

Charity Commission for Northern Ireland response to Communities Committee request on registration: hearings 7 and 21 October 2021

1.0 The registration process

Registration began in December 2013, following an amendment to the Charities Act (Northern Ireland) 2008 (the 'Act') regarding the public benefit requirement. The Act requires all charities to register with the Commission regardless of size, income or whether they are registered with HMRC for charitable tax purposes. The Commission therefore introduced a 'managed process' to deal with the registration of an estimated 11,500 to 16,500 charities.

The 'managed process' involves calling forward organisations in tranches as the limited resources of the Commission allow. These tranches are made up primarily of:

1. Some organisations which had already received charitable tax benefits (deemed to be charities under the Charities Act 2008 (Transitional Provision) Order (Northern Ireland) 2011 No. 12. and a new order made on 19 August 2013 No.211, until a decision was taken by the Commission on their registration status).
2. Organisations that have made themselves known to the Commission through the submission of an Expression of Intent (EOI) to register.
3. The Commission also facilitates grouped registrations where a large number of organisations operate under the same governing document, for example Parent Teacher Associations and churches.

We have continuously reviewed and improved our process since 2013 and the current registration process involves:

- Notification to the next tranche that the Commission will be calling them forward shortly, together with signposting to support and resources on the Commission's website to enable them to prepare in advance. These can be found at <https://www.charitycommissionni.org.uk/manage-your-charity/registration-support/>. They include toolkits, screenshots and podcasts of workshops on registration as well as signposting to helper umbrella groups in the charity sector.
- Once called forward the organisation has 30 days to submit an application. Extensions may be granted in exceptional circumstances.
- Application is via an Online Registration Form which seeks a range of information on the organisation including submission of its governing document.
- Applications are initially checked on submission to ensure that critical information such as the governing document has been submitted.
- The applications are then assessed to ensure:
 - they are eligible to register as a charity in Northern Ireland
 - the purposes or proposed purposes (if they are just being established) fall under one or more of the list of 12 descriptions of purposes in the Charities Act
 - that all of the purposes are exclusively charitable
 - that the organisation's purposes meet the public benefit requirement.
- The Commission then requests further information if needed.

- Once all of the required information has been provided, the application is evaluated in accordance with manuals approved by Commissioners.
- A summary report and recommendation is drafted for consideration by a Committee convened under schedule 1 of the Act.
- Depending on the outcome of the Schedule 1 Committee, the organisation is registered or refused entry onto the Register of charities. In some instances additional further information may be requested.
- If registered, a welcome pack outlining key duties and responsibilities in relation to a registered charity is provided to the organisation.
- If refused registration, the applicant is provided with the reasons for refusal and advised of the mechanism for appeal.

Whilst the Commission's procedures have changed over the years in a bid to continuously improve processes and speed up the registration process, there has always been a provision for decisions to be escalated to Commissioners if required.

2.0 The legal test that is applied

There is no straightforward legal 'test' set out on the face of the Act. Instead there is a definition of charity which includes a public benefit requirement, based on centuries of case law. Thus, registration is not a simple process.

The Act requires the Commission to keep a register of charities and every institution which is a charity under the law of Northern Ireland must be registered in the register of charities.

The term 'charity' is defined in the 2008 Act as:

"an institution which (a) is established for charitable purposes only, and (b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities." This means that:

1. It must be an institution, that is, it is an organisation that is an independent body, the hallmarks of which include having control and direction over its governance and resources.
2. It must be established for exclusively charitable purposes and for the public benefit. Whether an organisation is established for exclusively charitable purposes is determined by its governing document and, in particular, its stated purpose/s. For a purpose to be charitable, it is necessary for it both to fall within one or more of the 12 descriptions of purposes set out in the Act and to be for the public benefit. Purposes are considered on a case-by-case basis and they set out what a charity seeks to achieve, not its activities. In determining whether an institution is established for exclusively charitable purposes, the Commission must make reference to case law and the principles deduced from that case law, which is extensive and has arisen over hundreds of years.

Purposes are not charitable if they do not fit under one or more of the descriptors, are not for the public benefit or are political, that is, intended to make a change to the law or policy in the jurisdiction or are unlawful.

