Charity Law Association Working Party 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

The Charity Law Association (**CLA**) has approximately 1,050 members, mostly lawyers but also accountants and other charity professionals. It is concerned with all aspects of the law relating to charities and has established a working party to consider the consultation and to respond to the invitation for a call for evidence and views on the proposed Charities Bill NIA Bill 27/17-22.

The members of the working party are:

- Jenny Ebbage (Chair), Edwards & Co. Solicitors
- Sarah Burrows Edwards & Co. Solicitors
- Amira Graham, Worthingtons
- Denise Copeland, NICVA
- Professor Gareth Morgan, Emeritus Professor of Charity Studies, Sheffield Hallam University

The members of the Working Party serve in a personal capacity and the views expressed in this submission should not be taken to be the formal opinion of the organisation that they represent. Similarly, the views in this paper should not be seen as constituting the opinion of CLA members as a whole.

General Comment on the Charities Bill

Overall the Working Party was of the view that clauses 1 and 2 of the Charities Bill should be implemented as a priority and that clause 3 could follow after the Independent Review Panel on Charity Regulation has reported. We do appreciate however the time constraints with making changes to primary legislation and would not want to see Clause 3 omitted from this Bill.

We also wish to make a broader point that the delay in implementing charitable incorporated organisations (CIOs) in Northern Ireland is putting the charity sector in NI at a considerable disadvantage as compared to the rest of the UK. Around two thirds of new charity registrations in England and Wales are now CIOs and two thirds of new registrations in Scotland are SCIOs. The implementation of CIOs does not require anything in this Bill – as all the primary legislation is in the 2008 Act. It just needs the Department to bring in regulations and commencement orders in relation to sections 105-122 of the Act. As it stands, any charity in NI needing corporate status and limited liability has to be formed as a charitable company, requiring dual

regulation by both CCNI and Companies House. CIOs will also have the benefit of considerably simpler accounting requirements than charitable companies.

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.

This will be helpful to those charities appearing on the register to clarify their registered status and to give legal standing to the many consent orders and authorisations made. Trustees of charities will have relied on those consents or orders in taking actions on behalf of their charity.

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 have a number of concerns about clause 1(5) and wonder would it be better omitted.

A number of "relevant actions" have been excluded from the application of clause 1(2) so that those will not be treated as having been a decision made or thing done by 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 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 Asset 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 been of benefit in that it had protected a charity. 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, does the charity have a claim against the Commission for recovery of the costs or fees charged by the interim manager? In cases where the Commission has provided evidence to other public bodies or in connection with prosecutions what is the effect of excluding those disclosures under clause 1 (5) (c) on those disclosures should that information have been relied upon by the recipient to take other action?

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

We therefore recommend that clause 1(5) is removed.

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.

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 such a matter of 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, in addition to seeking a decision review from the Commission, is likely to seek legal advice on whether to also make an appeal to the Charity Tribunal in addition, in order to keep that option open (albeit stayed) 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, stayed 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 defined by 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, by specifying that the accounting and reporting requirement will only apply to financial years of a charity beginning on or after 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. Since the statutory requirements for audit and independent examination of accounts only apply to accounts required under the Act the effect that could mean that a charity has had no independent examination or audit of its accounts for some time.

Charities will have to produce accounts under their constitution and those that are companies must prepare and submit accruals accounts to Companies House (though we note some have only been providing abbreviated accounts to date). However, 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. So we accept the case for providing a full lead in time to allow for preparation of accounts that comply with the SORP, and on balance therefore we feel that commencing the accounting requirements with effect from the 2022/23 accounting year is reasonable.

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. We would urge the Commission to actively encourage such voluntary filings.

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 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 (but not all the powers listed in para 9A(2)) should not be delegated but remain for the Commissioners such as removal of a charity trustee. We do not believe that it is necessary to have the other matters listed in legislation but rather should be in detail of the Scheme. If all the matters in para 9A(2) are to remain 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 discussion 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.

We disagree that the Department should make the scheme of delegation. From a governance perspective we would expect 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

Whilst we understand the policy intentions of clause 3 – to simplify the requirements for very small organisations with charitable aims – we had varying views about how best to address these.

We are agreed that there needs to be a means for very small organisations that may have never intended to establish themselves as charities to "opt out" of the full framework of registration with CCNI under the 2008 Act. We considered several potential ways of achieving this.

- Some members of the working party feel that the proposed regime of "exempt charities" in the Bill would work well. The details of this would take effect under Regulations to be made under the new sections 16A and 16B to be added to the 2008 add by clause 3 of the Bill. However, a full consultation on those regulations will be essential before they are made.

