

FOR THE ATTENTION OF DR JANICE THOMPSON
COMMITTEE CLERK
COMMITTEE FOR COMMUNITIES

EMAIL ADDRESS: committee.communities@niassembly.gov.uk

SUBMISSION TO ASSEMBLY COMMUNITIES COMMITTEE ON CHARITIES BILL 2021
BY DEREK TUGHAN LLB

INTRODUCTION

1. As a former Director of two companies one of which was forcibly reclassified as a charity I welcome the opportunity to respond to the consultation on the Draft Charities Bill 2021. The Bill proposes to amend the Charities Act NI 2008 [CANI] retrospectively to render lawful over 7,000 decisions unlawfully made by the Commission staff and to introduce a threshold below which a charity need not register. I have noted the Committee's preference for focus to be confined to the Clauses in the Bill; given that (at this time of writing) the parallel Review into the current Regulator and its operational framework has not been published I respectfully ask that the Committee should hear my concerns and recommendations.

KEY BACKGROUND POINTS

1.1 The debate in the Assembly and documentation accompanying the Charities (NI) Bill enacted in 2008 clearly promoted the belief among charities and MLAs that registration as a charity would be voluntary.

1.2 The declared main point of the CANI, declared repeatedly by the Minister and Department officials, was "to protect the public" – so if no public money or donations are involved, forced registration is perverse as it leads to severe loss of ownership consequences and, without State compensation, is in breach of the European Court of Human Rights.

ISSUES

2. The new charities laws of the four jurisdictions of England & Wales, Scotland, Northern Ireland and our adjacent neighbour Ireland were based largely on the law as reformed in England in 2006. However, in Northern Ireland's case in respect of the matters of "choice" and "and objects versus real activities", two anomalies were introduced. As currently drafted in the proposed Northern Ireland Charities Bill 2021 these two often unrecognised anomalies will remain when they should be corrected retrospectively to bring Northern Ireland into line with best practice in the rest of the world, particularly Ireland and Scotland and (through discretion) in England & Wales. Their correction would also avoid potentially breaching basic principles of the ECHR code.

The recommended changes of this submission are:

- **Choice** – registration should not be based solely on a financial threshold. In other jurisdictions, even if a body has exclusively charitable written objects, it retains the right to *choose to not register* and not be treated as a strict charity so long as it does not attempt to fundraise or invite voluntary help and foregoes all other benefits of charitable status.
- **Real Activities** – that to qualify for registration, the day-to-day activities of a body should conform to or promote its written charitable objects.

Choice

3. On 29th June 2021 the Minister introduced the 2nd reading of the new Bill with the words,
“The Charities Act (NI) 2008 introduced a regulatory framework for charities here to ensure public confidence and provide assurance around charitable giving For the first time, all charities established here were required to register with the commission and be subject to the annual reporting and accounting requirements that came with it.”
4. The Minister confirmed that the universal purpose of a charity register is to give confidence and assurance to the public that donations, charitable grants and voluntary help, such as charitable giving” are used properly and in a regulated way by those bodies listed on it. The same point was made by senior Departmental official, John McGrath, in the 2007 Sub Committee meeting when reviewing the 2007 Bill that became CANI [see my Para 10, original Para 73], when he said, *“The main purpose of the Bill is to protect the public, as there is no formal register of charities”*. But by that same logic the register should then list only bodies that seek “charitable giving” from the public and should not include bodies that do not seek it, as in that case, “protection of the public“ is not a relevant issue.
5. As far as I can see it is best practice in every other worldwide country eg Ireland, Scotland, Australia, Canada, New Zealand, except Northern Ireland and England & Wales (although CCEW will use its discretion), to circumvent the problem of involuntary registration by not treating a body as a charity unless and until it registers. The body or organisation is given the choice to not register so long as it also foregoes all the benefits of charitable status. Only by registering will it get those benefits, for which it must then meet a “charity test” requiring it to have exclusively charitable objects but with the voluntary, not forced, consequences that its assets then transfer into a form of charitable trust.
6. The fact that NI is an outlier in this respect has profound adverse practical consequences for highly benevolent NI based private bodies wishing to use their privately funded assets for good causes but not wanting to lose ownership of them. Countries normally encourage, not discourage, such private initiatives of benevolence towards its own population. But almost uniquely in Northern Ireland, CANI can severely penalise a body whose objects are so benevolent that they fall into a category which CANI defines as “charitable”. In this way the CANI definition acts not as a high qualifying bar for those bodies wanting to register, as elsewhere in the world, but as a Venus fly trap capturing unwary benefactors.
7. An example may help. If the sole object of a benevolent private company is to let houses on a non-profit basis to “working class families” (not a charitable activity) the ownership of the houses remains with the company and, indirectly, its private shareholders. But if it becomes more benevolent by changing its sole object to letting to “families in need”, it falls within the definition of a “charity” in CANI ie the relief of poverty (which is a charitable activity) even if it does not want to access any benefits of charitable status. Its assets would then automatically pass from private ownership into a charitable trust against the owners’ intent, wishes and outside their control, despite no public funding or “charitable giving” ever being involved. Best practice, followed elsewhere, would be to allow it the choice to remain unregistered, outside the strict charity regime and its governance would then be solely a matter for UK Company law and HMRC regulations.
8. More surprisingly, the absence of choice is also in sharp contrast to what the Assembly, according to proceedings in 2007 and 2008, seemed to intend when it enacted CANI.
9. The evidence for their misapprehension is impressive: Paragraphs 10 and 11 below contain extracts of minutes of a Sub Committee meeting during the 2007 Charity Bill passage and a Bill Research Paper 131/08 produced in early 2008 where, by using phrases like *“if they choose not to register”, “they may not want to register”, “organisationthat choose to opt out”, “it was for an organisation to considerwhether it wished to register”,* etc, they clearly and unambiguously created the expectation among benevolent organisations and MLAs through conveying intent that a body could choose not to register as a charity if it so wished.