There is no statutory definition of the 'public benefit'. The 'Act' requires the Commission to provide statutory guidance on the Public benefit requirement <https://www.charitycommissionni.org.uk/media/1060/ccni-pbr1-public-benefit-requirement-v20.pdf> This guidance is intended to support charities in understanding the complexities of public benefit. Case law provides a series of examples of particular purposes in particular contexts which have been held to be charitable or for the public benefit, it is not static and evolves on a case-by-case basis.

In brief, there are two elements to the public benefit requirement:

1. The **benefit element**, this is about the benefit flowing from the purposes. For a charity's purposes to satisfy the benefit element that benefit must have three key features, it must:
 - flow from the charity's purposes
 - be capable of being demonstrated
 - being beneficial, not harmful.
2. The **public element**, this is about who may benefit from the charity's purposes. For a charity's purposes to satisfy the public element that benefit which must again flow from each purpose must:
 - be to the public or a section of the public,
 - not provide a private benefit to individuals unless that benefit is incidental.
3. It must be subject to the control of the Court in the exercise of its jurisdiction with respect to charities. Indicators that an institution is governed by the law of Northern Ireland include that it was established in the jurisdiction; it is a company registered in Northern Ireland; the governing document explicitly says it is governed by the law of Northern Ireland; or the majority of trustees are based here.

This differs from an 'activity test' such as the one set out in Scotland's charity legislation and implemented by the Office of the Scottish Charity Regulator (OSCR).

Under the Charities Act (Northern Ireland) 2008 if a charity acts outside of the exclusively charitable purposes for which it was established or contrary to them that is a breach of trust, rather than it ceasing to be a charity. How a charity is being operated is separate from whether it is a charity in law. The Commission has no power to remove a charity from the register because of how it is being operated by the current trustees.

The most straight forward way in which to explain this aspect of charity law is to use an analogy. If the charity established by a governing document is seen as a car and the charity trustees that are running it as the drivers, just because the car is driven down the wrong side of the motorway doesn't stop it being a car, it is rather that the trustees that are not driving it correctly.

3.0 Suggestion that organisations have been forced to become charities when they are not, Communities Committee has been provided with evidence.

The Commission can only speculate in providing a response with regard to organisations being 'forced' to register and the evidence provided to the Communities Committee. Some organisations that meet the legal definition may not previously have thought of themselves as charities.

The legal definition of a charity is an institution which is **established** for charitable purposes only, and falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities. The Commission does not create charities. An assessment is made on the governing document which establishes the organisation and if it meets the legal requirements then it is placed on the register of charities. The decision to register a charity is an appealable decision, so the option is available to appeal the decision to the Charity Tribunal.

The Commission has provided guidance to support charities during the application process on issues relating to purposes which are not exclusively charitable or problematic dissolution clauses, for example. However, this is only guidance and ultimately it is up to the trustees to decide whether or not they wish to amend a governing document to enable them to register. If they do not the Commission will, and has in the past, refuse registration in line with the requirements of the Act.

However, if an organisation meets the requirements set out above under the legislation then it **must** register as a charity under the current Act; failure to apply is a breach of trustee duties under 'the Act', Section 17(1). There are no exceptions or exemptions to applying for charity registration as the Act currently stands. The Commission must apply the law.

Where the courts have decided that an organisation is a charity in law, the Commission must register it.

In addition, in 2011 in order to facilitate the oversight of charities in Northern Ireland whilst an essential change was made to the legislation regarding the public benefit test, provisions were brought forward to deem those organisations which had secured charitable tax benefits from HMRC to be charities. These provisions were updated in 2013 to include all organisations in Northern Ireland granted charitable tax exemptions by HMRC under the Finance Act 2010 up to and including 18 August 2013. Charitable tax benefits were only provided by HMRC to organisations that had presented themselves to HMRC as charities before charity registration was introduced. Under the deeming provisions the Commission must make a determination on charitable status in order to remove the organisation from the deemed list, whether that be to enter them onto the register or to refuse them entry.

Evidence provided of an organisation that did not believe it had exclusively charitable purposes being forced to register and then having its assets stripped.

