



Northern Ireland
Assembly

Committee for Communities

OFFICIAL REPORT (Hansard)

Charities Bill: Committee Deliberations

21 October 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 Stephen Dunne
Mr Mark Durkan
Ms Ciara Ferguson
Mr Paul Frew
Ms Áine Murphy

Witnesses:

Mr Martin Ireland	Department for Communities
Ms Sharron Russell	Department for Communities

The Chairperson (Ms P Bradley): Clause 1 is "Actions of Commission staff treated as Commission actions". I remind members that questions or comments should focus on the specific clause that is under discussion. I welcome Sharron and Martin to the meeting. Sharron, I ask you to give a very brief overview of each clause. I will then highlight any specific issues that have come up in our evidence before asking members whether they have any queries.

Ms Sharron Russell (Department for Communities): Thank you very much, Madam Chair and members, for having Martin and myself back. I will be very brief, because some of the clauses, particularly clause 1, are quite complex. Clause 1, from the Department's perspective, returns charities to the position that they enjoyed prior to the judgements, with some caveats or carve-outs. Clause 1 is complicated. It deals with making previously unlawful decisions lawful, except, where to do so, would likely impinge on the rights of individuals under the ECHR. It provides fresh appeal rights, in accordance with schedule 1 to the Charities Act (Northern Ireland) 2008, where such decisions are made lawful. It then disapplies accounting and reporting requirements for past periods. That was important in ensuring that charities are not overburdened where they have not continued to voluntarily provide accounts and reports to the commission; although, as the Committee has heard from us, quite a number of them have.

I decided to give that overview rather than go into clause 1(1) to clause 1(9) as we did last week, but we are here to take any questions and provide any clarifications.

The Chairperson (Ms P Bradley): That is great; thank you, Sharron. Members, I should have said that you have an updated version of the evidence summary of documents.

I want you to bear with me for a few minutes. Yesterday evening, we sent to Committee members and to Sharron and Martin the issues that have been highlighted to the Committee. I will read out the issues that have been brought up so that we have them on the record and reported by Hansard. Sharron, perhaps, you could address some of the issues after I read them out.

I begin with the retrospective nature of the legislation. The majority of respondents felt that clause 1 would meet its policy objectives and that it deals sufficiently with the retrospective effect to make lawful the majority of decisions taken by the commission staff. Some respondents felt that retrospective legislation is not usual and can have unforeseen consequences, because some activity that was not intended to become lawful can slip through, unnoticed, until it is legally challenged at a further date. In that regard, one respondent said that there is the potential for a decision that might have been deemed unlawful, had it been challenged prior to the new legislation, to become lawful by default.

Other potential unintended consequences that were highlighted were the potential for adverse consequences for charities and the third sector if, for example, a decision that was made illegal by the judgements had, in fact, originally been a beneficial effect in that it had protected a charity; and that the unlawful exercise of a power by staff is made lawful by the Bill, but, following public consultation, is not included in the schedule of delegation as one of the powers that the Department believes it proper for the commission staff to exercise.

There was general support for any decisions still subject to ongoing legal proceedings not being subject to the clause to protect individuals' rights, and for the certain matters set out in clause 1(5) not being subject to clause 1(2), rendering those decisions and orders unlawful.

I move now to refreshed appeal rights. The overwhelming majority of respondents felt that 42 days was too short. Proposals were made that the time be extended to three months, and one respondent asked the Committee to consider somewhere between three and six months. It was queried whether the 42-day period for appeals should run concurrently, as is the case under the charity tribunal regulations. It was highlighted to us that it would be more useful to allow for an appeal to the charity tribunal after the result of the decision review, as that would be more practical for charities and avoid proceedings in the charity tribunal having to be withdrawn.

A proposal was made that clause 1(5) matters that are not already subject to the matters outlined in clause 1(3) and clause 1(4) should also be afforded the refreshed appeal rights rather than be excluded. There were a number of proposals from legal bodies to remove clause 1(5) from the Bill because of that issue. One individual proposed that all decisions, orders and directions that are made lawful, retroactively, are made appealable in the Bill, even if not specifically allowed in schedule 3 to the 2008 Act. Legal bodies also asked why section 37 of the Act, which relates to power to direct application for charity property, was not included at clause 1(5)(e).

A number of other issues were raised with us that do not relate directly to clause 1 but are probably best highlighted here, although one of them strays into clause 3 matters. A number of respondents highlighted that the lack of opportunity for Northern Ireland charities to have a charitable incorporated organisation (CIO) structure regulated in Northern Ireland is not good, and requested that the Bill deal with that matter. In his written submission, the individual who was too unwell to brief the Committee highlighted the absence of choice in Northern Ireland to not be a registered charity, even when an organisation's true purposes are not exclusively charitable, and that the choice to register should not be based solely on a financial threshold.

OK. Where do we start? [*Laughter.*] I do not know. Sharron and Martin, do you want to come in on anything? We will then open it up to members.

