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Submitted to Call for evidence and views on the Charities Bill
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Introduction

1 How would you like your response to be published?

I would like my response to be published.

2 What is your name?

Name:
Trevor McKee

3 What is your email address?

Email:
[REDACTED]

4 What is your organisation?

Organisation:
Lough Neagh Rescue

Policy Objectives of the Bill

5 Do you think that the Bill will meet the policy objectives? If not, why not?

No

Please provide further comments:

All of the Commissions staff decisions were void ab initio, that is, they never had any legal existence or effect. They cannot by an imaginative reconstruction of the statute ever gain validity, to presume so is a legal nonsense and not in the public interest. Notwithstanding the lack of public consultation (as the changes are claimed to be "technical", however, are anything but), which would have been expected as a minimum, I believe that the implications of this Bill going through without proper scrutiny and consideration is not in the public interest. I have voiced my concerns directly to the department (DFC), but unfortunately my representations have fallen on deaf ears. There appears to me to be an unseemly haste to get this legislation through, when there is no evidenced need or legal imperative to do so. It is my view that the Bill is a means of a quick fix that does not properly address the problems the Charity Commission or its sponsor department has found itself in. Retrospective legislation should be a harbour of last resort, not an administrative convenience deployed to repair a broken NDPB. Retrospective criminal legislation is forbidden by Article 7 of the European Convention on Human Rights (ECHR), to which the UK is a signatory. Although essentially civil in nature, charity law and the powers of the Charity Commission can carry criminal consequences, e.g. contempt, failure to comply, or disobedience to an order, direction or decision of the Commission. It is therefore, in my view, within the scope of Article 7 in the very least. The Court of Appeal found that decisions etc to be taken by the Commission were Judicial, that is why the "Commission" were tasked to take those decisions as they were specially recruited for their particular skills. Previously pre the Charities Act (Northern Ireland) 2008, the Chancery Court took these Judicial decisions. Therefore, it is abundantly clear that these decision making powers cannot be delegated in any circumstances, and the Court of Appeal cautioned through its published decision to tread carefully.

My point in this is, that a satisfactory analysis of the proposed Bill, and what its consequences may be are not going to be fully considered. It seems to me that the issue of retrospective legislation being deployed in this manner, and not for a legitimate purpose, is counter-intuitive. I would have thought that the departments responsibility before introducing a legislative provision having retrospective effect, is to balance the conflicting public interests and to consider whether the general public interest in the law not being changed retrospectively may be outweighed by any competing public interest. In making this assessment the department will have regard to relevant international standards including those of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was incorporated into United Kingdom law by the Human Rights Act 1998. In my view this hasn't been the case. The question then is not will the Bill meet the policy objectives, but are the policy objectives legitimate in a democratic society. I say not.

6 Do you foresee any unintended consequences of any of the policy objectives of the Bill?

Yes

Please provide further comments:

The Bill does not address the fundamental failings within the Charity Commission. Since May 2019 it has operated through a schedule 1 committee with no adverse effects on the sector. It has even reduced the number of meetings of this committee, reflecting the minimal workload it bears. The Courts found that there were no sustainable workload arguments argued by the Commission. To argue otherwise is to fly in the face of the decisions of the courts. In the NICA the judgement repeated McBride J;

"The judge despatched the "workload argument at [115] – [119] thus:

"The Commission further contended that an interpretation of section 19 that did not permit delegation of functions, would place an unacceptable workload upon the Commission having regard to the limited number of Commissioners and the breadth of the functions they had to undertake. 16 There was no evidence before the court about the workload of the Commission. The only available evidence was the evidence of Ms McGahey who informed the Tribunal that the Commission's workload was light, although it had increased more recently.

