

Dr Janice Thompson  
Committee Clerk  
Committee for Communities  
Room 430  
Parliament Buildings  
Stormont  
Belfast  
BT4 3XX



2 September 2021

Dear Dr Thompson,

**Charities Bill: Response to Committee Call for Evidence**

Please find attached a submission to the Committee in relation to the Charities Bill, in response to the Committee's Call for Evidence.

While I have provided detailed comment on the specific provisions of the Bill, I believe that it is also very important that the Committee consider the policy (or lack of it) which has led the Minister to publish a Bill without first holding proper public consultation on her policy proposals.

The provisions of the Bill demonstrate significant changes in policy (delegation of powers to Charity Commission staff in particular) and impact on individuals' human rights.

The Department has acknowledged that the Bill does reflect changes in policy and has advised that there will be public consultation about these – but only in respect of the subordinate legislation which will be made following passage of the Bill. The Department has also acknowledged that the Bill could affect individuals' human rights and has confirmed that specific provisions in the Bill were included to mitigate the risk of this.

Of particular importance is the Department's admission that the Minister decided not to hold proper consultation because doing so would mean that the Bill might not be passed during the current mandate. That is a very bad reason not to hold public consultation on a Bill which makes significant (and controversial) changes in policy and which impacts on individuals' human rights.

I have set out these points in more detail in the attached submission.

There have been many complaints about the Commission's use of its investigative and regulatory powers which have not been properly investigated. These included dishonesty and bias on the part of Commission staff, use of the Commission's powers to prevent a charity paying its solicitors thereby halting its appeal to the Tribunal, along with the failure of the Department to exercise proper oversight and governance.

The Minister has given no indication that any remedial action has been taken to prevent a recurrence of the actions which were the subject of complaint and has provided no information on any action to ensure that the previous failures of governance and accountability have been addressed.

I would suggest that the Committee ask the Minister to provide a briefing on the complaints and the criticisms of governance set out in the draft report of the Department's internal review and the report by Jonathon Baume. This is material information to any consideration of delegation of powers to Commission staff,

Without the necessary assurance that the concerns about the Commission's actions and the deficiencies in governance have been addressed, passage of the Bill will give the impression that those actions and failures in governance are condoned by the Minister and the Assembly.

I have made some recommendations which I hope will be viewed as constructive. I have in particular suggested that the provisions relating to the Commission's regulatory functions should not proceed but instead be the subject of proper public consultation, which also suggesting two possible ways in which charities unlawfully registered can be returned to the register of charities could be reconstituted, with the latter being achieved during the current mandate.

I have previously requested that I be given the opportunity to make an oral presentation to the Committee and I now repeat that request. I look forward to your reply.

I confirm that I would like my submission, including the covering letter, to be published.

Should the Committee require any additional information or clarification, my e-mail address is: XXXXXXXXXXXX

Yours sincerely,

*Robert Crawford*

Robert Crawford

# CHARITIES BILL: SUBMISSION TO COMMUNITIES COMMITTEE

From: Robert Crawford

## Experience of charity regulation

1. The Committee may find it helpful to know that this submission is based on my experience of the Charity Commission's investigation of the Disabled Police Officers' Association NI (DPOANI) and the subsequent handling of complaints by the Commission and the Department.
2. I was also one of the successful personal litigants in the *McKee and Others v Charity Commission* case which was finally decided by the Court of Appeal in February 2020.

## Summary of recommendations

3. I have offered some recommendations based on the points made in this paper. These are set out in slightly more detail at the end of the submission.
  - 1) The proposals for charity registration and for the regulation of charities should be separated.
  - 2) The reconstitution of the charities register should be achieved without retrospective effect. As set out below, this might be possible without legislation. If not, it should be achieved by listing the charities to be returned to the register in a schedule to the Bill.
  - 3) The proposals in respect of regulation (delegation of powers etc.) should be dropped from the Bill and be the subject of proper public consultation before further consideration by the Committee.
  - 4) The Committee should ensure that the concerns about the Commission's delivery of its functions and about the Department's governance of it have been properly addressed before approving the principle that powers should be delegated to staff.
  - 5) There should be no retrospective effect for any of the proposed measures. There is no compelling public interest to justify such an approach.

## CHARITIES BILL: OVERVIEW

4. Before turning to the provisions of the Bill itself I would first like to make some general points, primarily about the charity regulation proposals.

