



Northern Ireland
Assembly

Committee for Communities

OFFICIAL REPORT (Hansard)

Charities Bill: Committee Deliberations

18 November 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
Miss Aisling Reilly

Witnesses:

Mr Martin Ireland	Department for Communities
Ms Sharron Russell	Department for Communities
Ms Clare Irvine	Department of Justice
Ms Gillian McClearn	Northern Ireland Courts and Tribunals Service

The Chairperson (Ms P Bradley): With the Committee are Sharron Russell, Martin Ireland, Gillian McClearn and Clare Irvine. You are all very welcome to the meeting. Gillian and Clare threw us off a wee bit with their email addresses. We had to go and look to see who you are. Martin thought that he was going to be on his own. *[Laughter.]* It is good to have you all here.

Gillian and Clare, I think that it is best to start with you on the time frame for appeals to the Charity Tribunal. Can you give us your views on the proposal to extend those to 91 days? *[Long Pause.]* Hold on. Gillian and Clare, can you hear us?

Ms Clare Irvine (Department of Justice): Can you hear us OK?

The Chairperson (Ms P Bradley): We can hear you now. Go ahead. We can hear you fine.

Ms Irvine: That is brilliant. Thank you. I am not too sure of the technology.

Some very quick introductions: I am the head of the judiciary and mental capacity branch in the Department of Justice.

Ms Gillian McClearn (Northern Ireland Courts and Tribunals Service): I am the business manager for the tribunals hearing centre, which includes the Charity Tribunal.

Ms Irvine: First, thank you very much for inviting us along to the Communities Committee. We really appreciate the opportunity to talk through the issues with you.

There are two real issues with the time limits that we are here to chat about. First, there is what is included in the Bill, as drafted. The Committee is also interested, as part of a wider exercise than the Bill covers, in looking at the existing time limits for applying to the tribunal.

I will raise what is in the Bill first. It might be helpful for the Committee to consider the decision of *Burke v the Charity Commission for Northern Ireland*, which was just issued by the president of the Charity Tribunal on Monday 15 November. We can provide a copy of that judgement to the Committee if that would be helpful. What is particularly interesting about that decision is that it looks specifically at the procedural rules for the tribunal and the provisions in rule 17 about out-of-time applications. We thought that it would be helpful to bring that to the Committee's attention. There have been some conversations about extending the provisions of the Bill to increase the application period from 42 days to 91 days. That judgement might add something to that debate as it describes how the Charity Tribunal looks at out-of-time applications. If it would be helpful, I can run through that judgement very quickly for you.

The Chairperson (Ms P Bradley): Yes. That would be good.

Ms Irvine: At the end of that judgement, the president, Damien McMahon, looks at out-of-time applications to his tribunal. He looks particularly at a couple of cases that have been decided in the upper tribunal in England and Wales, which is the appeal level of the tribunals structure in that jurisdiction. The two cases that he looks at are *Data Select Ltd v HMRC* in 2012 and *Leeds City Council v HMRC* in 2014. The president notes that those are persuasive and not necessarily binding on the Charity Tribunal in Northern Ireland. However, he goes on to say that the lessons learned from those cases are useful for his consideration of any cases in front of the tribunal.

That judgement says that, if any cases are out of time, the tribunal will consider a number of questions. First, what is the purpose of the time limit for the appeal? Secondly, how long was the delay in applying to the tribunal? Thirdly, is there a good explanation for the delay? Fourthly, what are the consequences for the parties if the time is extended? Lastly, what are the consequences if the time extension is refused? That seems to be the test that the tribunal will apply for any out-of-time cases. It may well be worth considering that judgement as you move forward with your deliberations.

We have pulled together some stats for you — again, we can provide them — on the number of out-of-time cases in which the time has been extended. We have looked at stats from 2016-17 through to 2021-22. In that period, there have been 12 cases in which there has been a time-point issue. The time was extended in six of those cases. Some of the 12 cases have been dismissed for reasons other than being out of time; perhaps the person who applied did not have standing to apply. That is the statistical background of out-of-time cases.