I am therefore not satisfied on the basis of the evidence before the court that the Commission is in fact overburdened. If however, the Commission is overburdened, there are a number of steps it can take to deal with this. First, it can regulate its procedures so that staff can assist it in making its decisions, for example by preparing reports etc. In The matter of an application by the Belfast Telegraph Newspapers Limited for Judicial Review [2001] NICA unreported, Carswell LCJ considered the role staff could play in assisting the members of the Equality Commission. He stated:

"[The staff] may properly be entrusted with the responsibility of carrying out much of an investigation, by delegation from the Commission as was held in R v The Commission for Racial Equality ex parte Cottrell and Rothon [1980] IRLR 279. They may also in my opinion conduct preparatory work for the Commissioners who have to make the decision in question, in the course of which they may well express their views. This is a well-recognised part of the work of senior officers in all branches of the public service. The deciders may be influenced by those views and may rely quite heavily upon their officers' advice, based upon their experience and judgment. The important matter however is that in the end the deciders reach their own decision accepting whatever opinions and arguments they think fit from their officers but making up their own mind at the conclusion of the process."

As appears from Belfast Telegraph, whilst staff can greatly assist the Commission in decision making, this does not detract from the important distinction between staff being advisors and the Commissioners being the "deciders".

Secondly, the Commission can deal with a heavy workload by discharging its functions by committee and by fixing the quorum of members who can make decisions."

Therefore there is no need for delegation, to accept that there is would be to accept the argument of the Commission that was utterly denounced in court. There is no workload necessity for delegation, the CCNI is a fully resourced to discharge its functions as presently constituted.

Clause 1: Actions of Commission staff treated as Commission actions

7 Do you feel the retrospective effect to make the majority of decisions taken by Commission staff lawful is dealt with sufficiently in the Clause?

No

Please provide further comments:

Staff of the Commission are not, and cannot be members of a schedule 1 Committee. Schedule 1 para 9 states; 9—(1) In determining its own procedure the Commission may, in particular, make provision about—

- (a) the discharge of its functions by committees (which may include persons who are not members of the Commission);
- (b) a quorum for meetings of the Commission or a committee.

Staff, because they are not mentioned, are excluded by inference. There was a period post May 2019, that the Commission established an unlawful schedule 1 committee that included the very people that had made all of the previous illegal decisions. I can develop further the reasons why staff cant be members of a schedule 1 committee, but that is not within the ambit of this submission. Put simply a schedule 1 committee cannot be a Rubber Stamping committee. The Commission themselves I believe would acknowledge and defer to this view.

Further re the delegation of powers, the NICA at para 19 remarked ""Section 9(4) requires decision making to be consistent and accountable. I consider that it is difficult to see how consistent and accountable decisions can be made if the Commissioners are not themselves involved in decision making. As appears in the case of McKee the decision was made by a case worker who was at pains to point out in her evidence that she acted independently and without reference to any other person. I consider that the only way in which consistency and the oversight required by section 9 can be met is by the Commissioners being involved in decision making either as a body corporate or by delegating these decisions to a Committee which must include at least one Commissioner or to a quorum of Commissioners."

It is clear that the decisions of the Commission are more than administrative and are akin to powers of the High court. To guarantee consistency and accountability Commissioners must take these judicial decisions, the courts and the Act cannot be clearer

8 Do you believe that individuals' rights under the ECHR are protected by the fact that decisions still subject to ongoing legal proceedings will not be subject to the Clause?

No

Please provide further comments:

In unlawfully discharging its functions by staff by the Commission, and by failing to provide oversight by the DFC, articles 6, 7 and 8 as a minimum have been engaged. The test fails at the first hurdle, the actions were not in accordance with the law, they were not necessary in a democratic society. Every order, direction, decision, registration, inquiry and scheme were illegal. Amending the legislation will not obviate the departments responsibility to act consistent with the ECHR, and to deal with the past.

The victims of the Charity Commission (and there are many), deserve better, The 2 x reviews initiated by the Commission and the DFC because of their restrictive terms of reference will not address these failings and acts of illegality. Nor will this Bill be informed by their findings should they ever be made known to the public, and it is by no means certain that will be the case.

In this Bill, no account has been taken into the ECHR abuses suffered by individuals subject to the regulation by members of staff of the Commission. It is trite to seek to protect individual rights retrospectively without dealing with the abuses of the present day.