Ms Russell: I will invite Martin to come in. Madam Chair, we have, obviously, watched and listened to the evidence and considered all the issues that have been raised. Martin has worked very closely with our departmental solicitors and the drafters in the Office of the Legislative Counsel (OLC) and has some responses to offer to the Committee.

Mr Martin Ireland (Department for Communities): Thanks, Sharron. The Department accepts that the retrospective nature of the legislation is unusual. We did a lot of work to ensure that there were no unforeseen consequences. We took a lot of care in that regard and carried out an exercise to try to identify where those unintended consequences might be. Really, that is what led to the inclusion of clauses 1(3) to 1(5). The fresh appeal rights provide an extra layer of safety there.

On the idea that there is the potential for a decision that might have been deemed to be unlawful had it been challenged prior to the legislation to become lawful by default, as Sharron said, the Bill aims to return charities to the position that they were in prior to the McBride judgement, with certain caveats. It is impossible to know what may have been deemed unlawful if it had been challenged; the fact being that it was not challenged. The vast majority of decisions were uncontroversial and largely welcomed by charities.

I will move on to the potential for adverse consequences for charities and the third sector if a decision that was made illegal by the judgements had, in fact, been of benefit to such charities. The only decisions to remain unlawful are those where potential ECHR impacts were identified if the Bill were to make them lawful, or where a schedule 1 committee makes a fresh decision and making both decisions lawful could have created uncertainty. It does not necessarily follow that the actions of a third party taken on foot of an order that is to remain unlawful are, themselves, unlawful. If challenged, third parties could seek to rely on section 175 of the 2008 Act, in that they believed that the order was lawful at the time and were, therefore, obliged to follow it. There is also a facility for trustees who are concerned about personal liability to apply to the commission for a waiver under section 91 of the Act.

There is no legal impediment to decisions being made unlawful and a further scheme determining that commissioners should, in fact, take some of those decisions. Any scheme of delegation can be reviewed from time to time, and the functions to be delegated can be changed.

On the 42-day appeals period, it must be remembered that we do not expect that there will be many fresh appeals. As I explained previously, that is due to the passage of time and the small number of appeals that emerged when the decisions were first taken. Having said that, we listened. We contacted the DOJ, and it expressed no concern, in principle, with us extending the time frame for appeals arising from this Bill from 42 to 91 days, for instance.

On clause 1(5) and not having appeal rights, our intention in designing clauses 1(3) to 1(5) was that the Bill should not interfere with decisions in any way so that they can proceed to their natural conclusion, via the courts if necessary, thereby protecting the rights of individuals under the ECHR. That being the case, no fresh appeal rights are considered necessary, as the orders remain unlawful and can be challenged. With regard to providing fresh appeal rights where they are not provided in schedule 3 to the Act, we are providing a table of decisions as requested by the Committee. We hope to have that with you in the coming days.

The aim of the Bill is to return charities to the position that they were in prior to McBride. Therefore, to introduce appeal rights where none previously existed possibly goes beyond the scope of the Bill. In any case, the number and nature of such decisions, and the passage of time, during which charities would have acted upon them and moved on, does not warrant it. If we were to consider that approach, we would need to consider what should be appealed or reviewed, who should have those appeal rights, and the powers of the tribunal if such an appeal were successful. As was said, most were uncontroversial and were welcomed by charities.

Section 37 is not included in clause 1(5) because the commission took no decisions under section 37 prior to McBride. With regard to CIOs, there already exists a power in the Charities Act (Northern Ireland) 2008 to introduce CIOs through regulations. Therefore, it is not necessary to include a power or provisions in the Bill in that regard. With regard to registering charities that are not exclusively charitable, if an organisation is not exclusively charitable, it cannot be registered as a charity in Northern Ireland.

That, I hope, addresses the issues raised. If the Committee has any others, I will be happy to try to address them.

The Chairperson (Ms P Bradley): Thanks, Martin.

Ms Armstrong: Martin, thank you. On that last point, are you saying that, if an organisation has, for instance, objectives that are charitable but its actions are not those objectives, that organisation cannot be a charity? If it has the objectives of a charity, it must be a charity, but, if it is a company that has charitable objectives but does more than that, does it have to be registered as a charity?

Mr Ireland: Kellie, the Charity Commission is the expert on that.

Ms Armstrong: OK.

Mr Ireland: The Act makes it clear that, for an organisation to be a charity in Northern Ireland, it must be independent, subject to the law of Northern Ireland, exclusively charitable and provide a public benefit. The commission compiles the register and does the operational side of that. If you have any questions in that regard, I can certainly direct them at the commission and get you a response as quickly as possible.

Ms Armstrong: That would be useful. We have heard evidence from people who said that they had no choice. Even though they believed that they were not exclusively charitable, they were forced to register under the new system and then had assets moved out of their company.

Mr Ireland: It is my understanding that it is the governing document of the charity that determines its charitable status.

Ms Armstrong: OK.

Mr Ireland: As I said, if you have specific queries in that regard, we can direct them at the Charity Commission and get back to you as soon as we can.

