



THE CHARITIES BILL

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The Charities Bill 2007 proposes to introduce an integrated system of registration and regulation (including control of charitable fundraising) as well as supervision and support of registered charities.

This paper seeks to assist Members in considering the Bill by providing;

- Background and Context information;
- Commentary on the main provisions in the Bill and issues arising from the consultation process; and
- Comparisons with charity legislation in the rest of the UK and the Republic of Ireland where appropriate.

Research Papers are compiled for the benefit of Members of The Assembly and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

SUMMARY OF KEY POINTS

An outdated legal framework, the changing nature of charities, concerns about the lack of effective regulation and developments in the rest of the UK have been key drivers in the review of charity law in Northern Ireland.

The Charities Bill (the Bill) is the outcome of an extensive development and consultation exercise. The Bill passed its First Stage on 10 December 2007 and is due to be considered at Second (Committee) Stage on 15 January 2008.

The overall policy aim of the proposals is to “introduce an integrated system of registration and regulation (including control of charitable fund-raising) as well as supervision and support of registered charities.”¹ In particular the Bill’s proposals:

- provide a definition of "charity" and "charitable purpose";
- establish the Charity Commission for Northern Ireland (CCNI) and the Charity Tribunal for Northern Ireland;
- create a register of charities;
- provide for a new form of charitable body (a charitable incorporated organisation); and
- deal with the regulation of charities and public charitable collections.

Generally the proposals have received broad support from those responding to the Department of Social Development’s consultations.

One of the key issues arising from the consultation process has been the need for a consistent and proportionate approach to regulation to avoid any adverse impact on smaller, UK or all Ireland wide charities.

The Bill provides a broad framework and further detail will be specified in regulations and guidance. The specific detail of the regulations and guidance will influence how the proposals will actually operate in practice.

¹ Department of Social Development (2005) *Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005*: http://www.dsdni.gov.uk/charities_consultation.doc

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CHARITIES BILL

INTRODUCTION

The Charities (Northern Ireland) Bill² was introduced to the Northern Ireland Assembly and passed its First Stage on 10 December 2007. The overall policy aim of the proposals is to “introduce an integrated system of registration and regulation (including control of charitable fund-raising) as well as supervision and support of registered charities.”³ In particular the Bill’s proposals:

- provide a definition of "charity" and "charitable purpose";
- establish the Charity Commission for Northern Ireland (CCNI) and the Charity Tribunal for Northern Ireland;
- create a register of charities;
- provide for a new form of charitable body (a charitable incorporated organisation); and
- deal with the regulation of charities and public charitable collections.

Generally the proposals have received broad support. Much will depend on how the system works in practice and further regulations and guidance will be important in this respect.

The remainder of this briefing considers the context for reform of charity law in Northern Ireland, details of the Bill’s main proposals and key issues arising from the consultation process. Experience in other parts of the UK and the Republic of Ireland is also considered. Given the Bill has 186 clauses, this paper does not attempt to provide a detailed explanation of each clause. Further information on the detail of particular clauses is given in the Explanatory Notes which accompany the Bill.

CONTEXT

An outdated legal framework, the changing nature of charities, concerns about the lack of effective regulation and developments in the rest of the UK have been the key drivers in the review of charity law in Northern Ireland.

CURRENT LEGISLATIVE FRAMEWORK

The current legislative framework is fragmented and it has been argued that:

Charity law has developed in a piecemeal and at times illogical and incoherent way over the centuries, many of the governing principles finding their origins in bygone times with very different values and norms⁴.

² The Charities Bill discussed in this Bill Paper was introduced by the Minister for Social Development in the Northern Ireland Assembly on 10 December 2007. It contains two sections that are additional to the Charities (Northern Ireland) Order 2007 laid before the UK Parliament in January 2007. The sections relate to religious charities and charities from, or operating outside, Northern Ireland.

³ Department of Social Development (2005) *Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005*: http://www.dsadni.gov.uk/charities_consultation.doc

⁴ O’Halloran, K and Cormacain, R (2001) *Charity Law in Northern Ireland*

At present there is no statutory definition of a charity in Northern Ireland. The legal concept however has been developed through case law over the years, based to a large extent on the preamble to the Statute of Charitable Uses 1601. To be charitable, an organisation must have purposes that are exclusively charitable and it must be established for public benefit. In 1891, Lord McNaughten grouped charitable purposes into four divisions: the relief of poverty; the advancement of religion; the advancement of education; and other purposes beneficial to the public.⁵ Statute law in Northern Ireland has, in effect, added recreation as a fifth purpose⁶. These are the broad categories used by the Inland Revenue to determine whether an organisation is deemed to be charitable for tax relief purposes.

There is no legislation specifically governing the administrative framework for charities in Northern Ireland. In practice, the majority of charities take one of three common forms: company limited by guarantee, trusts, or unincorporated associations. Charities therefore must abide by the relevant legislation in these areas.