### What's not in the Bill, and why.

5. The Bill does not address the vast majority of concerns raised about charity regulation in NI. In particular, it does not address the many complaints about the actions of the Charity Commission's staff and the harm caused to charities.

6. There has been a determined attempt by the Commission and the Department to avoid proper examination of these very serious concerns (which include dishonesty by Commission staff).

7. There has been no proper investigation of complaints. Investigating officers were not appointed and there are no investigation reports. The 30-page Briefing Paper submitted to Paul Givan MLA (then DSD Minister) in February 2016 is a good example of detailed concerns which have been ignored.

8. Mr Givan did commission a DSD internal review which got to draft report stage in autumn 2016, however its terms of reference excluded examination of complaints about the Commission. A request by me to meet the review team was turned down. Although those complaints were not considered the draft report still contained serious criticisms of failures in the Department's governance.

9. An independent review was Commissioned by the Minister for Communities in December 2020. However, although this is tasked with reporting on the Commission's delivery of its functions, it will not consider complaints about the Commission.

10. The chair of the Independent Review Panel has advised that Article 2.1 of its terms of reference "*specifically prohibits the Panel from revisiting past decisions in individual cases.*" She also notes that the Commission has appointed Counsel to review its handling of complaints and states that "*It would not be the intention of the Panel to trespass upon its jurisdiction.*"

11. The Panel was asked to meet a group of DPOANI members directly affected by the Commission's actions. It was thought that these disabled police officers would not feel comfortable talking about their experience in open online sessions. The request was declined.

12. The terms of reference for the Commission's review of complaints handling prohibit it from examining the most serious complaints about the Commission, specifying these as "*outside scope*".

13. There is also an independent report by Jonathan Baume<sup>1</sup> in August 2020 which was critical of the handling of one complainant's concerns about the Commission. The report made serious criticisms of the Commission and the Department's governance.

14. Mr Baume said in his report that the message to the complainant from the DfC was: *"there is no problem here, everything is fine, no need to trouble us', albeit put very politely."*

15. The Committee has now been asked to consider a Bill which ignores all of the serious complaints made about the Commission. None of the serious issues has been resolved and the Department has published no proposals on how its governance of the Commission will be strengthened.

16. If the Committee gives its approval to the proposals in the Bill, in particular to the proposal to delegate powers to Commission staff, there is a risk that the Committee will be seen to be condoning the previous misconduct by Commission staff and the Department's governance failures, and thereby failing in its duty to hold the Department and the Commission to account.

17. It is recommended that the Committee ensure that the issues raised by the complaints about the Commission and the deficiencies in Departmental governance are addressed before it approves delegation of powers to Commission staff.

## **Public consultation**

18. The Minister has decided that the public consultation which would normally take place before publication of a Bill should not take place.

19. The reason given in the Explanatory Note is that the Bill is "technical". It is not technical by any normal interpretation of that term.

20. The Bill legislates for changes in charities policy which have not been discussed by the Assembly or been the subject of public consultation. It makes changes which impact on individual human rights. Its provisions are to be applied retrospectively, something which is rarely done and only where there is compelling public interest to justify that. The Explanatory Note does not identify any compelling public interest.

21. Helpful clarification about the lack of public consultation was provided by [REDACTED] in her letter to me of 11 August 2021 (copy attached). [REDACTED] states (page 4) that:

*"The Executive agreed to the introduction of the Bill in this Assembly mandate simply to bring certainty to charities as soon as practically possible. To await the outcome of the review before introducing the Bill would have pushed it into the*

---

<sup>1</sup> Jonathan Baume is a former General Secretary of the First Division Association (trade union for senior civil servants), a former Civil Service Commissioner and former Council member of ACAS.

*next Assembly mandate, something that would have been hugely frustrating for charities and representative bodies who have been lobbying for action.”*

Asked what informal consultation had taken place, ██████████ (page 3 of her letter) advised that the Department had received submissions from NICVA and Edwards and Co. Solicitors. It seems that “*lobbying for action*” may not have been extensive.

22. ██████████ (page 5) suggests that charities may have used registered status to attract donations or apply for grants where registration was one of the eligibility criteria. This is given as the reason why retrospective effect is necessary.

23. Neither ██████████ nor the Explanatory Note provide any supporting evidence that there has been any significant difficulty for charities, or that such difficulties require retrospective legislation to address the problem.

