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GM-1435-2021

Dear Janice

DELIBERATIONS ON THE CHARITIES BILL 21 OCTOBER 2021

I am writing in response to your letter of 22 October seeking the Department's response to issues that were raised as queries, either in the public meeting with the Officials on 21 October or in the closed discussion session afterwards. May I also take the opportunity to apologise for the delay in responding, which is due to the need to consider further legal advice on some of the complex issues raised. You will see from the response that Minister proposes to make amendments to the Bill, the drafts of which are attached to this letter at **Annex A**.

Clause 1 – Actions of Commission staff treated as Commission Actions

Section 37

The Committee queried why s37 was not included at 1(5)(e) and the Officials advised that it was not required because the Commission had taken no decisions under that section of the Charities Act 2008.

I can confirm that the Committees understanding is correct and that this is illustrated in the "Table of Decisions" provided to the Committee following the briefing session on 14 October.

Sections 22(3) and 23(1)

In respect of queries raised by the Committee concerning section 22(3) and section 23(1) of the Charities Act (Northern Ireland) 2008 (the Act). It is indeed the case that there are no rights of appeal under section 22(3) and that the rights of appeal in respect of section 23(1) of the Act are limited to those who were served with the order to provide the information, but do not extend to those whose information may have been disclosed as a result of the order. Whilst retrospective validation of these actions by the Commission has the potential to engage a person's Convention rights in terms of Article 8 (Right to a private and family life) that does not mean that the validation will breach those rights.

Nevertheless, no matter how speculative, the validation does potentially remove a legality argument for third parties which they could have utilised to argue that any processing of the data was unlawful as it did not have a statutory footing. The validation of decisions taken under sections 22(3) and section 23(1) could therefore hinder a third party's potential recourse to the Information Commissioner, which is the appropriate mechanism for challenging such decisions, as opposed to the Charity Tribunal.

Minister has therefore determined that s22(3) and 23(1) should be added to Clause 1(5) of the Bill which is in keeping with her previously stated policy that the Bill should do nothing that could impinge on the rights of individuals under ECHR. In addition and upon further reflection Minister has determined that the administering of an oath or the requirement to make and subscribe a declaration of truth under s22(4) should also be included in Clause 1(5). These decisions and orders will therefore remain unlawful and thus free to be challenged by way of the Information Commissioner, NIPSO or the Courts, if those affected wish to pursue this.

Appeal rights – extending the timeframe

The Committee has asked if the Department would be willing to extend the timeframe for appeals from 42 to 91 days. I can confirm that Minister has concluded that there is justification for extending the timeframe for appeals arising from this Bill and will amend the timeframe accordingly from 42 to 91 days.

Although the evidence sessions indicated that the timeframe for appeals generally was insufficient, especially for smaller charities relying on volunteers, any proposal to extend the timeframe for appeals to the Charity Tribunal generally could not be effected through this Bill as the Charity Tribunal Rules are the responsibility of the Department of Justice. Minister would, however be content that officials consider this matter further and work with officials in the Department of Justice with a view to a possible future amendment to the Tribunal Rules.

Creating new appeal rights where none previously existed.

Clause 1(7) of the Bill provides fresh appeal rights for decisions made lawful by the Bill where they are provided for in Schedule 3 of the Act. Importantly, fresh appeal rights are not provided where they did not previously exist, nor for decisions that are to remain unlawful. A number of regulatory decisions, orders or directions where decisions taken prior to McBride will be made lawful will have no appeal rights, however, other protections are provided and no adverse ECHR impacts are evident. I have attached a table at **Annex B** illustrating this following an urgent review officials have undertaken since the issue was raised.

The issue of creating completely new appeal rights where none previously existed in the 2008 Act is complex. It would have to be determined what the appeal should be against, who could appeal and what the Tribunal's powers should be. The issue concerning 22(3) and (4) and 23(1) can be dealt with by adding them to Clause 1(5) whereby they remain unlawful as discussed above. There are no evident ECHR issues for any of the other decisions made lawful but which do not currently have appeal rights.

If new appeal rights, were provided where they did not previously exist, for those decisions being retrospectively validated by the Bill, but not provide those same appeal rights for all decisions arising from the same provisions going forward, it would create a disparity in the way in which similar decisions are treated before and after Royal Assent. This could give rise to a legal challenge. However, if for

example, new appeal rights were provided for all decisions arising from s22(3) or 23(1) going forward, it could hugely impact the number of appeals to the Charity Tribunal and seriously affect the Commission's ability to gather the evidence necessary to deliver its statutory functions. Consequently the Minister is not minded to do so.

Charitable Incorporated Organisations (CIOs)

The Committee have queried whether CIOs are outside the scope of the Bill.

CIOs are a charitable entity which were introduced in England and Wales in 2013 as a result of the Charities Act 2006. They have their own legal personality, with the ability to conduct business in their own name and limited liability so that its members and trustees will not have to contribute in the event of financial loss.