Ms Armstrong: I am interested in that because, last week, we heard from Colin Jess, of Social Enterprise, who was able to confirm that, while all his 900 members had a particular social benefit to their companies where they invest their money back into the community, only 50% were charities. I do not understand why, if their objectives are charitable, they do not have to be charities and how they can have a choice that others previously did not.

Mr Ireland: I do not believe that it is a choice. It is down to their governing documents and whether they are exclusively charitable. The commission is the expert in that area.

Ms Armstrong: Could you get that information or does the Committee need to write?

Mr Ireland: We can get that for you.

Ms Armstrong: That would be useful. I am completely confused by this part. I do not understand how social enterprises can choose not to be charities and other companies have been told that they must be charities. They may well have written objectives. Anybody can put down a written objective, but they may not be delivering or they may be doing more than those objectives. Anybody could say that they are a charity and put down wonderful words on a page, but you might see when you look at their finances that they are doing something completely different. That might put a question mark over how charitable a charity is. It would be useful to have that information.

The other issue is on the fact that the Bill has no power to introduce CIOs. Will you guys be reflecting on that? I am not sure why we would exclude that type of company in Northern Ireland.

Mr Ireland: We will certainly be looking at that as we go forward. As you know, the independent review will be reporting, and I am sure that it will consider that area. As I said, the fact is that, in the Charities Act as it stands, we could, through regulations, introduce CIOs.

Ms Armstrong: Thank you very much on the 42-day appeal. Are you guys taking that forward as an amendment to what has been produced so far?

Ms Russell: We have to put it to the Minister, but, obviously, Martin used the word "listening". It could not be clearer to us from the evidence that the Committee has taken that our current position on the days allowed is insufficient. That speaks loudly to us, and I am sure that the Minister will respond. We will come back to you once we update her.

Ms Armstrong: Thank you.

Mr Frew: I want to make sure that we are clear on the point that Kellie raised. There was movement here in my office, and I was distracted. Some might say that I am easily distracted. Did you say that you are minded to bring forward an amendment?

Ms Russell: We have not discussed it with the Minister yet. We have not fed back to her from our session last week and from today's session. As I said, we work with a very listening Minister, who is bringing the Bill to correct previous failings and to give certainty to the sector. She is a listening Minister, and I would be very surprised if the Minister were not minded to act on what we have heard and what she has heard. Obviously, we have to make sure that she is content.

Mr Frew: Given the fact that the Minister is such a listening Minister, if she is prepared to do something, being the listening Minister that she is, will she do it at Consideration Stage?

Ms Russell: We will put the options to her.

Mr Frew: Will she table any such amendment at Consideration Stage as opposed to Further Consideration Stage?

Ms Russell: All I can say is that we genuinely will put the options to her and seek to resolve it as quickly as we can. I think that it is very clear from the evidence that you have heard and from views around the Committee table that how it is currently drafted seems insufficient, and we, as officials, acknowledge that.

Mr Frew: I appreciate that you cannot give us anything more concrete on that until you speak to your Minister. Certainly, we will give you the process and the place to do that. Chair, we may well have to do a bit of work ourselves on the amendment that we would like to see, just in case something goes wrong with the listening Minister.

Again, I really do apologise if you covered this point and I missed it. Last week, we talked about section 22(3) and whether people should be allowed to appeal. I think that Martin did question whether having an appeal mechanism where that was not in place before is part of the Bill's scope. Is that what you are talking about when you talk about the scope of the Bill — section 22(3) — or are you still exploring that?

Mr Ireland: We are still seeking legal advice on sections 22(3) and 23(1) to see whether, in fact, there are ECHR impacts there. If there are, we will seek to address them, possibly through including them in clause 1(5). As I said, providing fresh appeal rights where none existed could be problematical. Certainly, we will come back when we have the legal advice and more certainty and will let you know if there is an issue there.

Mr Frew: You have said that you are seeking legal advice, so I get that you may not be able to answer my next question, but I will ask it so that I can play it out in my primitive mind. What would be wrong with giving fresh appeal rights in this piece of legislation, considering that you are bringing forward a piece of legislation that is unique in its retrospective nature? What would be wrong with commencing appeal rights for the here and now and going forward?

Mr Ireland: It depends on the nature of the order or decision that does not have appeal rights and why that situation arose. When you see the table that we provide, hopefully, it will become clearer. One example is the making of cy-pres schemes by the commission. A cy-pres scheme is done at the request of someone who is acting on behalf of a charity to apply property or money, for instance, as closely to the original intentions as possible. In making that scheme, it is usually the charity's solicitors who request that and suggest how it might be done. When they get permission to make the scheme, there is a chance to challenge it, because it is published. The chance to appeal it is at that stage, prior to it being made. You have to remember that, when Royal Assent is achieved, most of these orders will be between three and eight years old. If a cy-pres scheme was made seven years ago, it will already have been acted on and the charity will have moved on. To provide a fresh appeal right in that instance, you have to be clear on what is actually going to be appealed, who will appeal it and what a tribunal will be able to do in that circumstance. Looking at that is a distinct area of work in itself.

