

Response to the invitation for a call for evidence and views to the Northern Ireland Assembly Committee for Communities on the Charities Bill (NI) 2021

From Jenny Ebbage and Sarah Burrows the only ranked lawyers in Charity Law in Northern Ireland by Chambers UK 2021



Each of us acts for many of the leading charities in Northern Ireland.

We regularly give up our time to engage with organisations and people from the third sector which we see as a vital cog in the Northern Ireland community and economy.

We believe we have a unique contribution to make given our legal experience and expertise in charity law in Northern Ireland.

We welcome this proposed statutory legal solution in the Charities Bill. Charities and the public must have clarity and certainty as they move forward, confident that they can rely upon the registrations, the decisions they make and the orders, determinations and consents already made by the Commission.

The Court of Appeal decision means that no member of staff of the Commission acting alone can take a decision or exercise a power and function of the Commission. The Court found that there was no power of delegation of the Commissioners statutory powers or functions which could be implied nor was there any express power of delegation. The Court of Appeal case was a matter of statutory construction but the impact of the decision has meant that a number of the decisions made by the Commission such as orders for removal of trustees or determinations of membership are considered void. Other decisions such as a Consent order to a regulated alteration to amend objects of a charitable company, such as to widen those objects for example, are voidable and remain in force until successfully challenged.

There is also a company law matter to consider. Many charities are constituted with the legal structure of a company limited by guarantee and as such are subject to the Companies Act 2006. If a charitable company wishes to alter its objects clause, its dissolution clause or the provisions in its governing document relating to benefits to members or directors, a technical company law procedure must be followed to ensure that any proposed amendment is authorised by way of a special resolution of the Company members. In addition the consent of the Commission is required for these so-called "regulated alterations" before the complex company law procedure takes effect. The consequences of the Court of Appeal decision means that company directors who are also charity trustees are concerned that they are acting ultra vires i.e. outwith their powers with the consequences being the potential risk of personal liability.

Comments on Clause 1 Actions of Commission Staff treated as Commission actions

Clause 1(1) and (2)

We agree with the principle to introduce retrospective legislation to treat decisions made by or purported to be made by a member of the Commission's staff before 19 May 2019 as having been a decision made or thing done by the Commission. We comment on the exceptions in clause 1(3) to (6) below.

It is our understanding that the Court of Appeal decision provides that the process for decision-making was incorrect in that Commissioners or a Committee including a Commissioner was not in place, but the effect has called into question the validity of the registrations of over 6,000 charities. The registration process has taken approximately 7 years to get to this point. It is estimated that the size of the charity sector is in and around 12,000 organisations so the registration process was only half way through. It is devastating to the sector that the considerable work undertaken by charity trustees and the Commission in registering those charities is of no legal effect. Moreover the fact that those charities are still charities at law (due to the nature of their legal governing document) is hard for charities and the public to grasp. Registration was seen as a badge of authenticity by donors, beneficiaries, funders and charity trustees and often one to wear with pride.

The provisions in clause 1 will be helpful to those charities appearing on the register to clarify their registered status.

The registration of a charity is very important in terms of underpinning confidence and trust in the charity sector and is the recognised standard throughout the United Kingdom and taken as evidence that a charity is under the scrutiny of a regulator and in good standing. There is already confusion as to the effect of registration. Many funders have eligibility criteria stating that they will only provide funding to bodies that are "registered charities". This has the potential for an unfair disadvantage to charities which have not yet been called forward to register, particularly when dealing with UK-wide foundations or trusts, many of which will only accept applications from registered charities. We have already seen examples of funders which will not provide funding even on evidence that the body is a charity at law and is registered with HMRC for charity tax reliefs. We have experience where a local bank would not allow a new charity company to set up a bank account because it was not yet registered with the Commission. For those charities which applied for funding on the basis that they were a registered charity and have received funding perhaps for a three or five-year term, it could be the case that the letter of offer for the funding contains a registration condition and a declaration will have been made confirming the body to be a registered charity. If it is no longer a registered charity this could possibly amount to an event of default, perhaps requiring repayment of some or all of the grant received or it may affect the entitlement to future payments. Charities are not sure what to do - for example, does the charity revert to the funder to refer them to the Court of Appeal case; or notify the funder that they are no longer a registered charity; or should the charity say nothing and continue on with its obligations to deliver the project on the basis that it remains a charity at law?