A limited company has a lot of the attributes of a CIO and can be a charity, however, they must be registered with both Companies House and the Charity Commission for NI (the Commission), whereas a CIO established here would only be required to register with the Commission thereby reducing bureaucracy. A charitable company or registered society within the meaning of the Industrial and Provident Societies Act (NI) 1969 could apply to the Commission to convert to a CIO.

Part 11 and Schedule 7 of the Act introduces the concept of the CIO in NI, makes provision for their registration, the conversion of charitable companies into CIOs, the amalgamation of CIOs and allows the Department to make regulations to make further provision. There is therefore no requirement to include the introduction of CIOs in the Charities Bill as the powers are already contained within the Act, but have yet to be commenced.

However, a CIO must be registered with the Commission regardless of its size and income so that it is not subject to regulation by Companies House. This is the case in England and Wales and would also be the case in NI. The power to introduce a registration threshold is therefore capable of dis-applying any registration threshold for CIOs.

The Independent Panel conducting the Review of Charity Regulation in NI has considered the possible introduction of CIOs in NI and the Minister will consider any recommendations arising in that regard.

Clause 2 – Power of Commission to delegate to staff

Section 37

The Committee has queried why when sections 33 – 36 have been included in Clause 2, 9A(2) as powers that can never be delegated to staff, section 37 has not. As reported by officials during the various briefing sessions, the Minister recognised that statutory inquiries and the resultant orders taken under sections 33- 36 can have an impact on individuals in terms of their reputation and their ability to continue to act within the charity sector. Although such orders can be made by staff in other jurisdictions throughout the UK and Ireland, the Minister took the view that in order to restore confidence in the process here, such decisions are better taken by the Commission or a Committee established by the Commission under Schedule 1 of the Act. Such decisions account for a small percentage of the decisions undertaken by the Commission. The section 37 power whilst important does not appear to the Department to have those same potential impacts on individuals.

The fact that section 37 is not included in Clause 2, 9A(2) does not make it inevitable that it will be delegated to staff but allows greater flexibility by allowing it to be considered for inclusion in any future Scheme of Delegation which would be fully consulted upon. However, in the interests of addressing the Committee's concerns there would be some justification in including it in Clause 2, 9A(2). Section 37 decisions could have major implications for the charity and its trustees and this is reflected in the fact that section 38 of the Act treats section 37 orders in the same way as those of sections 33-36 in terms of notification of the Commission's decision and a statement of the Commission's reasons for making it. Minister has therefore agreed to amend the Bill so that the making of orders under section 37 is included in Clause 2, 9A(2) meaning they can never be delegated to staff.

Section 33 – 36 powers

The Committee raised a concern that including the powers under sections 33-36 in Clause 2, 9A(2) would mean that the Commission could not respond with urgency if the need arose. However, these powers are rarely used and it is the Department's view that decision making Committees established by the Commission could have emergency procedures in place to deal with matters of urgency. Indeed this has been the case since the McBride Judgment. It is these powers that are the most contentious and have led to most appeals to the Charity Tribunal. The Minister believes that such powers should not be delegated to staff of the Commission given the particular issues that have previously arisen in NI.

Public consultation on the Scheme of Delegation

During the evidence session on 14 October, Mr Frew, MLA asked if the Bill could stipulate that a public consultation would be undertaken on any potential Scheme of Delegation. Minister has determined that the Bill be amended to state that such a consultation will be undertaken on the first Scheme.

Clause 3 – Regulations exempting charities from registering by reference to thresholds

Registration

In your letter you state that the Committee wish to be content that the drafting is broad enough to ensure that the threshold can be widely considered in the future, pending the recommendations of the Independent Review Panel and be set either by:

- Income or income plus assets; and/or
- By considering the option of a choice to register (either because a charity falls below the threshold or because it does not choose to register for a legitimate reason i.e. income should not necessarily be the sole reason).

I can confirm that the power to make the required regulations is indeed wide enough to allow for the threshold to be income only or income and assets and that any charity falling below the threshold could choose to be registered to avail of the benefits accruing from it. However, the regulations could not allow a charity above the threshold to choose not to register as the Act does not provide for a "legitimate" reason not to register and the policy intent in respect of the power relates solely to a registration threshold based on income or income and assets.

During the briefing on 21 October officials undertook to ask the Commission to provide a short paper on the registration process. This paper has now been provided and accompanies this letter.

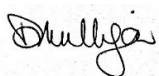
Specified timeframe for the introduction of the regulations

Your letter asks if Minister would be open to specifying a timeframe in the Bill for the introduction of any regulations introducing a threshold should the Committee support Clause 3.

Minister is not minded to do so as it is her belief that such an amendment if accepted would statutorily commit the Minister for Communities to introduce a registration threshold even if a future Minister did not wish to do so.

I trust this is helpful for Members.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Diane Mulligan', is positioned above the printed name.