I will move on to the Committee's wider interest in existing time limits and rights of appeal to the tribunal. Having briefed our Minister yesterday, we want to flag up that we consider those to be matters that sit within the Justice arena. The Justice Committee would also have an interest in those issues. From a DOJ perspective, we rather suspect that there might be an issue with the scope of the Bill. As you will be aware, the long title of the Bill sets out its scope and what can be contained in the Bill. Obviously, it is a matter for the Speaker to determine, but we wish to flag that up just for completeness.

More widely, we wonder about delay. We take delay in the justice system very seriously. Although increasing time limits for applying to the tribunal would not necessarily create delay in the civil justice system per se, it could well cause delay. It would probably cause delay for the individuals who are involved in that case. We suspect that the longer people have to apply to the tribunal to access the justice that it can apply in any case, the longer they will take to make that application. It is maybe just human nature that the longer you have to do something, the longer it takes. We wonder about that.

We note that, completely for good reasons, no consultation was carried out on the Bill. I know that DFC has worked extremely hard to resolve the specific issue that the Bill is trying to deal with. On the wider point of extending existing time limits, we, in Justice, wonder whether it would be helpful to carry out a consultation or, at least, consider consulting. There may be other stakeholders with views. We wonder whether 91 days is the right limit. There may be other limits; we just do not know about that. I have mentioned the Justice Committee's interest, and I am quite sure that the Justice Committee would welcome the opportunity to scrutinise those wider issues.

We wonder, too, about the impact on other tribunals if existing time limits were extended. We always have to think about repercussive effects. Would that call into question whether we should look at time limits for other tribunals? Some tribunals have tight time limits for applications. With mental health, for example, if somebody is detained in a psychiatric setting, you want to get the case moving swiftly. That applies to special educational needs cases as well. Gillian and I were talking about that just ahead of the meeting. Those cases have tight time limits for applications because that is a big chunk out of a child's school year when, perhaps, the child has not gone into a school environment while waiting on a decision. Certainly, on the wider issue of looking at time limits for existing applications to the tribunal, we wonder whether there is merit in looking at having a slower time.

That is the position that we, in Justice, will be in. I am certainly happy to discuss any of those issues with the Committee.

The Chairperson (Ms P Bradley): Thank you for that. The issue came from various charities because of how charities are, quite often, set up. As you will know, they do not always meet regularly, so it would cause problems for them to get appeals in within that time. That is why we have taken up the issue, asked more questions about it, and are looking at a possible amendment. You mentioned other tribunals. To be perfectly honest, what other tribunals do is up to them. That is not our remit, so I do not really care either way about that.

You talked about the 12 cases, six of which have been extended. What percentage of the appeals cases were those 12? I imagine that it was quite low, and that very few asked for an extension.

Ms McClearn: Out of 34, we had 12 that were out of time, so just short of one third. Six were extended. Four were dismissed on the time issue — so a smaller number again — and two out of that 12 were dismissed for other reasons: the time issue was secondary, perhaps, to their not having standing with the commission to lodge an appeal on behalf of the charity. Therefore, about 50% of the extensions were granted on a time basis.

The Chairperson (Ms P Bradley): That is actually higher than I thought. A time extension was asked for in roughly one third of those cases. They did not all get it, but one third asked for it. OK. It is actually higher than I thought.

Mr Allen: Can I clarify whether DOJ, if it were minded to make an amendment, could do that through secondary legislation?

Ms Irvine: Yes. That is correct. We have responsibility for making the secondary legislation. The draft primary legislation that you are scrutinising actually amends our secondary legislation. We have power to amend that secondary legislation. The vires sits with us.

Mr Allen: No problem. Has the Justice Minister been consulted on it yet? Is there any particular view as to whether DOJ would be minded to carry out a consultation and take this forward?

Ms Irvine: We have briefed our Minister. We wanted to explore it with you guys this morning and see whether there is really strong feeling that a consultation would be useful. I could not offer any guarantees about the timescale. The issue has come up at the end of the mandate, and, as I am sure that you are all aware, there is a lot to be done before the end of the mandate. However, if the Committee identifies that as worthy of scrutiny and that it would be useful for us to carry out that consultation, we suggest that the Committee writes to our Minister. We would certainly give that due consideration.

Ms Sharron Russell (Department for Communities): I want to give Mr Allen some assurance that Minister Hargey has been very clear in her commitment that we will seek to explore with Justice just such a consultation. Minister Hargey would be happy to write to the Justice Minister. It is necessary for us to make sure that the Committee knows that. It is in her response, I think.