With regard to section 22(3), from my memory, it has appeal rights. The issue is that they are limited to the people who the orders were issued to rather than the people whose information may have been shared as a result of those orders. What would they actually be appealing? We would need to look at that very carefully.

Ms Russell: Mr Frew, if it gives you any assurance, we have always articulated the broad principle that no Minister, let alone one who has very publicly articulated her commitment to rights in this

regard, would want to introduce retrospective legislation that cuts across people's rights. She has repeatedly and very publicly committed to making sure that she will not cut across anybody's rights. As Martin said, we will be taking further advice. Underneath some of the decisions and categories, it is complex, but we will take the legal advice and where there is any evidence to support the view that we might cut across people's rights, which the Minister has committed to not doing, of course we will look at how we can address that. We can give you that commitment whilst we continue to receive legal advice and to talk to OLC on the drafting.

Mr Frew: I get that it is very complicated. Martin, you talked about what could happen if we gave fresh appeal rights. Is the worst that could happen that it would just be mute or redundant, or do you see there being any negative unintended consequences of giving fresh appeal rights?

Mr Ireland: On sections 22(3) and 23, I cannot make any definitive statement, because I have not received the legal advice. With regard to the others, you are probably right: it is unlikely that new appeal rights would be exercised.

Mr Frew: Yes, but they will not do any harm in themselves if they are in the Bill.

Mr Ireland: I cannot see how they would do any harm. We would need to consider it very carefully. In the case of a scheme, for instance, that scheme will have been made and acted on years ago. Whether we could do anything at all that would unpick that is highly unlikely. We would need to consider it very carefully.

Mr Frew: I am intrigued by it because of the retrospective nature of clause 1 in the Bill. I am not looking to give fresh appeal rights for something in the past, other than the fact that the Bill gives retrospective legality. That is the only reason why I am not convinced that we do not need it.

Mr Ireland: Hopefully, the table, which we hope to get to you in the next few days, will make that clearer, and we can go forward from there. We will certainly investigate it further.

Mr Frew: OK. Chair, that is me for this round. I just want to say that, because we have not yet seen that table — the officials have done good work to produce that paper, and we are grateful for it — we need to hold the spot. The Committee may well need to table amendments if members are still not satisfied when we see that table.

The Chairperson (Ms P Bradley): Thanks, Paul. Do you want to come back on that, Kellie?

Ms Armstrong: I want to ask a very quick supplementary question, following on from what Mr Frew was saying. Will that table contain details of decisions that were made where there are still legal proceedings going ahead? Martin said that decisions would have been made years ago. In some cases, decisions were made and they are still in the process of challenges and sorting all that out. If there are legal proceedings still in place at the moment, does that mean that, if a retrospective provision came in, they could be within the scope, or would they definitely be outside it? Will the table include those that are still going through some legal process? Will they be within the scope or outside it because sections 22(3) and 23 are not there?

Mr Ireland: The table will provide all decisions taken by the Charity Commission prior to McBride. It will not set out individual decisions; it will have only numbers against categories. If there is ongoing litigation in any of those categories, clause 1(3) will mean that they will not be made lawful.

Ms Armstrong: Oh right, OK; that has me completely confused now. I do not think that I can discuss it because they are still legally open. OK, thank you.

Ms Russell: Would it be helpful to the member, Martin, if we could, beside those numbers, state the numbers within those categories where we know or are aware that litigation remains ongoing for challenge? Could we do that?

The Chairperson (Ms P Bradley): Yes, that would be helpful.

Ms Russell: That might be helpful.

Mr Ireland: We should be able to do that. There are very few that remain ongoing, but we can certainly attempt to do that.

The Chairperson (Ms P Bradley): Does any member have further questions about clause 1? There does not appear to be.

We will move on to clause 2. Sharron, will you give us a brief overview, please?

Ms Russell: As members know, clause 2 is, as I have explained in previous briefing sessions, driven by the need to have a commission that is effective and efficient in the use of public money. Clause 2 introduces a limited power of delegation to staff, provided that those decisions to be delegated are set out in a scheme of delegation that is agreed by the Department. Clause 2(2) also stipulates, however, that decisions relating to the opening of a statutory inquiry, the publishing of any resultant report from that inquiry and orders arising from it — which we know and acknowledge, and the evidence shows, can have significant consequences for individuals — and the commission's powers to make subordinate legislation, could never be delegated by staff under the clause as we have drafted it.

The Minister has recognised that statutory inquiries and the resultant orders can have an impact on individuals. Representations have been made to her and to the Committee on the damage that they can cause to reputation and to ability and confidence to continue to act in the charities sectors. I remind the Committee that such orders can be made by staff in other jurisdictions. You have heard evidence to that effect in your submissions from around the UK and Ireland that staff can make those decisions. The Minister has, on balance, taken the view that, in order to restore public confidence in the process here, which she knows has been damaged, such decisions would be better taken by commissioners or a committee established by the commission under schedule 1 to the Act.