Diane Mulligan

Departmental Assembly Liaison Officer

Private Office

ANNEX A

Charities Bill

Draft amendments for Consideration Stage

Clause 1, Page 2, Line 5

At end insert -

- ‘() the giving of a direction purporting to be under section 22(3) of the 2008 Act,
- () a decision, or purported decision, to give a direction under that provision,
- () administering an oath, or requiring the making and subscription of a declaration of truth, under section 22(4) of the 2008 Act,
- () the making, or purported making, of an order purporting to be under section 23(1) of the 2008 Act,
- () a decision, or purported decision, to make an order under that provision,’

Clause 1, Page 2, Line 31

Leave out ‘42’ and insert ‘91’

Clause 2, Page 3, Line 31

Leave out ‘36’ and insert ‘37’

Clause 2, Page 4, Line 8

At end insert ‘; and before making the first scheme under sub-paragraph (3), the Department must carry out a public consultation.’

ANNEX B

DECISIONS WHERE NO APPEAL RIGHTS EXIST

| | | | |
|--------|--|----------------|---|
| S22(3) | Direction to a) produce accounts/statements and verify by statutory declaration (b) produce copies of documents and verify by statutory declaration (c) attend to give evidence or produce documents | 95 orders | Redress through ICO for GDPR issues. Proposed amendment – add to Clause 1(5) so that they remain unlawful |
| S22(4) | Administer oaths | | Proposed amendment – add to Clause 1(5) so that they remain unlawful |
| S22(6) | Publish inquiry report | 6 | Redress through NIPSO Currently included in Clause 1(5) – to remain unlawful |
| S23(1) | Order for production of information or documentation | | Redress through ICO for GDPR issues [NB the person to whom the order is addressed can appeal to the tribunal on the narrow grounds in para.2(2) of Schedule 3] Proposed amendment – add to Clause 1(5) so that they remain unlawful |
| S24 | Disclosure of information to any public body or office-holder | unquantifiable | Redress through ICO for GDPR issues. Covered by Clause 1(5) – to remain unlawful |
| S29 | (D) Making schemes to apply property cy-pres (D) Making schemes - Gifts for mixed purposes | 11 | An order made by our Commission establishing a cy-pres scheme is simply one type of s.31 order |

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|----------|---|----|---|
| | | | against which there is already a wide right of appeal to our tribunal. |
| S47 | (O) To exercise the same power as the A.G. with regard to the application of charity property | 2 | The A.G. is intricately involved in the process and can issue directions to the Commission to refrain from exercising the power or to consult the A.G. before using it. |
| S50 | (D) – to determine the membership of a charity | 1 | <p>This was done during the course of a statutory inquiry?</p> <p>We do not believe that appeal rights are needed where the s.50 determination forms part of a s.22 inquiry for which there are extensive appeal rights.</p> |
| S54 | (O) – authorising the taking of charity proceedings | 1 | s.54(5) allows a fresh application to be made to a High Court judge if the Commission refuses permission, so it is not obvious why a right of appeal to the tribunal is needed. |
| S123(6) | (DR) – to give public notice of a trustee resolution | 32 | <p>The Commission's power to intervene in the s.123 process is to be found under s.124(2) (objecting to a resolution) against which there are appeal rights.</p> <p>It is not obvious why there should be appeal rights for 123(6) in which the Commission requires a proposed transfer to be advertised and thereby slows down the timetable a bit</p> |
| S123(7) | (DR) – for more information in respect of a trustee resolution | | It is not obvious why there should be appeal rights for 123(7) which allows the Commission to seek more info on the resolution |
| S123(11) | (O) – to vest property of the transferor charity in | | Not obvious why appeal rights are required as |

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| | the transferee charity, in its charity trustees or in any trustee for that charity, or in any other person nominated by charity trustees to hold property in trust for that charity at the request of the trustees | | this simply allows the Commission to facilitate the charity to do what it wants to do. Otherwise it could go to the Court. |
| S129 & S130 | (D) not to concur with a trustee resolution made under section 129(3) or 130(2) | | Appeal rights exist for 129(3) and 130(2) only Decision of the Commission not to concur under section 129, or under section 129 as applied by section 130, with a resolution of charity trustees under section 129(3) or 130(2) |
| S129(6) (including S129(6) as applied by S130(4)) | (DR) to give public notice of the resolution | | S129(6) same as 123(6) – not obvious why appeal needed as only about giving public notice |
| S129(7) (including S129(7) as applied by S130(4)) | (DR) – charity trustees to provide more information in respect of larger incorporated charities spending capital given for a particular purpose | | S129(7) same as 123(7) – not obvious why appeal needed as Commission only looking more info on the resolution |
| S129(10) (including S129(10) as applied by S130(4)) | (D) to concur or not concur with a resolution | | S129(10) simply requires the Commission to give public notice of its decision so no reason to provide appeal rights. |
| S175(5) | (O) – Any order made by the Commission may be varied or revoked | 8 | The subsequent order will be made under the original provision and will attract the applicable appeal or review rights. |