Under the Charities Act (Northern Ireland) 1964 and the Charities (Northern Ireland) Order 1987 the Department for Social Development (the Department) acts as the charity authority for Northern Ireland. Its main functions concern giving consent to the disposal of land or buildings by charity trustees who usually cannot sell, or otherwise dispose of, such property without specific consent, and making Schemes to change the objects of charities whose original functions can no longer be carried out effectively. While the Department does have some interventionist powers they are "*exercised in a reactive rather than a proactive fashion*".⁷

Although some charities will be subject to regulation from other bodies there is no one regulatory system specifically for charities in Northern Ireland. Thus, it has been argued that this fragmented framework is unsuitable given the nature and role of charities today

CHARITIES IN NORTHERN IRELAND

Charities operating in Northern Ireland are part of a larger voluntary and community sector. This is a diverse sector comprising an assortment of organisations including large national charities such as Oxfam and many smaller groups. Nowadays many of these groups are closely linked with the provision of public services. Overall, the voluntary and community sector makes an important contribution to the economy of Northern Ireland as the facts from NICVA⁸ illustrate:

- £614 million was the estimated total income for 2003-04.
- 50% of all income is generated by 5% of the sector
- 35% of the sector's funding comes from government.
- 29,000 paid employees work in the sector
- 4.4% of Northern Ireland's workforce is employed in the sector
- 75,000 volunteers are engaged in formal volunteering
- £12.72 is the average donated to charity per person per month.

Within the voluntary and community sector it is estimated that there are around 5,000 charities (as determined by the Inland Revenue) in Northern Ireland. However, there will be organisations who do not seek tax exemptions from the Inland Revenue, so

⁵ Commissioners for Special Purposes of Income Tax v Pemsell (1891) AC531

⁶ Cormacain, R. O'Halloran, K and Williamson, A (2001) *Charity Law Matters*

⁷ O'Halloran, K and Cormacain, R (2001) *Charity Law in Northern Ireland*

⁸ NICVA *State of the Sector IV* <http://www.communityni.org/index.cfm/section/article/page/WhatIs>

the actual number of bodies who may be considered charities under the proposals could be in the region of 9-12,000.⁹

One of the issues to arise in recent years has been concern from the public about the use of charitable funds in certain instances. A particular concern in Northern Ireland has been that the lack of regulation has facilitated the activities of paramilitary groups by making possible the illicit use of money and the diversion of funds obtained from crime.¹⁰

GB AND REPUBLIC OF IRELAND DEVELOPMENTS

The proposals in the Bill have been heavily influenced by developments in charity law in GB and the Republic of Ireland. Reforms have resulted in the passing of the 'Charities Act 2003' and the 'Charities Act 2006' covering England and Wales and the 'Charities and Trustee Investment (Scotland) Act 2005'. These latter two acts are being implemented on a staged basis. In the Republic of Ireland the 'Charities Bill 2007' was presented to the Dail on 24 April 2007, just prior to the elections on 29 April 2007. It has passed its Second Stage reading and was referred to the Select Committee on 15 November 2007.¹¹

The Charity Commission has been in operation in England and Wales since 1993 and maintains a register of around 135,000 charities while the Office of the Scottish Charity (OSCR) has been in operation since 2006.

A key theme arising from the consultation process has been the need for co-ordination with the rest of the UK and the Republic of Ireland and the need for the regulatory framework for UK wide and all Ireland charities to be proportionate.

REVIEW OF CHARITY LAW IN NORTHERN IRELAND

There has been extensive consultation on charity law reform in Northern Ireland. A previous review and consultation exercise took place during 1994-1996, although there were areas of disagreement on a way forward.

In 2000 the Minister for Social Development made a commitment to undertake a review of charity legislation. In March 2004 the Department established an Advisory Panel to look at various options for reform. Following the Advisory Panel's work the Department issued a consultation paper in 2005¹² and consulted on a draft Charities Order in October 2006.¹³ The Department has produced short summaries of responses received to both these consultations.¹⁴ Responses came from a wide range of bodies and individuals and were largely favourable.

The Charities (Northern Ireland) Order 2007¹⁵ (made under the Northern Ireland Act 2000) was laid before the UK parliament in January 2007 but with the restoration of devolution the legislation will be considered by the Northern Ireland Assembly.

⁹ Information provided by Department officials to the Social Development Committee 31 May 2007

¹⁰ See discussion in Select Committee Northern Ireland Affairs, 3 May 2006

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmniaf/886/6050306.htm>:

¹¹ www.oireachtas.ie/viewdoc.asp?DocID=7535&&catID=59-60k

¹² Department of Social Development (2005) *Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005*: http://www.dsdni.gov.uk/charities_consultation.doc 11 February – 3 June 2005, 106 responses received

¹³ Department of Social Development (2006) *Consultation on Draft Primary Legislation*:

http://www.dsdni.gov.uk/dsd_charities_review.pdf

¹⁴ Department of Social Development *Consultation on the Review of Charities Administration and Legislation in Northern Ireland 2005*. Summary of Consultation Responses: www.dsdni.gov.uk/responses_summary.doc Department of Social Development *Summary Of Responses Public Consultation on Charity Law in Northern Ireland 17 July -13 October 2006*

: <http://www.dsdni.gov.uk/dsd-charities-review06-summaryofresponses.doc>

¹⁵ www.opsi.gov.uk/si/si2007/draft/em/ukSIDem_9780337968150_en.pdf

THE BILL

The Bill contains 14 Parts, 186 clauses and 9 Schedules. The following provides an overview of the key provisions along with comment about the effect of the proposals and issues raised during the consultation process.