24. ██████████ states that “*The Department considered that whilst the risk of harm in most cases was not high risk, there was potential harm to charities and trustees should decisions remain unlawful.*” If the risk of harm to charities is indeed a reason for the Bill, it is surprising that this was not explained in the Explanatory Note. The fact that the Department itself acknowledges that this is not a high risk undermines its argument that it is necessary to rush this Bill through during the current mandate.

25. Both the Charity Commission and NICVA have been active in reassuring charities and funders. Charitable status is not affected by the lack of registration.

26. The policy proposal that Commission powers be delegated to staff is not as straightforward as it sounds. The Commission is required (s6 of the 2008 Act) to have collectively a range of knowledge and experience, including:

- the law relating to charities,
- charity accounts and the financing of charities, and
- the operation and regulation of charities of different sizes and descriptions.

27. One Commissioner must also be legally qualified. It is clear that the legislator anticipated that these were the skills which the Commission would require to carry out its functions. There is no similar requirement that Commission staff working on charity regulation have such skills. At the time of its investigation into DPOANI the Commission did not employ any qualified accountants.

28. This emphasises again the importance of the Committee being sure that any delegation of powers will not simply lead to similar problems as in the past. Proper governance and accountability were not previously in place and there is nothing in the Explanatory Note to suggest that they are in place now.

29. There is some inconsistency in the Minister arguing that a continued lack of lawful registration must be addressed quickly while in the same Bill she proposes to introduce a threshold which would exempt small charities from registration.

## Future consultation

30. ██████████ advises (page 3) that there will be future consultation on some of the new policy proposals, in particular the power to delegate to Commission staff and the introduction of a threshold for charity registration.

31. ██████████ states that the Bill:

*“... does not delegate powers to Commission staff nor does it introduce a registration threshold but provides vehicles for both to be achieved should they be deemed appropriate. It does this by allowing for a future decision on a limited power of delegation to Commission staff via a Scheme of Delegation which the Minister will formally consult on and provides a power to introduce a registration threshold via subordinate legislation which will also be subject to consultation and scrutiny by the Assembly through the draft affirmative procedure.”*

32. The fact that the proposals in respect of delegation of power to staff and a registration threshold are to be the subject of future consultation and further, subordinate, legislation will be required undermines the argument for rushing the Bill through the Assembly in the current mandate.

33. Where a Bill is to create a power to make subordinate legislation, it would be normal for a Department to set out how it anticipates that power should be exercised and for that to be the subject of public consultation. In this case, the Department has admitted that it does not yet have a view on what powers might be delegated but will carry out public consultation to inform that decision. That will make it difficult for the Committee to decide whether the proposed power to delegate is necessary, appropriate or proportionate.

34. There is a massive inconsistency in legislating to make lawful decisions taken by Commission staff before public consultation about the delegation of Commission powers, which will not take place until the new mandate.

35. There is a crucial distinction to be made between the proposals in respect of charity registration (where there is common agreement on the policy that charities should be registered) and the much more controversial proposals on charity regulation.

36. The proposal to make provision for delegation of Commission powers (including the proposals on retrospective effect) are significant and represent controversial new policy. They should not be enacted on the basis of the very limited argument set out in the Explanatory Note. They should instead be the subject of proper public consultation before any legislation is made.

37. The independent review of charity regulation commissioned by the Minister is due to report after the summer. ██████████ (page 3 of her letter) advises that the review is taking views on registration and delegation. She states:

*“Early findings from this consultation have been useful and the full recommendations will complement future consultation on these issues before decisions on policy change are taken by the Minister.”*

38. The inclusion in the Bill of a power to delegate Commission powers to staff pre-emptly consideration of the findings of the independent review.

39. ██████████ also notes that the Independent Review Panel of Charity Regulation NI was provided with a copy of the draft report of the Department's internal review completed by Mr Scott and a summary of the findings of the TEO Review Report (which is presumably the report prepared by Jonathan Baume and submitted to the Head of the NICS in August 2020).

40. The report of the independent panel will therefore be highly relevant to the contents of the Bill. It makes little sense to legislate until the contents of that report have been properly considered.

41. The Court of Appeal (McCloskey LJ) in *McKee & Others* said:

***“[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.”***

42. The reference to the issue being of “*significant public importance*”, and to a “*public interest of some potency*” surely underline the importance of proper public consultation. It would seem a little impertinent to ignore the view of the Court of Appeal.