The provisions in Clause 1 will give legal standing to the many consent orders and authorisations made and which have been relied upon in good faith. Charity trustees have relied on those consents or orders in taking actions and making decisions on behalf of their charity. For example, we have advised on numerous mergers. In many cases, a merger will require consent from the Commission, for example a section 96 consent to amend the objects or charitable purposes clause of one or more of the merging parties to ensure compatibility as assets can only be used for the specific and limited charity purposes. This can involve a widening of the objects clause. If the trustees rely upon this and conduct charitable purposes which are wider than those of the charity before the order was granted, we have been asked if this means then that the trustees are in fact acting in breach of trust. The effect of s.96 consent of the Charities Act (NI) 2008 ("2008 Act") means that such an order is ineffective without an order of the Commission. Where a charity is a company, any regulated alteration (such as an amendment to its objects clause, dissolution clause directing the application of property on dissolution or an alteration where it would provide authorisation for any benefit to be obtained by directors or members or persons connected with them) is ineffective if such consent has not been obtained (s.96(2) of the 2008 Act). Charity trustees were concerned about any personal liability if they acted in breach of trust. This Bill will provide that reassurance to those charity trustees and make those orders valid again.

Clause 1(3) and (4)

We agree that the principle in clause 1(2) should not alter the outcome of court or tribunal proceedings finally decided or those where proceedings are pending before the end of the day on which Royal Asset is received.

Clause 1 (5)

We recommend that clause 1(5) is removed.

When we initially reviewed the Charities Bill we took the view that the matters in clause 1(5) should not be subject to clause 1(2) thus that those matters remained unlawful as determined by the courts.

Under clause 1(5) a number of "relevant actions" have been excluded from the application of clause 1(2) so that those will not be treated as decisions of the Commission. This includes, for example, a decision that an inquiry report be published and that information be disclosed by the Commission to certain public bodies or office holders; and the making of orders relating to a number of matters in sections 33-36 of the 2008 Act. These orders include various powers to act for the protection of charities such as appointing an interim manager, appointment of additional trustees, suspending a trustee or removing a trustee of a charity, power to suspend or remove trustees from membership of a charity and power to give specific directions for protection of a charity.

We query why section 37 Power to direct application of charity property was not included at clause 1(5)(e).

As these matters appear to be outwith the scope of the Charities Bill, we must conclude that they remain subject to the High Court and Court of Appeal judgments so that they remain unlawful or invalid. We are not clear as to the consequences for

the Commission or for those affected by those decisions if they are not the subject of pending court or tribunal proceedings or proceedings finally decided before Royal Assent is received. We are concerned that there could be potential for adverse consequences for charities and the third sector if for example a decision (although made contrary to a procedural irregularity and therefore unlawful as found by the courts) had in fact a beneficial effect in that it had protected a charity.

This is particularly concerning if persons were removed as charity trustees for good reason (albeit that the technical process was unlawful) and in order to protect a charity. Those removal orders can also extend to prevent that person from being a trustee of any charity. Such a removal order is no longer valid because of an irregularity with the process rather than an examination of whether there were proper grounds or reasons to remove them. In order to provide a sound basis to clear a person's name if they were removed but should not have been [other than the process was unlawful] and to protect the charity sector from persons who are or may be unfit to be charity trustees, this matter needs to be reviewed or the grounds and circumstances of their removal reviewed and determined by a court or the Charity Tribunal.

In cases where an interim manager has been appointed (at the cost of the charity) after the opening of a statutory inquiry and that decision is now deemed unlawful, we would query whether the charity has a claim against the Commission for recovery of the costs or fees charged by the interim manager or have grounds to refuse to pay such costs or fees?

To provide for more certainty on these matters of such importance to the charity sector and any individuals concerned we consider it might be preferable to include these matters within clause 1(5) as being subject to Clause 1(2) and to allow fresh appeal rights, unless the matter is already included within the circumstances provided in clause 1(3).

Clause 1(6)

We agree that this provision is welcome to clarify the standing of any fresh decision or thing has been made or done by the Commission or by a Committee under para 9 of Schedule 1 to the 2008 Act on the same point such as a new consent order being made to alter an objects clause of a company with charity status.

Clause 1(7) and (8) Refreshed appeal rights

We agree the introduction of refreshed appeal rights. We have a general comment on the period for a decision review and/or an appeal to the Charity Tribunal for Northern Ireland. However, we suggest that clause 1(5) matters that are not already the subject of the matters outlined in clause 1(3) and (4) of the Charities Bill are also afforded the refreshed appeal rights rather than being excluded.

Affording a further period of 42 days for a decision review or an appeal notice to be filed from the date on which the Act receives Royal Assent is welcome. However, we query how realistic this timeframe will be for a charity board to meet and take a decision and obtain legal advice on a matter of such importance and a longer period could be considered for "relevant actions" such as three to six months.