Mr Allen: The issue for me is that we all know how quickly the cogs of government can move at times. I would want a commitment on a timeline. We have seen past issues trundle on for several years, so I would want a definitive commitment on a timeline and when we are likely to see this all taking place.

The Chairperson (Ms P Bradley): Do any other members want to comment on or ask about this issue? Sharron and Martin, have you anything that you want to add?

Ms Russell: You have the Minister's response in your packs. The concerns of Justice and, in particular, those of the president of the Charity Tribunal, Judge McMahon, have been put to Minister Hargey. The Minister remains of the view that this is, potentially, outside the scope of the Bill, while recognising that that is a matter for the Speaker. She flags up the issue that Bills are not generally used to amend secondary legislation, and that Justice could, of course, effect any necessary change through an amendment. The Committee has been interested in the need to consult on, for example, the delegation to staff. She, too, is aware of the need to consult on any unintended consequences or, indeed, any opportunity to extend the rules more broadly outside this specific piece.

The Minister continues to be committed to the unique circumstances that the Bill throws up for extending the time frame for those appeals. She is absolutely committed to that given the uniqueness of the legislation. However, given the locus of Justice, the interest of the Justice Minister and the Committee, Minister Hargey is minded to stay where she is on extending the time frame from 42 to 91 days for appeals arising directly from the Bill. I just feed that back to the Committee. She is clear that she would like us to meet Justice to explore having a wider consultation.

The Chairperson (Ms P Bradley): OK. Thanks for that, Sharron. That is good to know. We have to be mindful and respectful of our Justice colleagues in this.

I have nothing further to ask, and no one else has commented. Gillian and Clare, thank you so much for being with us and explaining that in a bit more detail. It sheds a little more light on the subject, so thank you for that.

Ms Irvine: Thank you for inviting us along. We really do appreciate the opportunity to come and speak to you about this.

The Chairperson (Ms P Bradley): Sharron and Martin will be delighted to know that they are staying with us. *[Laughter.]* We are mostly content with the clauses as amended. I will now go through each clause again and ask if any member has any further questions or points of clarification for the officials. This is your last chance because we will do the formal clause-by-clause scrutiny next Thursday. I would appreciate it if you do not bring up an issue then. Any issues can be brought up now.

Do members have any queries with clause 1, which is "Actions of Commission staff treated as Commission actions"? Is there anything that you want to ask Sharron or Martin, or are we mostly content with clause 1 as amended?

Members indicated assent.

The Chairperson (Ms P Bradley): Clause 2 is "Power of Commission to delegate to staff". Is the Committee content, or is there anything further that members want to highlight to Sharron or Martin? Are we content?

The Committee Clerk: Chair, that DOJ issue comes under clause 2. We will discuss that with the Bill Clerk in closed session.

The Chairperson (Ms P Bradley): Yes. We will have a closed session after this session to discuss further the issues that have been highlighted today.

Mr Frew: Just to clarify, when we say that we are content with the clauses, do we mean that we are content with the clauses as they are proposed to be amended?

The Chairperson (Ms P Bradley): As amended. Yes.

OK. Are members happy enough to move on?

Members indicated assent.

The Chairperson (Ms P Bradley): We will move on to clause 3. Are there any further issues or queries regarding clause 3, which is "Regulations exempting charities from registering by reference to thresholds"? Are there any other issues that members want to flag up with Sharron or Martin while we have them with us? Are we OK?

Ms Armstrong: Can I just ask for clarification? I am still not 100% certain about organisations that have charitable purposes but do not want to be registered as charities. Is there an option not to do that?

Mr Martin Ireland (Department for Communities): No, there is not. If an organisation's governing document makes it exclusively charitable, there is no provision in the Charities Act (Northern Ireland) 2008 for it to register voluntarily. If an organisation is exclusively charitable, the Act requires it to register. The only thing that the Bill does is to provide the power to introduce a registration threshold. If an organisation falls below that threshold, it can choose to register if it wishes. However, if it is above that threshold, and it is exclusively charitable, it must put itself forward to the commission for registration.

Ms Russell: Obviously, it would also have to meet the charities test.