THE CHARITY COMMISSION

As discussed earlier there is no one overall body in Northern Ireland responsible for the regulation of charities. The Bill proposes, under Part 2, to establish a new Charity Commission for Northern Ireland (CCNI).

ESTABLISHING THE CNNI

Clauses 6 to 11 and Schedule 1 relate to the establishment of the CNNI. It is proposed that the CCNI will be a non-departmental public body (NDPB). The Department, through the public appointment process, will appoint members of the Commission. It will consist of a chairman, a deputy chairman and at least 3, but no more than 5 other members. It is anticipated that the Commission will initially be staffed by approximately 16 people with an estimated set up cost of £300,000 and £800,000 annual running cost.

OBJECTIVES AND FUNCTIONS

The CCNI's key objectives, under Clause 7, can generally be described as:

- increasing public confidence and trust in charities
- promoting awareness and understanding of the operation of the public benefit requirement
- promoting compliance by charity trustees with their legal obligations
- promoting the effective use of charitable resources
- enhancing the accountability of charities

Clauses 8 and 9 deal with the CCNI's functions and general duties, while Part 5 deals with its information powers. Part 6 also contains provisions that cover the power of the CCNI to make schemes and act for the protection of charities. Key points are that the CCNI will:

- operate the register of charities and determine access to the register;
- encourage and facilitate the better administration of charities;
- determine whether public permits or collection certificates should be issued in respect of charitable collections; and
- investigate misconduct or mismanagement in charities (the Commission is given powers to address failings in these areas including suspending trustees or freezing charities assets)

VIEWS ON THE PROPOSED CNNI

Overall responses to the Department's consultations were supportive of the proposals relating to the establishment of the CCNI. For example, the Rural Development Council responded that, "*These actions will lead to greater*

transparency and accountability and signal a commitment to the work and progression of charities in Northern Ireland.”¹⁶

ISSUES ARISING - POLICEMAN OR FRIEND?

There were some comments made in consultation responses about a potential conflict in the dual role of the CCNI ‘regulating and advising’ the sector. Many who attended NICVA’s¹⁷ consultation seminars felt that the Commission should be responsible for regulatory advice, while umbrella groups within the sector should be responsible for giving general advice to make clear the regulatory role of the Commission. The need for a distinction between general advice and advice on legal requirements has been recognised by the Better Regulation Task Force for Civil Society. Their 2005 report stated, in relation to the Charity Commission in England and Wales, that “*it is important that the Charity Commission avoid the risk of regulatory creep that occurs when advice is not clearly separated from legally binding obligations.*”¹⁸

The Department’s response to the consultation stated that:

We feel that the regulator is best placed to offer advice on meeting the requirements of the legislation and the regulator. However, there is much to be said for the idea of clearly labelling advice as ‘mandatory’ or ‘best practice’, and we expect the proposed CCNI to follow this approach.¹⁹

The Department has also confirmed that they expect umbrella organisations within the voluntary sector to continue to have an important advisory role in more general areas related to the operation of charities.²⁰

ISSUES ARISING – A PROPORTIONATE AND CONSISTENT APPROACH

A general theme arising from the consultation processes has been the need for the Commission’s regulatory regime to be proportionate, particularly in relation to smaller charities. The Bill under Clause 9 (2) point 4 states that in carrying out its duties the Commission must ‘*have regard to the principles of best regulatory practice*’. This includes only using their powers proportionately and targeting only cases where action is needed. These actions must also be transparent and consistent.

Comments from the consultation also suggested the need for consistency with the approach taken by other UK regulators and that proposed for the Republic of Ireland. A Regulators Forum has been set up to encourage consistency and co-ordination in regulatory approaches in the UK and Republic of Ireland.

THE REGISTER OF CHARITIES

A key aspect of the CCNI’s work will be maintaining the register of charities. The aim of a register of charities is to promote transparency, public confidence, and accountability.²¹

¹⁶ Rural Development Council *Response to the Charities (Northern Ireland) Order 2006*: <http://www.rdc.org.uk/publications/news.asp?ID=120>

¹⁷ NICVA Response: The Charities (Northern Ireland) Order 2006.

¹⁸ Better Regulation for Civil Society Task Force (2005) *Better Regulation for Civil Society*. p25

¹⁹ Department of Social Development (2005) *Summary of Responses. Public Consultation on Charity Law in Northern Ireland*. <http://www.dsdni.gov.uk/dsd-charities-review06-summaryofresponses.doc>

²⁰ Information provided by Department officials to the Social Development Committee 31 May 2007.

It is proposed that the registration system should have the following features:

- All Northern Ireland charities should be registered

Institutions from outside Northern Ireland, but which operate for charitable purposes in or from Northern Ireland should be registered.

- Details of charities should be updated annually to ensure information is current.
- All charities registered would be required to prepare annual accounts and reports to be available on request by the Department or the public.

It is anticipated that the register will be compiled on a phased basis, probably on the basis of the largest charities first, to allow staff to build up experience and to give smaller charities more time to prepare.²² It is estimated that around 9-12,000 charities will be eligible to register.