9 Do you feel that the Refreshed Appeal Rights in Clause 1 are sufficient?

No

If not, what would you propose?:

By limiting the avenue of appeal to only those actions listed in column 1 of schedule 3, the Bill seeks to fetter the discretion of the Tribunal in setting a bar on which refreshed appeal rights apply. It is certain that any decision, order, registration or scheme would be subject to judicial review in any case, so why seek to limit the appeal rights retrospectively?

I would strongly advise that all decisions etc of staff be subject to appeal, it is a matter of fact that NI is treated as the poor relation in appeal rights. We do not have an upper tier route as in England & Wales, and this is one of the reasons we don't have authority delegated to staff to take judicial decisions. It is another matter of fact that every decision of our Tribunal appealed to the High Court has been successful, with some remarkably scathing remarks made by the Judiciary.

The underpinning rule in making good administrative decisions is "getting it right first time". Without a safety net of an upper tier tribunal and the scrutiny that would bring on the charity tribunal, bringing forward retroactive legislation is a recipe for disaster.

The Charity Commission itself made a policy decision in 2010 not to allow a decision review of its decisions if it did not appear in schedule 3, this further drives any litigant towards the High Court when that does not need to be the case.

10 Please provide further comments in relation to Clause 1.

Do you have any other comments in relation to Clause 1?:

It is a widely held view (I certainly hold it), that regulation of the sector is an unnecessary effort. You may wish to satisfy yourself of the need for a regulator, before confining another £20 million to a problem, that in fact does not exist. I believe that even the Charity Commission will admit, that there is little wrongdoing in the sector sufficient to warrant a regulatory body. Any wrongdoing of note is, and has always been, dealt with by the PSNI, the Charity Commission having no statutory authority to investigate criminality.

1. Court of Appeal

First of all, it is important to remind ourselves of the remarks of the Court of Appeal about what the department might do in amending the legislation. I know from conversation with the Chief Commissioner that there had been serious thought given to bringing forward retrospective legislation, that would make all decisions orders etc. made by staff lawful from the beginning. I advised at that time of the perils of such a move, however, we are where we are, and if members are insistent in such a move, it is only right that they decide having heard an alternative view, and not simply rubber stamp a process that very few people fully understand.

If I can begin, I would like to recite McLoskey LJ, delivering the judgement of the Court at paragraph 47;

"[47] If the effect of our decision is to require some review and amendment of the 2008 Act, careful consideration should be given to the question of whether any of the powers and functions therein enshrined can properly be discharged by the staff of the Commission and, if appropriate, to reflect this in unambiguous language. The business of administering and overseeing charities in Northern Ireland is a matter of significant public importance, engaging a public interest of some potency."

You can see that the Court firstly recommends;

"careful consideration.....whether any of the powers and functions therein enshrined can properly be discharged by the staff of the Commission".

The Court is prescriptive, "any of the powers and functions". Without digressing into a detailed analysis of the powers and functions of the Commission, I would propose that all of the powers and functions of the Commission are;

a) Judicial in nature (pre CANI 2008, all functions were discharged by the Chancery Court)

b) To be exercised by those specifically recruited with a defined skillset.

If you agree (a) and the Court certainly does, how can staff ever take judicial decisions. Statutory regulation isn't a matter to be taken lightly, it is a "matter of significant public importance, engaging a public interest of some potency".

You may also agree that (b), cannot be fulfilled retrospectively, you cannot even by the most imaginative alteration or amendment imbue skills that did not exist at the moment of decision.

I would suggest that if the department (or anyone else), is indicating otherwise, then I would respectfully advise that any such proposal would be subject to Judicial Review. As McCloskey LJ, states, and it is worth repeating again;

"The business of administering and overseeing charities in Northern Ireland is a matter of significant public importance, engaging a public interest of some potency."

2. The Court & the substance of decisions

All of the decisions, orders, registrations and schemes are void ab initio. What that actually means in law is that all of the orders, and the grounding section 22 inquiries are void, this means they never existed in law, they never had any legal effect.