Ms Armstrong: This is what I am asking: who decides whether an organisation meets the charities test? Does that mean that the commission will have to go through all the company documents to weed out the organisations that are charities or that meet the charities test? That is what I am concerned about.

Mr Ireland: The Charity Commission is the statutory regulator of charities. It is up to it to determine that. The Charity Commission calls forward organisations that have charitable purposes, and it will decide what evidence it needs. That will take place through the registration process, and it will determine whether an organisation should be registered or not. That organisation would have the right of appeal to the Charity Tribunal if it is unhappy with the decision to register or not register it.

Ms Armstrong: OK. We have an enormous number of charities in Northern Ireland that are not allowed to be registered as charities because they are section 167 charities and their headquarters are based outside Northern Ireland. We have charities that want to be registered as charities. We have companies that have philanthropic intentions but do not want to be charities, because they may be able to fulfil their purposes without being a charity. Community interest companies (CICs) are not included in the legislation. I find it quite difficult that the legislation continues with that thread. Community interest companies are excluded. We will expect those companies to become official charities because of their charitable purpose, but we will not recognise their CIC status. To meet their charitable purposes, they may generate an income that is outwith their being a charity. It is a bit of a strange one. We have section 167 charities that want to be registered and cannot be registered, and then we have —

Mr Ireland: Section 167 has not yet been commenced. The independent review looked at the whole area of registration, and the Minister will obviously want to consider any recommendations that arise from that. The Bill is not about changing the fundamentals of the registration process. It is only about the possibility of bringing in a registration threshold at some future point.

Ms Russell: Kellie, if you remember, last week, I referred to the fact that the independent review of charity regulation picked up the point that not every non-profit organisation needs to be a charity but that every charity will be a non-profit organisation. That is as clearly as I can say it.

There will be recommendations about choices and options. It is wrong to say that there are no choices and options for non-profit organisations. It comes right back, as Martin said, to the governing document and the fact that they might want to be registered as a charity to avail themselves of tax exemptions and things like that. However, there are non-profit organisations that, through their governing documents, neither want nor need to be charities. The notion that every body must be a charity, and the fact that there are choices and options, quite exercised the independent panel. A section of the report will speak to that. It will be incumbent on us, as a Department, and other stakeholders to make sure that we educate the non-profit sector on all of that. As I said last week, the report has now gone to the Minister, and she has been briefed. We are moving towards publication of that report as soon as we can.

Ms Armstrong: Yes. This is what is quite difficult: we cannot include anything from that report in our report. What does that mean, then? The report gets published, but we, as a Committee, have already gone ahead and produced a report on a Bill with clause 3, potentially, in it. A report will be coming out that we cannot include reference to. Does that mean that the Minister could bring forward other changes to the legislation?

Ms Russell: Just to clarify, this clause, as Martin said, does not relate back to that. This is, essentially, about the power to introduce a threshold; right? What the independent panel is trying to say is that, outwith this legislation, it is about educating the wider non-profit sector and all of us, as stakeholders and owners of the regulatory framework, on the options and choices therein. The charity sector is a subset — there is a nice wee diagram that sets that out. Just to assure you, this clause would not impact that at all. It would just allow for a future threshold, which, as you know, would be consulted on.

Ms Armstrong: OK. So, the future threshold may well allow organisations that, as I always say, are not not-for-profit but are not profit-taking. They may be profit-making for social purposes. The community and voluntary sector organisations have had to go out and earn their own money in order to deliver their objectives. In order to deliver the 40% of the objectives that they have been set up for, a number of organisations may have income that is derived from profit-making purposes and that is in excess of 60% of their organisation. I worked in a social enterprise that was alleged by a Department to be breaching charity rules because it was making a profit to reinvest as a social enterprise. There was no community interest company and nothing like that was set up. It makes things very difficult when funders approach you in that way.

We are stuck between a rock and a hard place on this one, because we do not have that independent report. I understand the fact that the registration threshold is for future regulation or legislation to come forward with. Thank you.

The Chairperson (Ms P Bradley): OK, Kellie, thank you for that.

Do members have anything further to ask before we say cheerio to Sharron and Martin? No. OK. Thank you, Sharron and Martin. We appreciate your time, as always.