A last point, just to put that in context, is that such decisions account for a small percentage of the decisions required of the commission. That is the overview of clause 2.

The Chairperson (Ms P Bradley): Thank you, Sharron. Members, you have in your packs an updated version of the evidence summary document for clause 2. I ask you to bear with me again as I take a few minutes to go through the issues that have been raised.

First, on the power of delegation, the overwhelming majority of respondents in our evidence felt that the power of the commission to delegate to staff certain functions that are listed in a scheme of delegation is appropriate. One individual commented that clause 2 should be removed from the Bill to allow time for the report of the independent review of charity regulation to be considered and proper consultation done.

The position in Scotland was highlighted by the Office of the Scottish Regulator (OSCR). The Charities and Trustee Investment (Scotland) Act 2005 expressly grants the power to authorise employees of OSCR to carry out any function on behalf of the regulator. No specific exemptions are provided for. The delegation of functions by OSCR's board is covered by a schedule of delegation. Under that, almost all regulatory decision-making is carried out by employees but provides for the board to retain certain decision-making in novel or contentious cases.

The comments made to us on the proposed delegation included:

"The Commission needs to be able to respond to charities in a timely way and for that reason there is a necessity to delegate to staff."

"CCNI staff should be able to make certain decisions on their own to ensure that charities are able to receive decisions in a timely manner."

"The power to delegate or the Scheme of Delegation should allow Commission staff to operate effectively and efficiently".

A comment was also made that registration decisions only should be delegated and that additional resources should be provided to the commission to allow for that delegation. It was proposed:

"there should ... be a process for staff to 'refer' decisions to another committee/board where they feel support is required in borderline cases."

In relation to the Department for Communities making the scheme of delegation, there were views for and against who should make the scheme. Comments included:

"Requiring the Scheme to be made by the Department works against the general principle that CCNI should be independent of ministerial control."

"The Department ... is responsible for charity legislation for the oversight of CCNI, it would seem appropriate that it would make the scheme of delegation."

It was proposed:

"this should be done on a co-design basis, collaborating with the sector and in particular with CCNI and its staff."

There were also very specific comments from legal bodies expressing reservations about the proposals in the new paragraph 9A(2) to exclude certain matters from the powers of delegation. However, a proposal was made that delegation should still be possible in certain of those excluded situations, such as:

"[in] matters of extreme urgency: for example if serious wrongdoing in a charity is reported to CCNI they should be able to open an inquiry immediately rather than having to wait for the next board meeting".

There was a proposal:

"most of the powers in sections 33 to 36 need to be capable of being used urgently, without waiting for a full CCNI Board meeting".

It was also highlighted to us that it seems odd to require full board consent for the powers under sections 33 to 36 but not the powers under section 37, which are potentially wider.

Sharron and Martin, do you want to come in to provide any clarity around those issues?

Mr Ireland: OK. Thank you, Chair. With regard to —

Ms Russell: Before Martin speaks, I want to cover one point that I missed. This is to take the power to introduce a scheme at a further stage, where there would be further consultation on a scheme design and the need for a scheme. I forgot to outline that. Go ahead, Martin. I am sorry for cutting across you.

Mr Ireland: No problem, Sharron. With regard to the Department or the commission making the scheme and the co-design process, if the Department were to make the scheme, that would obviously involve a great deal of work with the commission. It is believed that the fact that the Minister would make the final decision on the scheme will add confidence to a system in which some have lost confidence. We do not believe that that interferes with the commission's independence, as the Minister would simply be exercising her role in setting strategic direction for the commission but would not intervene in individual cases, which would remain solely within the remit of the commission.

I turn to the new paragraph 9A(2) in schedule 1. Again, the stipulation that certain decisions would never be delegated was a public confidence thing, but it is possibly important to say at this stage that full board consent would not be required. Paragraph 9 of schedule 1 to the Act allows the commission to establish committees to discharge its functions. Such actions under sections 33 to 36 are rare, and the commission could put emergency procedures in place to deal with them.

It could be that other areas, such as section 37, are not delegated, but that would be for a future scheme. It is thought that that will rebuild confidence in areas in which decisions could have significant consequences for individuals. If you wanted to allow staff to take decisions in emergency conditions, the alternative would probably be to remove the stipulation from the Bill and allow everything to be in a scheme of delegation, but you may have challenges about what is and is not urgent.

The Chairperson (Ms P Bradley): Thank you, Martin. Do members have any further questions that they want to ask Martin about that? I will bring in Paul.

Mr Frew: Yes. I get the public confidence piece on that and the fact that you would want to ensure that things were not necessarily delegated to individual staff members. I get that. Why are we limiting that to sections 33 to 36? I get that it is in clause 1, because those are the areas in which decisions are made. I get that. No decisions were made on sections 32 and 37, as, I think, we outlined last week. Going forward, in order to ensure further confidence that decisions will be made on a committee basis or at commission level, why would you not add the:

"Power to direct application of charity property"

under section 37? It seems to be a pretty big deal. Why would you not ensure that those decisions were taken at corporate or commission level or that they were collegiate decisions?