43. It is submitted that the new policy proposals in the Bill in respect of charity regulation (in particular the proposal to delegate powers to Commission staff) should be the subject of public consultation before legislation is drafted. Public consultation would also provide the opportunity to repair deficiencies in the drafting of the 2008 Act.

## **SUBMISSIONS ON SPECIFIC CLAUSES**

### **Clause 1: Retrospection (general)**

44. Clause 1 of the Bill makes provision for previously unlawful decisions (some 8000 in total) to be deemed to be lawful with retrospective effect.

45. Retrospective provisions are not included in legislation unless there is a compelling public interest justifying their inclusion. The legislation most commonly cited to illustrate this is section 1 of the War Damage Act 1965, which was passed to exempt the Crown from liability for taking action to destroy private property in World War II. The Act was passed following a successful legal claim by the Burma Oil Company and was made retrospective in effect to render that claim ineffective.



46. The most common example where retrospective powers are used today is where legislation is made to tackle tax evasion. The compelling public interest arises because without retrospective effect those taking advantage of the tax loophole could otherwise avoid the effect of the legislation by taking action before it passed through Parliament and received Royal Assent.

### **Clause 1: Retrospection (charity registration)**

47. The Explanatory Note to the Charities Bill sets out no compelling public interest. It is certainly highly desirable that the over 6000 charities which went through the process of registration at considerable time and expense, only to find that the decisions taken by Charity Commission staff were unlawful, should not have to incur the cost and effort of having to go through the process again.

### **Alternative approach to reconstitution of charities register**

48. However, that very valid objective can be achieved without the need for retrospective legislation.

49. Paragraph 7 of the Explanatory Note sets out 'options considered'. It notes that the "larger part" of the unlawful decisions (6800 out of some 8000 decisions, *per* figures provided to the High Court by the Commission) related to charity registrations. However, these are not the only options.

50. The desired objective is that all of the charities unlawfully registered should become lawfully registered. That does not require retrospective legislation. All that is needed is to list all of the charities which had previously successfully completed the registration process and have the Bill declare that the charities on the list are registered.

51. There are at least two options which the Department appears not to have considered. First, it would appear to be possible for the Commission to register as a batch all of the previously registered charities, rather than requiring them to apply again individually. I cannot see anything in sections 16 or 17 of the 2008 Act which would prevent this. Section 16 imposes a duty (and therefore a power) on the Commission to create a list, and each of the previously registered charities will have complied with the requirements of section 17. The Committee may want to ask whether the Department has considered this and, if so, why it has been ruled out. It would be a much quicker solution than legislation.

52. If legislation is required, then instead of legislating with retrospective effect to deem unlawful registrations to be lawful, the Bill could list those charities which previously successfully completed the registration process in a Schedule and provide that the charities listed in the Schedule be added or returned to the register of charities.

53. That would then take effect immediately on the Bill coming into force, and charities would only become subject to the legal duties arising from registration

(reporting etc.) after that date. The Department has already indicated that the reporting requirements of registration will be disapplied until 2022.

54. Neither the Explanatory Note nor any other document has set out any compelling reason why retrospective action is necessary to achieve reconstitution of the register. One of the options considered was in fact quite similar – the creation of a new register of charities via subordinate legislation (Explanatory Note paragraph 7, option (ii).)

55. This was rejected on the rather odd ground that there was no suitable power to establish such a register within the existing Act. However, the Minister has now decided to make primary legislation which could achieve this.

56. Either adding a Schedule to the Bill listing charities to be returned to the existing register or creating a new register as considered by the Department would have the effect of achieving lawful registration for those charities which previously went through the registration process. Neither approach would require the legislation to have retrospective effect.

57. Another advantage is that such an approach would reduce the risk of further legal challenge.

58. Perhaps the more significant reason that this option was not accepted lies in the second half of paragraph 9 of the Explanatory Note, where it states that such an option *“would have done nothing in respect of the other unlawful decisions.”*

59. As the Committee will be aware, it has been the Commission’s regulatory decisions which have generated serious complaints and legal challenge. Registration has not generally led to conflict between charities and the Commission. It is submitted that a simple, non-retrospective, solution to the restoration of charities to the register should not be ignored because it *“would have done nothing in respect of the other unlawful decisions.”*

60. It is recommended that either the Commission should now return to the register (as a batch) those charities which had previously successfully completed the registration process, or if legal advice concludes that that is not possible, the Bill should restore those charities to the register by the simple mechanism of listing those charities in a Schedule to the Bill, without any retrospective effect.