We accept that to have different time periods or processes for decision reviews or appeals arising from “relevant actions” under the Charities Bill compared to decisions made in other cases, may cause confusion and complexity for the Commission and Charity Tribunals.

We also question whether the 42 day period should run concurrently as is the case under the Charity Tribunal Regulations.

Currently a charity can raise a decision review within 42 days of a decision and/or submit an appeal to the Charity Tribunal. Those time periods run concurrently which means a charity often has to submit two concurrent applications and is likely to seek legal advice on whether to also make an appeal to the Charity Tribunal to keep that option open should the decision review by the Commission not meet with their approval. An amendment to the Bill to allow for time periods to be extended to allow for an appeal to the Charity Tribunal after the result of the decision review would be more practical for charities and avoid proceedings in the Charity Tribunal having to be submitted and then withdrawn.

We note that the matter of the concurrent time periods has been raised in the ongoing Independent Panel's Review of Charity Regulation.

Clause 1(9) *Disapplication of accounting and reporting requirements*

We agree that to provide for certainty for charities where the registration resulted from a relevant action that an “exempt year” during which the accounting and reporting regime does not apply is a specific date such as a financial year of the charity beginning before 1 April 2022 rather than accounting periods having to be calculated from the date of Royal Assent.

However, in making that specific date for the financial year of the charity beginning before 1 April 2022 this has the effect of creating an accounting lag.

To take an example, if a charity has an accounting year end of 31 March 2022 it does not have to comply with the accounting and reporting regime until its year ended 31 March 2023, and it has a further 10 months to upload those accounts and reports to the Commission, being January 2024.

Charities will have to produce accounts under their constitution and those that are companies must prepare and submit accruals accounts to Companies House. Relaxations were in place to allow more time for delays in the preparation and submission of accounts and reports due to the impact of Covid.

Charities may wish to (and it seems that many are) continuing to submit reports and accounts to the Commission despite the legal obligation to do so having been negated by the court judgements resulting from the unlawful nature of the registrations.

Clause 2 Power of Commission to delegate to staff

We agree with the general principle of the insertion of the proposed wording for a new paragraph 9A into Schedule 1 to the 2008 Act to provide for delegation to staff of certain functions of the Commissioners. The ability for staff to take such decisions should enable those decisions to be made in a more timely fashion than under the current Schedule 1 Committee process provided that the Commission is resourced and staff are appropriately trained and supported with updated manuals, systems guidance and IT infrastructure to do so.

We agree that certain matters should not be delegated such as the removal of a charity trustee but that other more operational matters such as the appointment of an interim manager following on from a decision of Commissioners to open a statutory inquiry could be delegated by the Commissioners. We would seek reassurance that the Commission has procedures in place to ensure that matters of such importance such as instituting an inquiry or the removal of a charity trustee or appointment of an interim manager can be subject to an emergency procedure rather than awaiting the next scheduled board meeting. We also propose that in some cases the Commissioners would have a flexibility that whilst they must take a decision on a matter that once the decision is taken in principle such as to open an inquiry that they can have a power to delegate certain details to staff. For example, in a charity where concerns have arisen, the board may wish to take a decision such as instructing the staff to write to a charity with specific concerns and to open an inquiry if no satisfactory reply is received within a certain time (such a process is only possible if a member of staff is given delegated power to assess whether or not a reply is sufficient).

We question the omission in 9A(2)(c) of section 37 Power to direct application of charity property which is a wider ranging power than the others mentioned in sections 33 to 36.

From a governance perspective it is our view that the Commissioners should be the body to make the scheme of delegation in consultation with the Department since the Commissioners are the governing body.

Clause 3 Regulations exempting charities from registering by reference to thresholds

The subject matter in Clause 3 is one of the matters under review by the Independent Review Panel on Charity Regulation. We take the view that the provisions of clause 1 and 2 of the Bill are vitally important for the charity sector and welcome their implementation as soon as possible in order that clarity is provided for the charity sector.

We further take the view that clause 3 should be put on hold to await the outcome of the Independent Review which may inform the way in which Clause 3 should be drafted.

Other matters

It would have been useful to have taken this opportunity to bring into force that part of the legislation which provides for Charitable Incorporated Organisations (CIO's). We do understand that this forms part of the remit of the Independent Review Panel and perhaps that can be enacted soon.

A review of the resourcing of the Commission would be timely (if not already underway) to assess the impact of the Charities Bill and whether any additional funding, staff, training, support or systems are needed.

We are pleased that this legislation is being proposed as it will provide more certainty for our clients and the advice that we give to them following the outcome of the Court of Appeal decision.

Jenny Ebbage

Sarah Burrows

24 September 2021