I could go through various sections of the Charity Act. Why are we limiting ourselves? If clause 2 is about public confidence — I believe that it is and that it is right to be — why are we limiting it to sections 33 to 36? Is it just to fit neatly with clause 1?

Mr Ireland: No. It is because the powers in sections 33 to 36 are those that can have the biggest impact on individuals. They have resulted in the vast majority of appeals to the Charity Tribunal. I think that I am right in saying that, out of approximately 80 appeals to the Charity Tribunal, all but 26 of those appeals related to actions taken under sections 33 to 36.

The thing about including extra powers in the Bill is that you lose a certain amount of flexibility. It is by no means a given that anything that is not in the Bill will be delegated to staff. That will be subject to a full public consultation, and it could be that section 37, for instance, would not be delegated to staff. It could be that parts of section 24 on information sharing will be delegated to staff, but other parts will be reserved for a committee. The more that you can put in the scheme of delegation, the greater the flexibility. Sections 33 to 36 are there because of the particular circumstances that have arisen from those orders.

Mr Frew: I would probably need to read clause 2 again, but am I right in saying that the Bill ensures that sections 33 to 36 cannot be delegated? The scheme that will come will outline what can be delegated. Are you saying that that scheme can also add things that should not be delegated? If something is not mentioned — if something becomes moot — where does that leave that section? Will the scheme have to delegate —

Ms Russell: Every other area?

Mr Frew: Yes.

Ms Russell: No.

Mr Frew: If the scheme does not mention a section, power or decision-making role, and the Bill does not, where do those sections lie?

Mr Ireland: Delegation, in those circumstances, would be unlawful. If it is excluded in the Bill, it cannot then be delegated under a scheme of delegation. If it is not in a scheme of delegation, it cannot be delegated to staff, and if staff took those decisions, it would be unlawful.

Mr Frew: New paragraph 9A(2)(c) mentions only sections 33 to 36, and new paragraphs 9A(2)(a), (b) and (d) provide the other aspects that cannot be delegated. Imagine that the future scheme mentions other things that can be delegated. There are bound to be aspects of decision-making that are not included in the Bill or the scheme. Therefore, are we saying that, by default, they cannot be delegated because they are not in the scheme of delegation?

Mr Ireland: Only the regulatory functions that can be delegated to staff will be set out in the scheme. Any regulatory function that is not delegated to staff in the scheme cannot be delivered by staff.

Mr Frew: They cannot be delivered. In paragraphs 9A(1) and (2), you are ensuring and showing that those things cannot be delegated.

Ms Russell: Yes.

Mr Frew: I get you now. Thank you.

Ms Armstrong: Following on from Paul's point, I am confused as to why section 37 is not listed under:

"The following may not be delegated under sub-paragraph (1)".

That is a substantial piece of work. Some of the evidence that the Committee has received relates to section 37 of the 2008 Act, especially section 37(1)(b), which states that:

"it is necessary or desirable to make an order under this section for the purpose of securing a proper application of that property for the purposes of the charity."

We have received witness statements that say that property has been taken from individuals. That is the sort of thing that seems to have caused significant impact. It is the sort of decision that you would not leave to a staff member to be liable for. You would not want it to be delegated but done by the commission.

Mr Ireland: That may be the case. The scheme will be consulted on, and, if it is determined that section 37 should not be delegated to staff, it will not be delegated to staff in the scheme of delegation. Section 37 could be included in paragraph 9A(2); it could be added to it. I have not had time to consider the ramifications of that, but it could be put into paragraph 9A(2). You would lose flexibility by doing that. You would set in stone that section 37 can never be delegated to staff whereas, in a scheme of delegation, that would be determined after public consultation.

Ms Armstrong: My concern is that delegating to staff could allow one person to make a decision but that, if it cannot be delegated, the commissioners would make the decision. It is just about having checks and balances for that. It is about the fact that we have received information from witnesses that appears to reflect directly on the removal of quite significant amounts of property. I will not comment on the outcome of those decisions, but those are some decisions that stand out. It is just about the fact that one member of staff can take the decision to remove property from a person whereas, if we say that section 37 is included rather than waiting for the schedules, the group of commissioners could make the decision.

Mr Ireland: As I said, we can certainly look into that and include section 37 in paragraph 9A(2), if that is the Committee's feeling.

Ms Armstrong: OK. Thank you.

The Chairperson (Ms P Bradley): There are no other comments from members or issues being raised. We will move on. I did not think that we would get this far, but we have.

Mr Frew: On that, Chair. I know that Martin said that he will look at that, for which we are grateful. I think that the Committee should consider drafting an amendment so that it can be agile and responsive on this if the Department does not follow through.

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

We will move on to clause 3. Do you want to give us a brief overview, Sharron?