In the case where orders and decisions are found to be void, neither the Commission or the Department can adopt a backstop position, and claim there was "procedural error", but the decision was substantively correct. The substantive decision evaporates just as completely as the procedural decision.

This is a bizarre position with no credibility, one which in my view, enjoys no validity. Equally invalid, is any fanciful notion that would seek to recognise that anything that flowed from these void decisions taken by staff with little or no appropriate skills, were anything other than plainly wrong. That is why delegation is such an extremely sensitive subject, the Minister herself accepts that some matters are never delegable, but how does she know which is which?

I believe this information and this view, which is vital to the public understanding as to what went wrong in the Charity Commission would be missing

from any considerations of the Assembly or the department as it tries to navigate a way through the disaster that has become charity regulation in Northern Ireland.

It serves no purpose that these matters are swept under the carpet. It is public knowledge that the most significant review of the Charity Commission (Scott), has been "binned" by the present dispensation (DFC), and recorded as no longer relevant. The "Scott Review" paints a damning picture of the regulator and its attitude to its duties, as does the highly influential "Baume Report". It seems to any reasonable observer that the body formed and charged with regulating charities, had no governance itself.

Yet the department lies silent on these matters, instead by stealth it attempts to fudge the Court of Appeal judgement and render nugatory those judicial decisions.

You will also be aware that the comments by the Court of Appeal are about going forward, there is no inference or imaginative interpretation that would lead the department or the Commission on a voyage of discovery, to attempt to re-interpret what the Court meant and seek to retrospectively alter history.

3. Conclusion

There is a presumption that statutes are not intended to have retroactive effect unless they merely change legal procedure, and not change the identity of the legal executor. The orders, registrations, schemes and decisions of the staff of the Commission were illegal. The correct procedure was always in place, and the correct body entitled to take the impugned decisions were exquisitely aware of their duties (having been chosen for their particular skills). The victims of the Charity Commission staff (and there were many), cannot be made subject to some departmental inspired double jeopardy, many of the victims have received "letters of comfort", are these to be discarded in favour of a reverse engineered administrative exercise undertaken by the department, especially in the face of a reviving Commission post "McKee & Ors v CCNI"?

The Court of Appeal decision and subsequent information uncovered, allowed us to lift the stone on a systemic culture of maladministration, and toxic relationships coupled with problematic cultural issues within the Charity Commission. Retrospective legislation goes nowhere to confront that reality of fact

The Charities Act (Northern Ireland) 2008 is a fully effective act as it is, without tinkering or meddling. The Commission as an entity is well resourced and capable of delivering on its mission and vision statements well into the 21st Century. It may need additional assets in the short term, but these are inconsequential matters compared with the dangerous pathway of re writing history.

There are two significant reviews of the regulator that are in train as we write, surely the sensible thing to do before passing a Bill is to review those findings that might appear, including I assume, the de minimus level to exempt charities with marginal income and assets.

The thorny issue of the 3500 charities that have been forced to close has not yet been grasped, or understood by the Department. Who fights for their rights, who stands for them?

I would caution the members as to the haste that this Bill is progressing. The McBride judgement was in 2019, why is the summer of 2021 the time to address this matter. There is without doubt matters of some public interest to be settled, in which case, let the public speak. You may be aware that the Committee for Communities have advised its members that personal litigants may have no right to make oral submissions to the Committee.

In whatever ways the members decide to proceed, please do so having considered all of the evidence and all of the reviews, closed and open. The Charity Commission seem to have absolutely no problem discharging its functions lawfully, no one is being prejudiced by a lack of decisions or assistance, that is a matter of fact and law worthy of members consideration.

Clause 2: Power of Commission to delegate to staff

11 Do you feel the power of the Commission to delegate to staff certain functions that are listed in a Scheme of Delegation is sufficient?

No

12 Please provide further comments on the power to delegate, or the Scheme of Delegation, including: Will it allow Commission staff to operate effectively and efficiently?