WHO SHOULD REGISTER

All bodies wishing formal recognition as a charity in Northern Ireland will need to register with the CCNI. This will apply regardless of the type of body or their annual income. This is the case in Scotland and that proposed in the Republic of Ireland. In England and Wales there are limited exceptions and exemptions, for example, charities with less than £5,000 annual income are exempt from registration.

Respondents to the Department's consultation generally welcomed the provisions requiring all charities to register. The Charity Law Association considered that it would avoid the complexities involved in having excepted or exempt charities²³. However, some consultation responses suggested that churches in particular should be exempt from registration requirements. The Department's response to the consultation stated,

We do not feel that churches should necessarily be regulated differently from other charities, or exempted from requirements which are felt to be appropriate for all other types of charity. ... Churches and similar multi-part charities will register at the level at which control is exercised, normally at the level at which accounts are prepared and overall management exercised.

In evidence to the Social Development Committee Department officials stated that ultimately it was for an organisation to consider whether it wished to register or not. Registration would bring benefits. Charities registering with the Commission will be able to refer to themselves as 'registered charities' and as such may benefit from greater public confidence and access to funding and support that is aimed specifically at charities. Organisations would need to consider on balance whether these benefits outweighed any problems they may have with registering. In theory it would be possible for an organisation to still try and obtain charitable tax relief from the Inland Revenue without having to register as a charity. However, in practice it is likely that organisations would do both.²⁴

²¹ Department of Social Development (2005) *Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005*: http://www.dsadni.gov.uk/charities_consultation.doc,

²² *ibid*

²³ The Charity Law Association Working Party On Charity Law Reform In Northern Ireland (2005) *Response To Department For Social Development In Northern Ireland Consultation Paper*: <http://www.charitylawassociation.org.uk/wparyjune05.html>

²⁴ Information provided by Department officials to the Social Development Committee 31 May 2007.

The Bill as introduced contains a section on religious charities. Religious charities are to be designated under Section 166 and are to include 'any component element of such a charity which is itself a charity (whether or not having as its principal purpose the advancement of religion).' Some of the conditions which must be satisfied under Section 166 for an institution to be designated a religious charity include:

- The advancement of religion as its principal purpose and regular worship as its principal activity.
- Having been established for at least 10 years and has a membership of at least 1,000 persons who are aged over 16 years and normally resident in Northern Ireland.
- Internal organisation that includes an authority or authorities in Northern Ireland to exercise a supervisory and disciplinary function with requirements for auditing and recording that conform to the requirements of CCNI.

Clause 166 (5) allows CCNI to withdraw designated religious status where any of the conditions above cease to apply or where CCNI (under Section 22) has conducted an inquiry and no longer feels the designation is appropriate.

Under Clause 165, sections 33 to 36 relating to the protection of property owned by a charity do not apply to designated religious charities. Therefore CCNI, on having conducted an inquiry under Section 22, cannot suspend or remove trustees etc. from membership, appoint an interim manager or give specific directions for the protection of the charity.

ISSUES ARISING – IMPACT ON SMALLER AND UK WIDE / ALL IRELAND CHARITIES

There has also been some concern that the process of registering should be made easy, particularly for smaller charities. For example, the Law Centre (NI) consultation response stated that, "*It is important that adequate support systems are available to ensure that smaller charities can obtain the advice and support they will need to complete the registration process and to comply with any subsequent reporting requirements.*"²⁵

A number of reporting and auditing requirements arise from being a registered charity. The proposed accounting and reporting regime for registered charities is dependent on a charities income band. Those with higher incomes will be subject to greater requirements. Originally it was proposed that the minimum threshold was set at an income level of £25,000. However, this was the one issue that caused most concern during the consultation process. Many respondents argued that the thresholds were set too low and would have a particularly onerous impact on smaller charities. Following the consultation process changes have been made so that the accounting / audit threshold levels have been raised to £100,000 which is consistent with that of the rest of the UK. As noted earlier the Commission will be under a duty to ensure that it follows best regulatory practice in carrying out its functions.

During consultation there were concerns that registration and reporting requirements should not cause charities already regulated by other bodies in Northern Ireland, or

²⁵ Law Centre (NI) (2006) *The Charities (Northern Ireland) Order 2006 Proposal for an Order in Council Consultation Response*:

<http://www.lawcentreni.org/Policy/Responses/Responses%202006/charities.htm>

UK and all Ireland wide charities operating in Northern Ireland, additional unnecessary work.

Section 167 Institutions

Part 14, Chapter 4 of the Bill includes a separate section on institutions which are not a charity under the law of Northern Ireland, but operate for charitable purposes in or from Northern Ireland. They are to be referred to as 'a Section 167 institution' and their trustees will be expected to produce an annual financial statement and statement of activities relating to its work in or from Northern Ireland.

The Department will have discretion to make an order for the CCNI to keep a separate register of charities that are not subject to Northern Ireland law, but wish to operate in or from Northern Ireland. The Department cannot make any draft order relating to charities from outside Northern Ireland without submitting it to the Assembly for approval.

This discretionary part of the Bill was added to avoid the situation in GB where charities registered in Wales did not meet the criteria for charitable status in Scotland when OSCR was established.