Ms Russell: Thank you, Madam Chair. As members know from previous briefings, clause 3 does not arise directly from the judgements. Rather, it provides a power to introduce a registration threshold through regulations at some future point, if — I think that the "if" should be in capitals — the Minister

were minded to consider that policy change. I suppose that that emerges from the fact that the threshold has long been called for by some organisations in the voluntary, community and charity sector here. The Minister has been lobbied on that, and I think that the Committee has heard at first hand about quite strongly held views of representative bodies. I can give you an assurance. This is in the Bill. Like the scheme of delegation, such a change would require a full consultation to ensure that such a major change to the framework would be properly evidenced, after which the Minister could decide whether it would be appropriate. Crucially, that power would give the Minister the ability to respond quickly, without the need for a further Bill. In the way in which it is drafted, it is proposed that any subsequent regulations that the Minister brings would be subject not just to full public consultation but to the draft affirmative procedure, which would allow for fulsome debate and scrutiny in the Assembly. In drafting the clause, the Department was mindful that the power would need to be wide enough to allow for a threshold to be introduced in a way that could address any other impacts arising from the Act. Clause 3 therefore introduces the new sections 16A to 16C to the Act.

As members know, as well as looking at that this issue, the independent review of charity regulation has been looking at the previously discussed issue regarding delegation to staff. I want to assure members that that quite fulsome consultation has already been carried out and that, before the Minister arrives at a decision, she will undertake further consultation.

That is all I want to say by way of introduction to clause 3. Martin and I are happy to clarify.

The Chairperson (Ms P Bradley): Thanks, Sharron. Bear with me while I read out some of the issues that have been raised with the Committee.

In our evidence, the majority of respondents thought that it is appropriate to have this power in the Bill. Some noted that a timetable needs to be in place for the introduction of clause 3 to ensure that it is implemented as soon as possible. The UK-wide Charity Law Association, which established a working party to look at the Bill, noted that its members had differing views. Some members of the working party felt that the proposed regime of exempt charities in the Bill would work well. Other members of that working party felt that any organisation that is established in Northern Ireland and makes claims to charitable status should be registered with the Charity Commission for Northern Ireland (CCNI), but with less weighty accounting and reporting being required for small charities. That is similar to the situation in Scotland.

Some of those opposed to the threshold for registration said that such a threshold could mean that a whole regime of Northern Ireland charities is exempted from registration and other oversight by CCNI. They also said that it could lead to a tier of organisations that are charities in law that, although having no registration with CCNI, are still potentially subject to certain aspects of the 2008 Act. In that regard, a proposal was made to us to retain the system under which all organisations claiming charitable status must seek to register with CCNI under section 16(2) of the 2008 Act. They would be required to file accounts, but those below a certain income level would be exempt from the requirement to have their accounts independently examined.

It was stated that exemptions from regulation require more careful and detailed consideration, so they should not be rushed through as an add-on to a Bill. It was also stated that the Bill urgently needs to rectify the unlawful delegation issue. It was suggested that a simpler system for bodies that are very small in size and income would be a suitable compromise, with an option to apply to register if the institution wished to have charity status. In addition to that, it was said that the level of threshold should be decided in collaboration with the wider sector, taking into account the views of individual charities and representative bodies.

Respondents were asked to provide further comments on the list of matters that the regulations on the threshold will cover. It was asked whether the threshold should be based on income alone, or income and assets. It was stated that reporting requirements need to be proportionate to the size of the organisation and take into account whether it is a wholly volunteer-led organisation or whether there are paid staff. Furthermore, it was stated that accounting and reporting thresholds need to be revised to help to relieve the burden on small registered charities, and it was suggested that the Department should take the opportunity to bring into force the part of the legislation that provides for charitable incorporated organisations.

Back over to you again, Sharron and Martin. Do you have any comments?

Mr Ireland: Those are all matters that will need to be consulted on. As Sharron said, the Bill does not introduce a threshold; it simply provides a power so that there can be a debate on it, and, if it is

deemed appropriate, it can be brought in reasonably quickly. You will know that regulations take approximately a year to bring in, whereas a Bill, with a fair wind, takes between two years and two and a half years to develop and pass.

The fact that such regulations would be subject to draft affirmative procedure will allow for proper scrutiny. We drafted the regulation power wide enough so that you could look at the level that the threshold should be set at; whether it would be income only, or income and assets; any evidence-gathering requirements that might be required of the commission; whether a charity could register voluntarily if it fell below the threshold; whether, if it fell below the threshold, it could be removed from the charity register; and whether other parts of legislation need to be amended as a result of bringing in, essentially, a new category of charity. Those are all decisions for the future. The Bill will simply allow any regulations to address what decisions are made as a result of that consultation.

Ms Armstrong: Thank you very much, Martin. As was said, when it comes to the power to set thresholds, it is all there; it is all about "may", and "the regulations will have to bring forward". Is new section 16A(7) the affirmative?

Mr Ireland: Yes.