Additional Comments on on Scheme of Delegation:

Benign, uncontentious and requested registrations of charities are delegable, however the issue of the re registration of illegally registered charities does not have to be achieved by retroactive registration. A charity is a charity in law as defined by its governing document, not because it is on a register of charities. The register of charities is a register of comfort, so that funders etc can be assured that the charity they decide to fund is regulated . However in real life, that doesn't happen. The Commission every year ask charities to jump through hoops, submit accounts etc, are any of these checked? I think you will find they are not, instead all that wasted effort only finds its way into a digital hole. Retrospective legislation will not deal with this deficiency.

The Charity Commission has closed 3500 charities in NI (source; combined list CCNI). I see no remedy for them in this Bill. If closing charities and destroying social cohesion of communities is a measure of effectiveness and efficiency, then yes, the delegation to staff of judicial powers will see a substantial return on investment.

McBride J commented on the delegation of powers and the particular skills of Commissioners, this was repeated in the NICA;

[21] As regards s 6 of the 2008 Act, the judge concluded at [120]:

"The Attorney General relied on the provisions of section 6 in support of his interpretation of section 19. Section 6 sets out the qualifications a Commissioner should have. These include expertise in charities and financial matters. The Commissioners are then selected on the basis of this expertise. Under the 2008 Act the Commission must undertake various functions including the removal of trustees and the creation of cy-près schemes. The discharge of these functions requires expertise in matters of charity law, finance and the exercise of discretion. I consider that it is therefore the Commissioners, rather than its staff who are especially equipped to undertake these functions. I find it difficult to see why the 2008 Act specifically requires the Commissioners to have the expertise set out in section 6 if, in accordance, with the other provisions of the 2008 Act, the Commissioners could delegate all their functions to staff. In such circumstances the expertise of the Commissioners would not be utilised in decision making where the

section 6 qualifications would be highly relevant. I accept that the provisions in relation to the qualifications of Commissioners is not conclusive to the interpretation of section 19, especially as Commissioners in England and Wales with similar qualifications and experience are entitled to delegate their functions to staff. Given that the factual background in England and Wales is different as staff previously acted as lay commissioners, I find the provisions of section 6 lend some support to the view that section 19 should not be interpreted so as to allow wholesale delegation to staff."

Again, to ignore such cautionary language of the court, and to allow delegation is fraught with danger. Those tasked with scrutiny of this Bill are encouraged to read the judgements and seek clarity on the arguments advanced. "All that glitters is not Gold"

13 Please provide further comments on the fact that it is the Department for Communities who will make and publish the Scheme of Delegation (after consultation with the Commission)?

Any comments on DfC making and publishing the Scheme of Delegation?:

I note that the Chairperson of the Committee has advised its members that it is not conducting an inquiry or investigation into the actions or processes of the Charity Commission. While that may be so, I would suggest that the Committee will need to consider, and be seen to consider, the actions of the Commission in order to form a judgement about what to put in the Bill.

It is clear from the Minister's statement to the Assembly that some previous unlawful decisions of the Commission are to be deemed lawful, while some are to remain void. Clearly the Committee and the Minister will need to understand how the Commission's previous unlawful decisions were reached in order to reach a view about whether to render them lawful or to list them as remaining unlawful.

The Committee will be very familiar with the principle of administrative law that all relevant information should be considered before reaching a decision or passing legislation. Not to do so could leave the decision or legislation open to challenge via judicial review. Ensuring that all relevant information is considered is even more important where it is proposed that the legislation should have retroactive effect, and where the decisions on what to include in the legislation will directly affect the rights of individuals. Also relevant will be that the Committee or the Minister is not waiting to see the outcome of the Independent Review before publishing the Bill for consultation. It might be considered risky to progress what is to be a very controversial Bill with unnecessary haste.

I have been referred to the ongoing Independent Review commissioned by the Minister and the separate internal review by Counsel commissioned by the Commission. I believe the Committee and the Minister seem to be suggesting that the many concerns raised about the Commission's actions will be covered by one or other of these reviews. That is simply not the case.

