

# Response ID ANON-Z2S2-SWYH-V

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:  
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4 What is your organisation?

Organisation:  
The Kubernesis Partnership LLP

## Policy Objectives of the Bill

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

Yes

Please provide further comments:

I am Emeritus Professor of Charity Studies at Sheffield Hallam University where I was involved in a wide range of research regarding charities, especially charity accounting and regulation, across the four jurisdictions of the UK and Ireland. I was also invited in 2018/19 by the four charity regulators to chair the Charities SORP Governance Review. I continue to work as a consultant with a wide range of charities, mainly small/medium-sized organisations, especially in Scotland and England but also some in Northern Ireland.

My comments in this consultation seek to draw on that background, and especially on parallels (where relevant) with the systems of charity regulation in Scotland and in England/Wales.

I welcome clauses 1 and 2 of the Bill and agree they will meet the important policy objective of enabling CCNI to take lawful decisions (and to rectify the status of decisions already taken). It is urgent to implement these provisions in order to address the long state of 'limbo' affecting charities in NI since the McBride decision.

However, I have some doubts about the policy objectives of clause 3 - I think this may not necessarily achieve the outcome intended - see further discussion below.

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

Yes

Please provide further comments:

I am not persuaded that the provisions of clause 3 which may create a whole class of NI charities similar to excepted charities in England and Wales (E&W) will be beneficial.

In E&W it is generally very hard for charities whose income is not over £5,000 to register with the Charity Commission for England and Wales (CCEW), and the lack of a registered charity number is often a major bar to seeking funding. It places grant-making charities in a very difficult position, for example, if they are deciding whether to make charitable grants to small organisations under £5,000 which have no evidence of charitable status.

Some E&W organisations under £5K rely on obtaining charity tax recognition from HMRC (for example, enabling them to operate a gift aid scheme) but many funders do not understand the notion of a charity that is recognised by HMRC but not registered with CCEW. Some organisations in this band wrongly quote their HMRC number as a 'registered charity number' (they are actually committing an offence in doing so) - a process that was common in NI before the advent of charity registration on NI.

It is becoming common for new charities being established in E&W to choose the structure of a CIO because there is no lower income threshold to register a CIO, so they do not have to wait until they achieve £5K income before being able to apply to register - but of course CIOs are not yet available

in NI.

I would encourage NI to following more closely the arrangements in Scotland where universal charity registration applies - i.e. an organisation cannot describe itself as a charity unless it is registered with OSCR [Charities and Trustee Investment (Scotland) Act 2005, s.13] except in limited case of charities established in other jurisdictions which make the relevant disclosures [s.14]. Although there have been some difficulties for smaller charities in complying with the requirements of registration with OSCR and financial reporting, they have been largely addressed by means of good clear guidance from OSCR.

I recall that in the lead up to the Bill that became the Charities Act (NI) 2008 there was fairly strong opinion that NI wanted a system of universal charity registration (as in Scotland) and I would caution against diverting from that clear view.

A small voluntary organisation that does not want the benefits or obligations of charitable status only needs to make a slight change to its constitution to make clear that it is NOT a charity - for example the object clause can say "the objects of the organisation are .... however, the organisation is not required to operate solely for charitable purposes".

I do not know of any major jurisdiction in the world, other than E&W, that allows organisations to have the status or benefits of being a charity (or any similar framework that gives tax concession to public benefit bodies) without a requirement for registration with the relevant regulator.

There may be a case for permitting very small charities to file accounts without an independent examiner's report (in E&W this was never required for charities up to £10K income, subsequently increased to £25K income) but I would certainly NOT recommend NI to take the path of allowing an organisation to be a charity without any registration or accountability to CCNI.

### 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?

Yes

Please provide further comments:

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?

Yes

Please provide further comments:

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

Yes

If not, what would you propose?:

10 Please provide further comments in relation to Clause 1.

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

The drafting appears to be sensible in order to address the issue.

### 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:

Clearly the Commission needs a power to delegate to staff so I do not have any concerns about the general principle.

But I have some reservations the proposals in the new s.9A(2) (inserted by clause 3) to exclude the matters listed from the powers of delegation. I agree that decisions on these issues should normally be taken by the full board, but I suggest that delegation should still be possible in certain cases such as:

(i) matters of extreme urgency: for example if serious wrongdoing in a charity is reported to CCNI they should be able to open an inquiry immediately rather than having to wait for the next board meeting; or

(ii) the board may sometimes wish to take a decision in principle but delegate certain details to staff. For example, in discussion a charity where concerns have arisen, the board may wish to take a decision such as instructing the staff to write to a charity with specific concerns and to open an inquiry if no

satisfactory reply is received within a certain time (such a process is only possible if a member of staff is given delegated power to assess whether or not a reply is sufficient).