Approach in the rest of the UK

In Scotland it is a requirement that all charities with significant operations in Scotland must register with OSCR. There are no comparable requirements for Scottish charities which operate in England and Wales to register with the Charity Commission. OSCR has issued guidance on the registration of cross-border charities.²⁶ Monitoring for cross border charities has been suspended for the moment to enable OSCR and the Charity Commission to work on aligning monitoring processes. It is likely that consistency in monitoring processes for cross border charities will be important in Northern Ireland too.

THE DEFINITION OF CHARITABLE PURPOSES AND THE 'PUBLIC BENEFIT' TEST

Part 1 of the Bill under clauses 1 to 5, deals with the definition of "charity," "charitable purpose" and the "public benefit" test. There is currently no statutory definition of a charity in Northern Ireland. The Bill proposes to ensure greater clarity by providing a definition of charity which reflects the nature of charities today.

It will be the responsibility of the CCNI to register charities and assess whether individual charities meet the necessary criteria. Essentially, it is proposed that to be considered a charity a body:

1. must be established for charitable purposes only *and*
2. pass a test of "public benefit"

CHARITABLE PURPOSES

Clause 2 (2) of the Bill sets out 12 different specific charitable purposes, which generally reflect existing case law. One of these purposes is a general category and should cover any purpose currently considered charitable which is not specifically

²⁶ OSCR (2006) *Guidance on Registration with the Office of the Scottish Charity Regulator (OSCR) for England and Wales Charities*. <http://www.oscr.org.uk/DocumentViewer.aspx?id=65c7f261-e853-4d3d-8a4d-3e04bd079861>

defined. Clause 2 (3) provides more detail on what is meant by particular charitable purposes.

ISSUES ARISING

Responses to the Department's consultations were generally favourable to the proposed definition of charitable purposes. A number of specific and fairly technical comments were made about some of the definitions. In particular, there were a few comments made about the definition of religion. The proposed definition of religion as outlined in Clause 2 (3) (a) is "*a religion which involves belief in more than one god*", and "*any analogous philosophical belief (whether or not involving belief in a god)*". Some responses suggested that the definition of religion should refer only to a "belief in God". The Department's response was that they were "*not minded*" to "*restrict it to a more limited definition of the advancement of religion than the rest of the UK.*"²⁷ In the 'Commentary on the Descriptions of Charitable Purposes'²⁸ in relation to the Charities Act for England and Wales includes the explanation that

A Supreme Being does not necessarily have to be in the form of a personal creator god; it may be in the form of one god or many gods or no god at all in the accepted understanding of the term. This is reflected in the Charities Act which states that the term "religion" includes a religion which involves belief in more than one god, and a religion which does not involve belief in a god.

The charitable purposes at a broad level are consistent with those of other UK legislation and that proposed in the Republic of Ireland. In detail they most closely resemble the English and Welsh legislation although there are some minor differences. For example, in Northern Ireland it is made explicit that the advancement of peace and community relations is a charitable purpose. In England and Wales "*the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services*" is a defined purpose.

The specific definitions in the legislation may influence how charities' governing documents are drafted. The slightly different definitions in England and Wales and Scotland has led to some issues being raised about GB wide charities meeting the registration requirements in Scotland and England/Wales and is one issue which the Charity Commission and OSCR are currently working through.

However, as the proposed definition in Northern Ireland is most similar to that in England and Wales it may be expected that this would be less of an issue where charities based in England and Wales that operate in Northern Ireland need to register with the CCNI. It may have more of an impact where charities based in Scotland operate in Northern Ireland.

THE PUBLIC BENEFIT TEST

The current position presumes that charities working under the heads of relief of poverty, religion and education automatically benefit the public, while all other charities have to demonstrate a public benefit arising from their work. Under the proposals for charities to be registered they will all have to prove that they meet the public benefit test. This approach is consistent with the rest of the UK and the approach proposed in the Republic of Ireland.

²⁷ Department of Social Development *Summary Of Responses Public Consultation on Charity Law in Northern Ireland 17 July -13 October 2006*

: <http://www.dsdni.gov.uk/dsd-charities-review06-summaryofresponses.doc>

²⁸ <http://www.charity-commission.gov.uk/spr/corcom1.asp#5>

The majority of respondents to the Department's consultations welcomed this change. For example, the Law Centre (NI) referred to the current "*inequitable divide in the expectations placed upon charities*".²⁹ On the other hand there have been concerns from some religious organisations about the need to prove that they meet the public benefit test. For example, the Presbyterian Church has been reported as saying that they do not agree that churches should have to meet the test.³⁰

Clause 3 (3) of the Bill sets out the broad conditions that the CCNI must "have regard to" when assessing whether the test can be met. The CCNI will also be under an obligation to provide guidance on the test with the aim of providing greater clarity to those wishing to register. The proposed definition of public benefit in the Bill mirrors that in Scottish legislation. A slightly different approach is taken in the English and Welsh legislation whereby public benefit does not have a statutory definition but will continue to be interpreted in accordance with existing case law

ISSUES ARISING - APPLYING THE PUBLIC BENEFIT TEST IN PRACTICE

The proposal to remove the presumption of public benefit may have implications for bodies currently considered charitable. The Christian Institute has expressed concern that the Commission "*will interpret 'public benefit' in line with the latest fads in political correctness.*" In response to these concerns the Department has sought to reassure churches that there is "*nothing to fear*" from the legislation and that the Charities Commission would work with these organisations to support and meet them in their requirements.³¹ It is anticipated that the vast majority of those organisations who have charitable status for tax purposes will meet the public benefit criteria.³²

Given the broad definition of public benefit proposed in the Bill a key issue will be the detail in the guidance the Charity Commission produces³³ and in this respect it may be useful to consider the approach taken by other UK regulators.