- Other members of the working party feel strongly that any organisation established in Northern Ireland and making claims to charitable status should be registered with CCNI, but with a lighter touch level of regulation for small charities. This would be similar to the situation in Scotland, as outlined to the Communities Committee by Martin Tyson from OSCR.

However, whilst we have differing view on the implementation, we are agreed that the following requirements should be fundamental to any concessions for very small entities.

(a) There must certainly *not* be a de minimus level below which a charity cannot easily register with CCNI (as applies in England and Wales to charities other than CIOs with less than £5,000 income). Any charity no matter how small must be able to register under the 2008 Act and thus obtain a registered charity number. Those of us taking this view noted the extensive difficulties and misunderstandings related to the systems of exempt and excepted charities in England and Wales – for example, the difficulties faced by such organisations in attracting charitable grants if they cannot give a registered charity number.

(b) We consider that any organisations in NI wishing to retain charity tax status with HMRC must be registered charities under the 2008 Act. Accordingly, an organisation currently on the deemed list (see the Combined List) but not yet registered with CCNI must be required *either* to register with CCNI *or* to notify HMRC to withdraw its recognition for charity tax status and to submit a pre-registration closure confirmation if the organisation is to cease operating and is technically still a charity at law

(c) Where a very small organisation with minimal assets was historically established with charitable aims in effect *by mistake* – i.e. where there was never really an intention by the founders to create a charity and where it holds little in the way of charitable assets and has not held itself out as a charity nor obtained HMRC charity tax status – there needs to be a means to opt out of mandatory charity registration under s.16(2) of the 2008 Act which states
"(2) Every institution which is a charity under the law of Northern Ireland must be registered in the register of charities."

There are various ways of achieving this:

(i) Some of us feel this could be handled by allowing such organisations to become exempt charities as proposed in clause 3 of the Bill – though careful consideration will be needed for the thresholds up to which this would be allowed.

(ii) Some of us would prefer to see an amendment to s.16(2) of the 2008 Act along the lines of s.13 of the Charities and Trustee Investment (Scotland) Act 2005 such that an organisation established in Northern Ireland that is not registered as a charity cannot make any claims to charitable status. It follows that such an organisation could not seek charity tax recognition from HMRC or solicit charitable donations. So, that would leave a system of universal charity registration in Northern Ireland, but still enabling organisations to opt out of charity registration if they do not identify in any way as a charity (even though they might have aims that could be considered charitable under s.2 of the 2008 Act).
https://www.charitycommissionni.org.uk/media/1022/20160615-charities-act-northern-ireland-2008.pdf.

(iii) A third possibility favoured by some of us would be to allow organisations with charitable aims but only minimal assets to amend their constitutions to make clear that the organisation is *not* a charity (and hence to avoid charity registration) without such amendment requiring consent from CCNI but by way of a notification to the CCNI and an opportunity for it to object. For unincorporated bodies this could be done by a slight extension of the existing power in s.126 of the 2008 Act (Power to replace purposes of unincorporated charity) https://www.charitycommissionni.org.uk/media/1022/20160615-charities-act-northern-ireland-2008.pdf. Admittedly this has the risk that funds or resources originally given for charitable purposes might thereby be diverted for non-charitable purposes, but provided this was limited to (say) organisations with a low threshold of asset value at the time of making the constitutional change, those of us who support this approach feel it is a proportionate risk. However, the trustees of any organisation taking this route would need to satisfy themselves that no events of default would be triggered under funding conditions. We further note that the normal criminal law provisions relating to fraud and theft would still apply in the event of serious abuses. We would suggest any such provision has a time limit – so that CCNI could still require such organisations to register if they had not amended their constitutions by (perhaps) three years after the Bill is enacted (though we suggest a power for CCNI to grant an extension to the time limit in specific cases).

(d) In all cases we would, however, support some relaxation of the accounting requirements for very small charities which are registered, by creating a lower band of charities whose accounts would not require independent examination under s.65 of the 2008 Act. We suggest an exemption from the independent examination regime in any financial year where a charity's gross income was under £10,000. Such charities would still be required to file accounts and a simple trustees' report with CCNI, but the accounts would only require approval by the trustees. (This would sit mid-way between the position in England and Wales where independent examination is not required for charities up to £25,000 income, and the position in Scotland where there is no lower limit.) This could be achieved by a small amendment to s.65 of the 2008 Act in the present Bill.