As you are aware many of the most serious concerns have been deliberately withheld from scrutiny by the Independent Panel and by Counsel. The Panel has made it clear that it believes that its terms of reference prohibit it from considering previous decisions, while the Counsel appointed by the Commission is explicitly prohibited from considering some of the most serious concerns raised about the activities of Commission staff.

The Committee should also be aware that the majority of the most serious concerns raised about the Commission's regulatory work have never been properly investigated by the Department, or the Commission.

Committee members have emphasised (wrongly), that submissions should relate to the clauses of the Bill. I think that is not quite right. My understanding is that it is open to anyone making representations to argue for the inclusion of additional provisions, if these are necessary or appropriate.

14 Please provide any further comments in relation to Clause 2.

Do you have any other comments in relation to Clause 2?:

I would simply note for the record, that the Committee has the responsibility of holding the Minister and the Department for Communities to account. I and others have written to the Committee on several occasions asking that the Committee ensure that the serious concerns about the Commission are properly investigated. Neither the Independent Panel's review nor the review being conducted by Counsel will do that. I would ask that the Committee examine this important matter before considering if any of the functions are delegable, or who creates the scheme of delegation.

The catastrophic failure of the Charity Commission was not caused by ambiguous statutes or procedural error, it was a statutory failure of Commissioners allowing one, or a small number of staff to lead the Commission and the sector into this position, and then to spend enormous amounts of money, public money from a public body, on the UK's most expensive legal advisors. This is surely not how it is supposed to be.

Clause 3: Power to introduce a registration threshold via regulations

15 Do you feel it is appropriate to have this power in the Bill?

No

Please provide further comments:

In relation to offences, retrospective criminal legislation is forbidden by Article 7 of the European Convention on Human Rights (ECHR), to which the UK is a signatory. Although essentially civil in nature, charity law and the powers of the Charity Commission can carry criminal consequences, e.g. contempt, failure to comply, or disobedience to an order, direction or decision of the Commission. or as in 3 above:

(3) Provision under subsection (2)(b) or (c) may widen the circumstances in which an existing offence may be committed or (as the case may be) create a similar or corresponding offence for additional circumstances, but the penalties or maximum penalties for the widened or new offence may not be higher than those for the existing offence.

It is therefore, in my view, within the scope of Article 7 in the very least.

My point in this is, that a satisfactory analysis of the proposed Bill, and what its consequences may be are not going to be fully considered. It seems to me that the issue of retrospective legislation being deployed in this manner, and not for a legitimate purpose, is counter-intuitive. I would have thought that the departments responsibility before introducing a legislative provision having retrospective effect, is to balance the conflicting public interests and to consider whether the general public interest in the law not being changed retrospectively may be outweighed by any competing public interest. In making

this assessment the department will have regard to relevant international standards including those of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was incorporated into United Kingdom law by the Human Rights Act 1998. In my view this hasn't been the case.

16 Please provide any further comments on the list of matters that the regulations will cover? Are there any matters missing from the list?

Any missing matters or other comments:

None

17 Please provide any further comments on Clause 3.

Further comments:

None

18 Please provide any further comments you wish to make on the Charities Bill.

Further comments on the Charities Bill:

The Charities Bill will not deal with the problem of systemic failure within the Commission. It would be much safer (and would negate the need for retrospective legislation), by bringing the Commission back into the department, so proper oversight can be exercised.

The Charity Commission has been the greatest administrative failure in NI history, even exceeding RHI in the damage it caused to our most vulnerable in society. Failure should be punished not rewarded. It is common knowledge that no person was ever criticised or sanctioned because of the actions and omissions of the Charity Commissioners. Both the department and the Commission have steadfastly denied responsibility despite the findings of both Jonathan Baume and Artur Scott in their reviews of the regulator. Instead, the Commission are rewarded by moving to lavish new accommodation in central Craigavon, away from deprived north Lurgan, contrary to the principle of decentralisation that put them there in the first place. Until the department deals with the legacy of the Commission, then retrospective legislation will only be like putting deck chairs out on the Titanic.