APPROACH IN THE REST OF THE UK

In the rest of the UK there has been particular controversy over whether independent schools will be able to meet the test of public benefit. The main problem identified is how such organisations can demonstrate adequate public benefit when access to their services is limited to those who can afford to pay the fees charged. These concerns do not appear to have been so significant in Northern Ireland, perhaps reflecting the relatively small number of independent schools. Debate in the rest of the UK has also focused on other types of charities that may potentially have more difficulty in meeting the test such as private hospitals, religious bodies, universities and other charities (e.g. artistic or conservation) that charge fees or have exclusive membership.

The definition of public benefit proposed in the Bill mirrors that in Scottish legislation. OSCR's guidance *Meeting the Charity Test*³⁴ provides further detail on each aspect and consulted³⁵ on how it would undertake a "rolling review" of those organisations

²⁹ Law Centre (NI) (2006) *The Charities (Northern Ireland) Order 2006 Proposal for an Order in Council Consultation Response*:

<http://www.lawcentreni.org/Policy/Responses/Responses%202006/charities.htm>

³⁰ Belfast Today News *New Moves Threaten Church Status Claim* 30 May 2007

³¹ Belfast Today News letter, *New Moves threaten Church Status Claim* 30 May 2007.

³² Information provided by Department officials to the Social Development Committee 31 May 2007.

³³ The Bill under Clause 4-(1) states that CCNI must issue guidance on public benefit objectives, so this is likely to be a priority for the new Commission.

³⁴ OSCR (2006) *Meeting the Charity Test*: <http://www.oscr.org.uk/PublicationItem.aspx?id=aec25378-896e-448a-bb07-906b8b715a96>

³⁵ OSCR (2006) *Rolling Review Proposals for Consultation*.
<http://www.oscr.org.uk/PublicationItem.aspx?id=a053326f-49a5-4858-a1f7-7dc84b38e613>

automatically placed on the register when it was first established (i.e. those deemed as charitable by the Inland Revenue) to ensure they meet the test. Results of the pilot exercise with 16 charities already on the register found that Further Education Colleges did not meet the charity test.³⁶ Ministers are currently reviewing the situation and colleges have been assured that the situation will be resolved.³⁷ The pilot study has led to OSCR's original proposals for the internal review being refined. In order to reduce the regulatory burden on charities, OSCR proposes to use the Charity Trustees' Annual Report as the starting point for review. Only where this is insufficient to satisfy the charity test will the charity have to be contacted. This is expected to work for small and medium sized charities, but 'restrictive conditions' will most likely make it unworkable for larger and complex charities which will need to submit documentation.

In England and Wales the Charity Commission's consultation on public benefit guidance ended in June 2007.³⁸ It is expected that final guidance will be issued in January 2008, prior to the relevant clauses coming into force in March 2008. Further guidance on specific sub-sectors will also be issued. Charities will include public benefit in their annual reports to the Commission from March 2009.

Both regulators have stressed that in the majority of cases organisations seeking charitable status should be able to meet the public benefit test. Furthermore, both regulators are also taking a risk-based approach to the public benefit test focusing resources on organisations which may have more difficulty in meeting the requirements. Where an organisation has difficulty in meeting the requirements the regulators will work with them to help them meet the requirements.

The need for consistency between the regulators in assessing public benefit has been recognised. The Memorandum of Understanding between OSCR and the Charity Commission states that, "*the expectation is that organisations qualifying as charities in one jurisdiction but not in the other will be exceptional and few in number.*"³⁹

THE CHARITY TRIBUNAL

The Bill, under Part 3 clauses 12 to 15 (and Schedules 2 to 4) provides for the creation of a Charity Tribunal for Northern Ireland. The Department's consultation paper highlighted the need for "*clear rules of accountability in place for the work of the proposed Charity Commission*" and sought views on a suitable appeals mechanism.

Establishment and Operation of the Tribunal

The Tribunal will consist of a President, legal members and ordinary members. The First Minister and Deputy First Minister will jointly appoint the members of the tribunal. Further details are set out in Schedule 2

³⁶ OSCR (July 2007) Rolling Review Pilot Study Report: <http://oscr2005phase2.cctechology.com/NewsItem.aspx?ID=aba97c8c-73ff-40c1-a79b-d5a63bde7845>

³⁷ This was because their constitutions permitted Scottish Ministers to direct or otherwise control their activities; forbidden under Section 7 (4)(b) of the 2005 Act.