If the Committee can provide an example, the Commission can explain the circumstances relating to it. Without knowing that, it can be said in general that an institution which is established as a charity enjoys the fiscal benefits of being a charity, for example, certain grants, gift aid, tax and rates relief. Charity law has long held that assets cannot be moved in and out of charity. If an organisation has a governing document with exclusively charitable purposes, has accessed charitable tax reliefs on the basis of being a charity it cannot, at a later stage, say it no longer wants to be a charity and try to remove property, assets or funds from the charity sector. It is for this reason that a philanthropic organisation is not granted charity status by the law. Whether an organisation is philanthropic or a charity is mostly identified by its governing document.

Why are only 50% of Social Enterprises charities registered but the rest are not. If their objectives are charitable, why do they get that choice when others have not.

Not all good causes are charities, not all social enterprises objectives will be exclusively charitable. If they are, then under the 2008 Act they must register. There are no exceptions or exemptions to applying for charity registration, failure to apply is a breach of trustee duties under the Act, Section 17(1). It may also be the case that some are still awaiting call forward as the Commission's resources allow, as the register is still being built.

Help provided to organisations who wish to be charities but have minor issues with their governing documents

The Commission is mindful that registration is a new and novel one-off process, particularly for smaller charities that are volunteer run. It continues to provide guidance and support to charities regarding their governing documents, for example, if there was an issue with an organisation's governing document which would present an obstacle to registration, such as a non-charitable dissolution clause, the Commission would advise the applicant and provide an opportunity to amend the governing document before issuing a refusal notice. It also provides guidance on matters pertaining to governance but which do not affect charitable status, such as advising a charity that they have an insufficient number of charity trustees according to the minimum number dictated in their governing document, typically this is provided following registration.

The Commission also publishes model governing documents on its website which can be referenced or used by organisations.

4.0 Other relevant matters raised with regard to registration

Suggestions that Schedule 1 Committee could register circa 6,000 organisations previously registered by staff via a list.

There would be a number of concerns with the suggestion as doing so would:

1. Not provide the Commissioners with the necessary information to take a considered and robust decision on the requirements for registration of each individual charity as set out in the legislation. Commissioners as decision makers have to be satisfied in line with The Charities Act (Northern Ireland) 2008 that each applicant is a charity in law considering each element of the requirements under the law (institution with control and direction, exclusively charitable and meet the public benefit requirement and that they are governed by the law of Northern Ireland). A list would not provide them with the information and facts to make that judgement, this would constitute poor decision making, leaving the Commission open to challenge in the Courts. Each registration decision can be challenged individually. The original application information which the Commission holds could be eight years out of date by now and it would not be possible to confirm it was still accurate without contacting all the charities.
2. Not cover the loss of charitable status on the register of charities in the interim period. The date on which a staff member took a decision to register a charity is key. If retrospective legislation is not brought forward and Commissioners had to make fresh decisions there is a resulting uncertainty gap for charities. For example on: the status of grants obtained on the back of their registered charity status in the interim period, potential that they are in breach of conditions of grant if registration was a pre-condition, potential they may have to return funding (at the discretion of funders), the raising of donations from the public under the auspices of its charity registration number, donations made by local businesses on the premises of registered charity status, tax and other benefits.

Restoring certain decisions made by staff through retrospective primary legislation would mitigate these and other uncertainties relating to consents, amendments to governing documents, broadening of purposes, religious designation, incorporations, property and other transactions.

Why are we excluding Charitable Incorporated Organisations (CIOs)

The Act provides for CIOs at Part 11 of the legislation. This part of the Act has not yet been commenced. CIOs are specially designed for the charity sector; they resemble charitable companies in many ways but differ in others and would only be regulated by the Commission in Northern Ireland, as opposed to dual regulation with Companies House. The structure is most likely to be beneficial for small to medium sized charities which employ staff or enter into contracts. While running a CIO should be simpler than establishing a charitable company it is not as straight forward as running an unincorporated association. A CIO does not come into existence until the Commission has registered it. The Commission

would welcome the introduction of CIOs, however, as with other parts of the Act which are yet to be commenced, given the Commission's current limited resources, development of external and internal guidance, internal systems and IT would be highly problematic and would slow down other work such as registration.

[Suggestion that 3,500 charities had closed due to regulation of charity sector](#)

The Commission is unaware of the research source of the statistic quoted, however, our records over the past 12 years as at 7 October 2021 show that 1,367 charities have notified the Commission of closure prior to registration, some of which closed prior to the commencement of registration in December 2013, and a further 444 have closed following registration.

The Commission would welcome the opportunity to brief the Communities Committee further if required.