61. It would presumably be sensible to omit from the register those charities who do not, for the time being, wish to be included (for example small charities might want to await the outcome of the policy consultation on the possible introduction of a ‘threshold’). Even if the register were reconstituted in full there will still be many charities who have yet to be registered.

## **Clauses 1 & 2: Delegation of powers to CCNI staff/retrospective effect**

62. Under this heading I have departed from the order in the Bill, as it seems appropriate to look first at the proposed new policy that Commission staff acting alone should be able to exercise some of the statutory powers of the Commission,

before examining the issues which arise from this new power being given retrospective effect.

63. Clause 2 of the Bill would permit delegation of the exercise of some of the Commission's powers to its staff, provided they were set out in a Scheme of Delegation approved by the Department.

64. Although the Explanatory Note lists a small number of powers which cannot be delegated, we have not seen a draft Scheme of Delegation setting out the powers which it is intended to delegate. So we do not know with certainty what powers are intended to be delegated. This rather belies the statement by [REDACTED] (page 4) that the Bill was introduced in the current mandate to "*bring certainty to charities*".

65. There is an inconsistency in the Bill between Clauses 1 and 2. Clause 2 looks forward. Commission staff would exercise delegated powers only as approved by the Department. This could be all powers not expressly excluded by the Bill or a lesser number.

66. We could have a situation where the unlawful exercise of a power staff prior to 16 May 2019 is made lawful by the Bill but, following public consultation, is not included in the Scheme of Delegation as one of the powers which the Department believes it proper for the Commission's staff to exercise.

67. This is surely fertile ground for further legal action, made worse by the new rights of appeal created by the Bill. This illustrates the need for public consultation.

68. The Court of Appeal noted in its judgment that the Explanatory Note and other preparatory documents relating to the Charities Act (NI) 2008 revealed no policy intention to provide for the delegation of powers to staff.

69. It was not considered necessary in 2008 to provide for delegation of powers to Commission staff. The need for this was considered again (by Commission and Department) in 2011 but no action was taken. The Explanatory Note gives no reason why the Ministerial view has now changed and fails to explain that this is in fact new policy (which should be the subject of public consultation).

70. There are a number of issues raised by the Minister's proposal. These include the nature of the powers which might be delegated and the scope of that delegation, and the arrangements for governance and supervision of the exercise of those powers. The Committee's Call for Evidence recognises this by highlighting "*the need to look at how the Charity Commission discharges its decision-making functions in the future.*" The starting point for that consideration is an understanding of what has happened to date, including the Department's failure to provide proper governance and accountability.

### **Some arguments about delegation to staff**

71. Most serious disagreements and legal cases have arisen in relation to charity regulation. Decisions by the Commission's staff have had serious consequences for charities, trustees, staff and beneficiaries.

72. I have no personal experience of the registration process, but I understand that in most cases it is non-contentious.

73. The argument advanced by the Commission in the High Court and the Court of Appeal was that delegation was necessary because of the heavy workload which would otherwise fall on Commissioners.

74. The Commission's legal advisor advised the High Court that its decision that staff acting alone could not exercise its powers would affect some 1200 decisions relating to the exercise of the Commission's regulatory powers, taken between 2011 and 2019.

75. Based on the Commission's figures this averages at around 13 regulatory decisions a month. This could easily be reduced if the Commission adopted a less confrontational approach to its regulatory work. For example, the Commission suspended two trustees of the Disabled Police Officers Association NI from membership of the charity on the ground that they were ineligible for membership, but subsequently (within weeks) accepted that they were wrong, having taken the decisions before having all of the relevant information.

76. In the High Court, Madam Justice McBride was not much impressed by the Commission's "workload" argument. At paragraph 115 of her judgement, she noted that the only evidence about this before the Court was the evidence of a Commission employee who had described its workload as "*light*". She went on to state in paragraph 116 that she was not satisfied that the Commission was overburdened.