³⁸ Charity Commission (2007) *Consultation on Draft Public Benefit Guidance* <http://www.charity-commission.gov.uk/library/enhancingcharities/pdfs/pbconsult.pdf>

³⁹ OSCR and Charity Commission (2007) *Memorandum of Understanding*. <http://www.oscr.org.uk/PublicationItem.aspx?ID=0180b205-f4cf-4e4e-9bb7-bbef90b70e85>

The Bill will allow Ministers to make further rules about the practice and procedure of the Tribunal, for example, in relation to the steps that must be taken before an appeal is heard and the timescales that are involved. The Tribunal will be able to award costs in certain circumstances, for example, if the tribunal considers that a decision or direction of the Commission is unreasonable

Decisions that can be appealed

The types of Commission decisions that can be appealed are set out in Schedule 3. This includes, for example, a decision by the Commission not to register an institution or to remove an institution from the register and an order requiring the accounts of a charity to be audited. If the appellant or the Commission is still dissatisfied they may appeal to the courts, but only on a point of law

ISSUES ARISING

While there was general support from the consultation for an appeal mechanism, there was relatively little specific comment about the proposals. This perhaps reflects the broad nature of the original consultation document. There was a view expressed that the Tribunal should be easy to access.

Again the proposals are similar to legislation in the rest of the UK. In England and Wales the Tribunal is not established yet and it is likely to be at least 2008 before it is in operation. Currently appeals against the Commission's decisions have to be made to the High Court and can be prohibitively expensive.⁴⁰ In Scotland the Scottish Charity Appeals Panel⁴¹ was set up under the 2005 legislation and has been in operation since late 2006. No appeals have been heard yet, although there have been requests to review the decisions made by OSCR.

CHARITABLE INCORPORATED ORGANISATIONS (CIOS)

Part 11 of the Bill proposes a new legal form for charities - the Charitable Incorporated Organisation ("CIO"). At present charities can choose to structure themselves in a number of ways for example, as an unincorporated body or an incorporated body such as a company limited by guarantee or an industrial or provident society.

There may be a number of benefits for a charity to being incorporated, for example it can enjoy limited liability and can hold property and contracts in its own right. These benefits may be particularly beneficial for larger charities that employ a lot of staff, enter into contracts or own land or other property. However, there are strict legal requirements about annual general meetings, accounts, and audit involving company status.

The intention behind the CIO is to avoid the need for charities that wish to benefit from incorporation to register as companies and be liable to dual regulation by Companies House as well as the Charity Commission. The suggestion of a new legal form for charities was first made in the Department of Trade and Industry's review of company law in 2001.⁴² It was subsequently developed by an advisory group set up by the Charity Commission.

⁴⁰ Fairbairn, C (2006) *The Charities Bill [HL]* Bill 83 of 2005-06

<http://www.parliament.uk/commons/lib/research/rp2006/rp06-018.pdf>

⁴¹ <http://www.scap.gov.uk/>

⁴² Modern Company Law: Final Report, para. 4.63ff

ISSUES ARISING

There was relatively little comment made on this aspect of the proposals during the consultation process, other than it being viewed as a positive development. Provision for CIOs exists in the other UK legislation but further regulations will need to be made and it is likely to be at least 2008 before these are enacted. There is therefore little to learn from experience elsewhere. It is likely that a key issue will be the detail in the regulations and the extent to which they make establishing a new body as straightforward as possible.

TRUSTEES

The Bill, under Part 9 Chapters 1 and 2 makes a number of proposals relating to “charity trustees.” There are a variety of names used to describe those controlling a charity depending on its legal form, e.g. directors of a company, trustees or committee members. ‘Trustees’ is the most widely accepted name used for all types of persons controlling a charity.

INCORPORATION OF TRUSTEES

Part 9 of the Bill comprises two Chapters covering clauses 74 to 95. Chapter 1 deals with the incorporation of charity trustees. Under the provisions the trustees of a charity may apply to the Commission for a “certificate of incorporation” of the trustees. Clause 74 empowers the Commission to issue a certificate of incorporation. After their incorporation the trustees may enter into contracts and sue and be sued in the name of the incorporated body. This is different to incorporating the whole charitable body, for example, by becoming a company limited by guarantee.

DISQUALIFICATION AND REMUNERATION

Part 9 Chapter 2, clauses 87 to 95 sets out a number of other provisions relating to charity trustees, including provisions concerning persons disqualified from being a charity trustee and remuneration of trustees.

Disqualifications

Under Clause 87 the Bill proposes that certain persons will be disqualified from being a charity trustee, for example, people with unspent convictions for offences involving dishonesty or deception, undischarged bankrupts or people disqualified from acting as company directors. If any person acts as a charity trustee while disqualified they will be guilty of an offence liable to a fine or imprisonment on conviction.

Remuneration

An underlying principle of charitable organisations is that trustees carry out their duties on a voluntary basis. The Bill proposes, under Clause 89, that in certain circumstances a trustee may be entitled to remuneration for *services* provided for the charity. This also applies to someone connected with a charity trustee where the remuneration may benefit the trustee. In clarifying the nature of services that may be entitled to remuneration the Charity Commission in England and Wales (where

similar provisions exist) give an example of a trustee who is a plumber providing plumbing services to the charity.

The Bill sets out the nature of the circumstances in which such remuneration may be provided. For example, it must be in the charity's best interests, that a minority of trustees are either paid in this way or connected to trustees who are, and that the governing document must not contain any specific provision forbidding this type of payment.