I also consider that most of the powers in sections 33 to 36 need to be capable of being used urgently, without waiting for a full CCNI Board meeting. It is worth bearing in mind that these power can only be used in any case once an inquiry has been opened into a charity, so if it needs one CCNI board meeting to open an inquiry and another before any of these powers can be used, charity trustees seeking to act in inappropriate ways will be able to run rings round the Commission.

(It also seems odd to require full Board consent for the powers under sections 33 to 36 but not to use the powers under s.37 which are potentially wider. All of these powers should, I consider, be capable of being delegated, as is the case for the equivalent powers of OSCR and CCEW.)

It is worth bearing in mind that all of these powers can be appealed to the Tribunal, so there is a safeguard in the event that someone considers they have been exercised inappropriately.

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?:

Requiring the the Scheme to be made by the Department works against the general principle that CCNI should be independent of ministerial control. The CCNI must be able to manage its own affairs and processes, including decisions about how and when to delegate decisions to staff.

I suggest that Commission should have the power to make such schemes of delegation as it sees fit, subject to consultation with the Department (and, preferably with the wider public). This should not be restricted to a single overall Scheme - most complex organisations have different schemes of delegation for different types of activity.

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

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

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:

As explained above under the policy questions, I consider that a whole regime of NI charities exempted from registration and other oversight by CCNI would be disastrous for the charity sector in NI.

The proposed drafting of clause 3 with the new sections 16A, 16B and 16C that would be added to the 2008 Act demonstrate how confsing such a regime would be.

As explained above, I do not know of any other jurisdiction in the world, apart from England and and Wales, that allows organisations to benefit from charitable status (or the relevant local equivalent) without requiring registration with the relevant regulator.

As explained above, organisations which do not want to be charities at all simply need to amend their constitutions to make that clear. But to allow a tier of organisations which are charities in law, but having no registration with CCNI, yet still potentially subject to certain aspects of the 2008 Act, would be a recipe for massive confusion.

I written about the disastrous nature of the whole regime of excepted and exempt charities in E&W, drawing on various strands of research and I would not wish this on NI(see Morgan, GG "The End of Charity?" Valectory lecture at Sheffield Hallam University, Dec 2015 pp11-12 <http://www.tinyurl.com/endchtxt>).

I suggest the right way forward is to retain the system under which all organisations claiming charitable status must seek to register with CCNI under s.16(2) of the 2008 Act, and requiring them to file accounts, but exempting those below a certain income level from the requirement under s.65(3) to have their accounts independently examined (IE).

However, I would strongly recommend that the accounts of such charities are still required to be filed with CCNI, and that the accounts must clearly show that they have been approved by the charity trustees. So, no amendment is needed to s.65 except for a small adjustment to subsection 65(4) to allow for small charities whose accounts will have no IE or audit report.

Nevertheless, I suggest the £25K threshold in E&W above which IE is required is uncomfortably high. It causes difficulties for grantmaking charities awarding grants to charities under £25K who sometimes end up requiring the recipient charity to have its accounts as a condition of the grant even if an IE is not required by statute. Bearing in mind that the audit threshold is lower in NI than E&W (£500K income in NI as opposed to £1M in most cases in E&W) I suggest a £10K (rather than £25K) upper limit for allowing a charity to file accounts with no IE.

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:

If any provisions are to be introduced along the lines proposed in clause 3 (even if, as I recommend, purely to allow the smallest charities to be exempt from IE) I strongly recommend that any thresholds are based on income alone - NOT assets.

It is incredibly confusing for those seeking to understand the requirements to have to consider both income and assets in assessing whether a charity is exempt from a requirement, especially when these amounts will vary from year to year.

When passing the Bill that became the 2008 Act, the NI Assembly wisely did NOT incorporate an assets test in the audit threshold in s.65(1) - this was a welcome simplification from the arrangements in E&W and in Scotland and was widely seen at the time as NI choosing a path of charity regulation that was easier to understand. So, if any exemptions are to be made for very small charities, I strongly urge that they are based on income alone.

17 Please provide any further comments on Clause 3.

Further comments:

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

Further comments on the Charities Bill:

Broadly speaking I welcome the Bill - certainly the provisions in clauses 1 and 2 are much needed - though I recommend further consideration is given the the delegation provisions in clause 2.

But I strongly recommend that any exemptions for smaller charities in clause 3 are limited to an exemption from the IE of their accounts, rather than exempting them from the registration with CCNI which also would cut them off from the valuable support that a charity regulator provides.