77. Madam McBride set out some actions which the Commission could take to alleviate any excessive workload, noting that staff could assist in preparatory work and noting that powers could be delegated to a committee (or committees) with a quorum set by the Commission. Since 16 May 2019, the date of the High Court judgment, the Commission has been operating through at least one committee, without any apparent difficulty.

78. It is recommended that the Committee ask the Department to submit evidence as to why it believes that delegation of powers is actually necessary, and why that was not considered to be the case in 2008.

### **Clause 1: decisions unlawful on other grounds**

79. Clause 1 provides that, with limited exceptions, decisions by Commission staff acting alone prior to 16 May 2019 are to be deemed to be decisions taken by the Commission (and thereby be lawful). Paragraph 11 of the Explanatory Note on Clause 1 sets out specific exceptions in the Bill and in addition states that certain decisions will remain unlawful where those decisions are unlawful "*on grounds other than the unlawful-delegation ground.*"

80. My understanding is that this refers to decisions which have been found to be unlawful on other grounds by the courts.

81. Most cases since November 2016 have been decided only on the ground that they were taken by staff acting alone. The courts considered this as a preliminary issue (as in the High Court decision of May 2019 and the Court of Appeal decision of February 2020). Other grounds of appeal, including arguments based on breaches of the ECHR, were not considered.

82. Since the Court of Appeal decision, the Commission has generally chosen not to defend cases where unlawful delegation was one of the grounds.

83. Although the Bill lists a number of provisions of the 2008 Act which will not be made lawful retrospectively, that will not cover all of the cases where individuals have been affected by the actions of the Commission and where legal action may still be possible.

84. In 2019 the then Head of NICS, David Sterling, commissioned Jonathan Baume to carry out a review of the handling of complaints about CCNI made by the widow of a deceased former member of DPOANI. The complaints related to the removal of personal files from the DPOANI office by Commission staff. The files contained personal information of members, including details of their disabilities and their addresses. The complaints highlighted the distress and anxiety about personal security caused by this action, which the widow believed had hastened her husband's death.

85. Mr Baume presented his report on 13 August 2020. He made some comments which undermine the Department's assertion that the Bill is merely "technical":

*"... the approach taken by the CCNI and DfC appears to have been that the CCNI may have acted without legal powers but nonetheless its actions were well-founded and reasonable (and should continue to be defended). But I would argue that this is a misleading approach for the DfC to take, and surely one that potentially undermines the 'rule of law'."*

### **Example: the misuse of section 23**

86. The Commission's misuse of section 23 of the 2008 Act illustrates some of the difficulties.

87. On 13 August 2014 the Commission entered the DPOANI office and removed personal files of DPOANI members, which contained details of DPOANI members' disabilities and their home addresses. This action was observed by a member of the DPOANI Board. Although initially denied by the Commission, it has since confirmed that it did enter the DPOANI office and remove personal files.

88. The Commission does have power to enter charity premises and remove documents. That power is set out in section 52 of the Act, helpfully titled "Power to enter premises". To use the power the Commission must obtain a warrant from a magistrate who must be satisfied that certain statutory requirements are met.

89. The Commission did not use its power under section 52. Instead, it made an Order under section 23, which does not give the Commission the power to enter

premises and remove documents. The section 23 Order did not make any reference to any personal files and the Commission made no list of the documents taken by it.

90. The Commission could have made a section 23 Order to require DPOANI (as the lawful custodian of its members' personal files) to provide the Commission with the files, but it did not do this. Had the Commission adopted this (perfectly lawful) approach, the Act provides a right of appeal which could have been exercised by the DPOANI Board (as the lawful holder of the information). Access to personal information was strictly controlled within DPOANI and individual trustees had no authority to access it.

91. Instead, the Commission adopted an approach which minimised the risk of any appeal. It first contacted PRRT (DPOANI's landlord) to get it to change the lock on the DPOANI office. PRRT later advised that it had, wrongly, believed that the Commission had the power to direct it to do this. The Commission did not inform the DPOANI Board that the lock had been changed.

92. Several days later, the Commission made its section 23 Order, which it addressed to two trustees whom it had appointed just five days earlier. The DPOANI Board was not informed. The DPOANI solicitor obtained a copy of the Order only three months later (by which time all but one of the trustees had resigned).

93. Aside from the unlawful delegation issue, the Commission's approach was unlawful on many other grounds, including breaches of the ECHR and GDPR.