10. **Selected Extracts from “Minutes of Evidence” of Assembly Sub Committee dealing with the 2007 Charities Bill – Dated 31/5/2007 [paragraph numbers as in original minutes]**
(The italics and words in bold are the author’s).

28. Church organisations that are structured around a central body must decide *whether they wish to register as charities*. Those bodies must ask themselves whether they want to do that, whether it is in their interests and whether it is valuable and beneficial. *If they choose not to register as charities, they will not be entitled to call themselves charities and seek the benefits that charities may have.*

42. Ms Lo: I presume that the 5,000 charities currently registered with HM Revenue and Customs will register with the new commission. *However, as was mentioned earlier, there are a number of organisations here that may not want to register with the commission*

43. Mr Murray: The only disadvantage will be that those organisations will not be able to call themselves a charity in Northern Ireland terms.

44. The only disadvantage to small organisations *that choose to opt out*, for whatever reason, is simply that they could not call themselves a charity, and that may impact upon their ability to attract funding or grants.

73. Mr McGrath: ***The main purpose of the Bill is to protect the public, as there is no formal register of charities.***

Bill Research Paper (131/08) – Produced by the NI Assembly Research and Library Services and Presented to the Assembly in January 2008 Page 6 – under heading “Who Should Register”

“All bodies wishing formal recognition as a charity in NI will need to register with the CCNI.... This is the case in Scotland and that proposed in the Republic of Ireland” [The ROI new Charities Act was enacted in 2009]

“Department officials stated that ultimately it was for an organisation to consider whether it wished to register or not. Registration would bring benefits. ... Organisations would need to consider on balance whether these benefits outweighed any problems they may have with registering. In theory it would be possible for an organisation to still try and obtain charitable tax relief from the Inland Revenue without having to register as a charity....”

On the basis of the above extracts the inference can be fairly drawn that members of the Assembly may have been subsequently misled as to what they were enacting.

Real Activities must align to Objects

11. It is best practice in most countries with modern charity law, including Ireland and Scotland, that a body cannot qualify as a registered charity seeking to be the recipient of “charitable giving” and all other benefits and protections of charity law unless its real activities conform to, or promote, the written objects which qualified it to register. That is fair and just and conforms to common sense. CANI, however, can and does force registration on all bodies with exclusively charitable written objects even when their actual activities are self-evidently not charitable. CANI should conform to best practice elsewhere with retrospective effect by verifying the legitimacy of charities or disqualifying them from the register by preparing performance reports. At the very least the CCNI should advise a body that it is not a charity and exercise sufficient discretion to permit the amendment of its objects to reflect accurately the actual day to day operations.

The European Court of Human Rights

12. It is surely axiomatic that the Assembly would not want to breach the European Court of Human Rights Code. Yet private asset confiscation contravenes the most fundamental principle of property ownership in ECHR [Art 1, Protocol 1 - *the right to the "peaceful enjoyment of a possession" without interference by the state unless fair compensation is paid.*
13. If choice to not register is introduced, it would also negate the need for the proposed financial threshold criterion as such bodies may simply opt to not register.
14. If the Assembly intends NI charity law to be fair, in line with best practice elsewhere, particularly Ireland and Scotland, and produce the consequences it intended and expected in 2007/8, this glaring anomaly of the absence of choice should be corrected urgently and retrospectively in the proposed Bill.

15. SUMMARY

15.1 The Bill as framed will be a missed opportunity to modernise Northern Ireland charity law. Even after the changes proposed so far, Northern Ireland will remain out of step worldwide, particularly compared to best practices of Ireland and Scotland and as noted, denied the common-sense use of discretion exercised by England & Wales. It is striking that the Department for Communities appointed Review body led by Dr Oonagh B. Breen was specifically tasked to consider "whether the Commission's engagement with stakeholders is in accordance with best practice ..." I would urge the Assembly Committee to include this focused approach in its deliberations on the Northern Ireland Bill.

15.2 The Assembly should also note that the UK Department of Culture is sponsoring a Charities bill via the House of Lords in the next session of Parliament. I would respectfully suggest that given the close alliance between Northern Ireland charity legislation and that pertaining in England & Wales that consideration should be given to whether or not their Bill, in its final form, contains relevant measures which should be adopted by the Northern Ireland Assembly.

15.3 The two anomalies outlined in this submission are interconnected. The first is the absence of choice to not be a registered charity, even when the organisation's true purposes are not exclusively charitable.

15.4 And the second is the unwelcome vulnerability of a body to qualify for registration, or even be forced to register as in NI, so long as its objects are perfectly drafted even when its true activities, as borne out in practice, are quite obviously different. Choice should not be solely on a financial threshold.

15.5 This Assembly has now the opportunity to deliver the expectations of its predecessor body of 2008 by addressing the anomalies being ignored in the current Bill and to rectify them retrospectively, to the extent practical, before further injustice occurs.

I would welcome the opportunity to explain, preferably in person, any of these points in greater detail.

DEREK TUGHAN LLB