. Sorry, Mr McKee.

You talked about the section on the appeals process. I understand that, and we, as a Committee, will seek information relating to those decisions that have been made. For instance, if, through this legislation, the Charity Commission is able to adopt the current registrations and say that they are accepted, what happens to those that were turned down in the previous regime that is now being fixed? We can certainly look at that for you. I will say, however, that there is a concern that this piece of legislation seems to be a lot wider than it is. It is exactly what it says in the papers, and we have to stick to that.

My other concern is the reference that you made to the freedom of information request. It is my understanding that legal advice that is provided to a Minister is privileged and cannot be released, so I am not 100% certain what that information is. Like Mr Frew, I would be very interested to see the response provided to the freedom of information request. If that contains legal advice received by the Minister, it might open a floodgate to a lot of other things. I am, however, interested to see what that is.

You mentioned the Attorney General. I am not aware that the Attorney General would have provided information to a Department. If you speak to Mr Crawford, perhaps we can ensure that that information is sent through to the Committee as well, where the former Attorney General has put it in writing.

That is all I have, Mr McKee.

Mr McKee: OK. Thank you.

The Chairperson (Ms P Bradley): Thank you. No members have indicated that they want to ask anything further.

Thank you for attending to brief us, Trevor, and thank you for your submission to the Committee. You have certainly given us a lot of food for thought. Thank you so much.

Mr McKee: Thank you, Chair. Thank you, members.

The Chairperson (Ms P Bradley): Thank you.