94. An appeal was later attempted by the widow of a DPOANI member who believed that her husband's death had been hastened by the increased stress arising from the knowledge that his personal details, including his address, had been taken by the Commission. The Tribunal dismissed the appeal on the ground that the appellant did not have standing, the right of appeal being limited to the two trustees appointed by the Commission to whom the section 23 Order was addressed.

95. The effect of the Bill would be to deem the use of section 23 to have been a decision of the Commission and therefore not unlawful on the ground of unlawful delegation. The Bill would take no account of the fact that the Commission used the wrong power, breached ECHR and GDPR requirements and failed to comply with its own procedures. The Bill would also fail to take account of the Commission's dishonest approach, in particular what appears to have been an (unfortunately successful) attempt to avoid any appeal.

96. A proper public consultation would have allowed all of this to be given proper scrutiny by the Committee. It would also highlight an apparent deficiency in the 2008 Act, in that the Commission can require beneficiaries' personal information to be produced without the persons affected having any right of appeal to the Tribunal. The Commission is not required to inform those affected and in the DPOANI case it chose not to do so.

97. The lack of any right of appeal to the Tribunal means that any legal challenge must go to a higher court. The new appeal right in clause 2 will not fix this.

98. There are over 140 charity members whose personal details may have been taken unlawfully. Legal advice has been obtained by the DPOANI Board which has written to current and former DPOANI Board members whose details may have been taken.

99. Mindful of the request to focus on the clauses of the Bill I have not attempted any more comprehensive examination of the Commission's decisions, however a similar problem may arise in respect of the Commission's use of section 22(3), where there is no right of appeal in the Act. One case has recently been the subject of an unsuccessful appeal to the Tribunal. There may also be a difficulty with actions taken by interim managers appointed by the Commission.

100. The use of statutory powers to obtain personal information will always be a decision which should be taken with care and sensitivity. That has not been seen in the Commission's approach to date. In the case of DPOANI the seizure of serving and former police officers' information caused considerable distress and anxiety.

101. In the absence of proper public consultation and scrutiny, the Bill may well be perceived as endorsing the Commission's unlawful actions. The Department (██████████ letter of 11 August 2021, pages 3 and 4) makes it clear that the Department did not consider individual decisions to determine whether they should be deemed to be lawful, instead "*... cognisance was taken of the overall number of decisions and the nature of those that had been appealed to the Charity Tribunal or the Courts.*

### **Delegation to Commission staff: Governance and accountability**

102. The Explanatory Note makes no reference to the governance and accountability arrangements in respect of the Commission, notwithstanding critical comment in two reviews and in many complaints.

103. Many of the complaints have been about the actions of Commission staff, not just whether or not their actions were within the letter of the law but about how they treated charities and their trustees and beneficiaries.

104. There has been no proper investigation of the majority of the complaints about the actions of Commission staff. There are no investigation reports and consequently no lessons learned. Although the Department's internal review was critical of the Commission and the Department's governance, it did not consider the complaints made about the Commission (due to lack of time).

105. Similarly, the independent review of charity regulation currently underway will not consider the complaints. Article 2.1 of its terms of reference "*...prohibits the Panel from revisiting past decisions in individual cases.*" The Chair of the Panel has noted that the Commission has commissioned its own review of complaints against it (hardly independent) and has advised that "*It would not be the intention of the Panel to trespass upon its jurisdiction.*" However, the review commissioned by the Commission is also prohibited from examining past decisions.

106. I would recommend to the Committee that any consideration of whether powers should be delegated to Commission staff should be informed by the criticisms that have been made of those staff and by proposals (if any) by the Department as to how governance will be strengthened to avoid any recurrence.

107. It is clear from the reviews and complaints that there have been significant failings in governance and accountability. Had there been a policy document published for public consultation, we might have expected to be told how the failings are to be addressed.

108. The Department has advised (██████████ letter of 11 August) that the reason that there was no public consultation on the Bill was that there was insufficient time.

109. The Department has instead advised that there will be public consultation on the extent of the delegation of powers to staff and the proposed threshold for charity registration. It has said nothing about public consultation on the deficiencies of the governance and accountability of arrangements.