Ms Armstrong: It is about choice. We have heard from plenty of people who said that, if there is a threshold, it needs to be at a low enough level because we have smaller charities out there. A charity that is not on the register of charities, however, will not be able to apply for a significant amount of charitable funding. Even grants of up to £1,000, for instance, require charities to be on a register. Do you envisage that choice being made available? I am aware that, under new section 16B:

*"Regulations under section 16A may make provision requiring, or authorising the Commission to require, any—
(a) relevant institution ...*

to provide the Commission with information or evidence".

Do you envisage that the consultation will allow charities to have a choice, if a threshold is brought in, over whether to apply, even if they are beneath that threshold? If so, are we not tying them up in knots anyway under new section 16B, because the CCNI will be able to ask them to provide the same evidence as a multimillion-pound charity in any case? New section 16B does not limit what they can ask for.

Mr Ireland: Kellie, the regulations certainly allow a charity that falls below any threshold to register voluntarily, if they want to do so. New section 16B enables the commission to seek whatever evidence is required from an institution in respect of a threshold. For instance, any charity that falls below the threshold will not have to produce an annual report and accounts to provide to the commission, but it will still be subject to charity regulations, so, if a member of the public has a concern about a body, the commission will have to determine, first, whether it falls within its jurisdiction. To do that, it will need to be able to request evidence from that body to determine whether it is a charity and whether, in fact, the commission has any jurisdiction over it. A concern about such a body would otherwise probably have to go to the police.

We do not envisage setting up a whole separate register of charities that fall below a threshold, but there needs to be a power for the commission to seek evidence from a body. For instance, again, a body might misrepresent itself as a charity that falls below the threshold. In such a case, if a member of the public were concerned about that, the commission would need to have the power to get the evidence from that body to determine, first, whether it was a charity and, secondly, whether it had misrepresented itself as a charity that fell below the threshold and therefore did not have to be registered.

Ms Armstrong: OK. We are all assuming that the threshold that is being talked about is one of money. As I mentioned, I am concerned that there are organisations with charitable objectives that are not, in fact, charities, because they do more than those charitable objectives and are therefore outside that definition. While they may be philanthropic, they cannot by any means be determined as charities. Is there an intention to consult on what a threshold is? It may not necessarily be money.

Mr Ireland: If such an organisation is not a charity, it will not be subject to the regulation at all. It relates only to charities that fall below the threshold to register. It applies simply to charities.

Ms Armstrong: Having applied for charitable status under the new rules, I know that organisations have to jump through hoops to provide so much information and even have to amend their objectives to ensure that they comply with the requirements. There are organisations that may have been listed as charities by Companies House and HMRC in the past, but that, when charity registration came up, said, "No, we are not really a charity. In fact, we may be paying money back to HMRC". They were, however, then forced to go through the process of becoming a charity. I do not understand how objectives and actions have not linked up. You say that an organisation, under new section 16B, has to be a:

*"(a) relevant institution, or
(b) person connected with a relevant institution".*

A private company or private individuals who have their own company will not necessarily be linked in with that, even though they are philanthropic.

Mr Ireland: No, unless they represent themselves as a charity, in which case the commission will be able to seek evidence from them to determine whether they are a charity or not. The Charities Act relates only to charities. An organisation has to register only if it is a charity; if it is not a charity, it does not have to register. As I said, we will get more information on this from the Charity Commission for you. I cannot believe, and I have no evidence of, organisations being forced to be a charity. The determination is made on the three tests in sections 1 to 3 of the Act.

It may be that, if an organisation has a slight problem with a governing document and wants to be a charity, it can get advice as to how it can change that governing document if it wants charitable status. However, I would be amazed, frankly, if any organisations were forced to be charities.

Ms Armstrong: I do not know whether the Department has copies of the evidence that we have received. I am sure that you have also received it from the individuals over many years. It might be worthwhile looking at them, because that is what they have been telling us.

In those early days, there was definitely a lot of using a hammer to crack a nut in order to get organisations to apply. However, the fact is that this is a voluntary application as opposed to a mandatory one, and that is the difficulty.

Thank you for that. I ask a lot of questions, but you are helping to clarify things in my mind. Thank you, Martin.

The Chairperson (Ms P Bradley): No other members have indicated that they want to ask anything about clause 3 at this stage. Our witnesses will return to the Committee. Is there anything further that you want to add, Sharron or Martin?

Ms Russell: I will add a final point of clarification on that last issue, which Ms Armstrong raised and to which Martin responded. From the engagement that took place during the independent review of charity regulation, I would expect some commentary in the report on what the member has just told us. As you know, we await the finalisation of the report and the Minister's views on it. Some of the issues to which Ms Armstrong refers have been raised in some of those seminars. The Department will reflect on that.

Ms Armstrong: We await that in the report with bated breath. *[Laughter.]*

The Chairperson (Ms P Bradley): Thank you both for your time. No doubt it will not be too long before we speak again.

Mr Ireland: Thank you.