110. The internal review carried out for the Department for Social Development in 2016 (the "Scott" review) made a number of relevant comments. Paragraph 1.4.1 noted that:

*"... casework files area often in poor order and demonstrate an incomplete and on occasions inadequate audit trail in recording decisions taken."*

111. That view was reinforced by documents later disclosed at the High Court and Court of Appeal proceedings. Examples of appalling record keeping include the failure of the Commission to find a signed copy of its decision to open the DPOANI statutory inquiry; its presentation in affidavit evidence of a manual watermarked "draft" as the authoritative operational manual at the time it removed me as a trustee; and its failure to record the documents removed by it from the DPOANI office.

112. Paragraph 1.4.4 of the internal review noted: *"The powers exercised under Section 33 of the Act (including suspension and removal of trustees, appointment of interim managers etc.) should be directly scrutinised or approved by the Commissioners and this could be implemented immediately."*

113. It is clear that significant decisions were not being scrutinized by Commissioners (which begs the question of what their role actually was). There was nothing to prevent Commissioners exercising greater oversight at any time and the Committee may want to ask why the Department did not press for this in 2016.

114. The report compiled by Jonathan Baume was also critical of the Commission. In paragraph 10 of his report Mr Baume stated that "to a layman" the case "...offers at least prima facie evidence of problematic cultural issues within the CCNI (which should have been of concern to the DfC)."

115. Mr Baume gave as an example the fact that when the widow made her concern public, the Commission threatened her with legal action. The Commission apologised after the case was publicised on the Nolan show.



116. Mr Baume also noted in his report that the Department took the line that it had no “...powers to intervene in the Commission exercising its statutory functions”, whereas it is clear that it had not just a power but a duty to do so.

117. Mr Baume notes that paragraph 3.3.3 of the Commission’s Management Statement and Financial Memorandum states that the DfC sponsor team shall “address in a timely manner any significant problems arising in CCNI , whether financial or otherwise, making any such interventions in the affairs of CCNI as DfC judges necessary to address such problems” and should “bring concerns about the activities of CCNI to the attention of the full board of Commissioners, and require explanations and assurances from the Commissioners that appropriate action has been taken.”

118. Mr Baume asks rhetorically “was any of this considered or undertaken?”

119. I would submit that the Committee might ask the same question and might also inquire how governance will be strengthened and greater vigilance exercised by the Department to ensure that there is no lack of accountability in the future.

### **Clause 3: Registration Threshold**

120. I have no direct knowledge of the registration process, so offer no informed comment from my own experience. The Committee may however wish to note the comment at paragraph 1.2.1 of the Scott review that “the risks associated with small charities are low.”

### **Other issues**

121. A number of difficulties in the drafting of the Charities Act (NI) 2008 have been identified during the Commission’s investigations and the various legal challenges arising from them. The lack of a proper mechanism to bring an appeal to the Tribunal to challenge the Commission’s use of its information gathering powers has been discussed above. There are other areas where additional amendments to the 2008 Act might be useful. A public consultation process is likely to produce other suggestions.

### **Recommendations**

122. I invite the Committee to consider the following recommendations, intended to strike a balance between the desirability of reconstituting the charities register quickly and the importance of proper public consultation and scrutiny of the Minister’s policy proposals in respect of charity regulation.

- 1) The proposals for charity registration and for the regulation of charities should be separated. The latter is much more controversial.

- 2) The reconstitution of the charities register should be achieved without retrospective effect. As set out below, this might be possible without legislation. If not, it should be achieved by listing the charities to be returned to the register in a schedule to the Bill. Charities should have the option of choosing not to be placed on the register for the time being. There would be no point in adding small charities to the register if the introduction of a threshold means that they are not required to be registered.
- 3) The proposals in respect of regulation (in particular the proposal to delegate powers to Commission staff) should be dropped from the Bill and be the subject of proper public consultation. This would allow time for the report of the Independent Review of Charity Regulation to be considered and would also provide an opportunity to repair other deficiencies in the 2008 Act.
- 4) The Committee should ensure that concerns about the Commission's delivery of its functions and the deficiencies of the Department's governance of it have been properly addressed before approving the principle that powers should be delegated to staff. The Committee may wish to consider asking the Minister to extend the terms of reference of the Independent Review of Charity Regulation to include detailed consideration of the complaints and concerns raised.
- 5) There should be no retrospective effect for any of the proposed measures. There is no compelling public interest to justify such an approach.

123. As stated in my covering letter, I would very much welcome the opportunity to make an oral presentation to the Committee on the matters set out in this submission.

Robert Crawford

2 September 2021