INDEMNITY INSURANCE

Trustees may wish to have trustee indemnity insurance or liability insurance which protects them from any personal liability they may have or for a breach of trust. In order to address this the Bill, under Clause 94, proposes to provide trustees with a statutory power to purchase trustee indemnity insurance and to pay the premiums with the charity's money, subject to certain limitations and conditions.

ISSUES ARISING

There was relatively little comment in the consultation responses on the proposals regarding trustees. Where comment was made it was generally supportive. According to NICVA in relation to the proposed incorporation power:

“The main advantage of the incorporation of charity trustees is that the charity itself can have property in its own name, whereas under the current rules, it would need a holding trustee to hold the property on its behalf. Taking away the need for a holding trustee avoids the need for the execution of deeds, transferring land and/or investments, which costs money and can be quite time consuming.”⁴³

FUNDRAISING

Fundraising is of vital importance to charities. The nature of fundraising activity has developed over the years. Nowadays, in addition to traditional forms of street and house to house collections, fundraising is often undertaken through electronic media and through modern collecting techniques such as direct debits. However, the existing legal framework in relation to such techniques is “non-existent.”⁴⁴

Charities are also increasingly relying on professional fundraisers. Areas such as payroll giving and direct marketing campaigns are normally run on charities behalf by professional fundraisers. There has been much discussion in the media about the presence of on-street professional fundraisers. They have suffered from a poor public image and are often referred to as ‘chuggers’, short for charity muggers. Despite the importance of professional fundraising their activities are not closely regulated in Northern Ireland. This contrasts to the rest of the UK where statutory regulation is in place

⁴³ NICVA(2006) *Briefing Paper: The Charities (Northern Ireland) Order 2006*
<http://www.communityni.org/uploads/docs/Draft%20Charities%20Order%202006%20NICVA%20Briefing%20Paper%204.pdf>

⁴⁴ Cormacain, R and O'Halloran, K (2001) *Charity Law in Northern Ireland*

Research⁴⁵ has revealed that the most popular form of giving is where individuals are approached and asked for a donation as happens through street collections. But reports over bogus charitable street collections suggest that public confidence in this type of collection could be higher.⁴⁶

PUBLIC CHARITABLE COLLECTIONS

The current legislation governing street collections is the Police, Factories etc (Miscellaneous Provisions) Act 1916 and the legislation governing house-to-house collections is the House-to-House Charitable Collections Act (NI) 1952. The Bill, Part 13 Chapter 1 (sections 130 to 148) proposes to replace the current legislation governing street and house to house collections and introduce a modernised framework in order to improve public confidence in the system.

The Bill, under Clause 130, introduces a new concept of “public charitable collections” which are defined as charitable appeals, made either in a public place or by door to door collections. This will provide greater clarity than under the current framework. For example, in relation to door to door collections it is clear that this includes business properties rather than just residential properties.

The term ‘appeals’ includes the giving of money by whatever means. This would include, for example, direct debits. Clause 131 defines the types of appeals that are not considered public charitable collections. This includes those that take place on land occupied by places of worship.

In order to conduct these collections individuals or organisations responsible for them must obtain both a public collections certificate and a permit from the Charity Commission.

Public Collections Certificates

In essence the public collections certificate will prove that an organisation or individual is trustworthy to collect. The Bill, under Clause 138, specifies grounds on which the Commission could refuse to approve a collection certificate, for example, where the applicant has been convicted of a criminal offence, or where the amount likely to be given for charitable purposes is inadequate given the total amount likely to be obtained.

Permits

A permit will allow a collection to take place at a particular location and at a particular time. There is only one ground on which the CCNI can refuse a permit, under Clause 144, that is where it “would cause undue inconvenience” to the public or businesses. This could be, for example, where there were already collections taking place at the same time on the same day.

Short-Term Local Collections

It is proposed, under Clause 135, that short-term local collections would be exempt from the certificate and permit requirements. Although these collections are exempt from the need to obtain certificates and permits the promoter must still notify the Commission of the proposed collection.

⁴⁵ NICVA (2005) *Is it Worth More Than Small Change?*

<http://www.communityni.org/index.cfm/section/Publications/key/smallchange>

⁴⁶ http://news.bbc.co.uk/1/hi/northern_ireland/2933852.stm

ISSUES ARISING

Generally consultees were supportive of the proposals in relation to public collections. There was a concern from some organisations, for example, the Law Centre Northern Ireland, that regulation in this area should not be “*unduly bureaucratic*.”⁴⁷

Initially the Department proposed that door to door collections would only require a certificate, but not a permit.⁴⁸ However, some respondents to the consultation suggested that both should be required. The Department therefore changed the proposals and the draft Order required both a permit and certificate to be obtained.

Not all respondents were supportive of this change though. As the Institute of Fundraising Northern Ireland,⁴⁹ argued, “*regulation should be proportionate to the scale and nature of activity*” and that as door to door collections “*do not raise capacity issues like street collections*” they should not require to obtain a permit.

PROFESSIONAL FUNDRAISERS

Part 13 Chapter 2 of the Bill proposes to introduce new controls over the use of professional fund-raisers and commercial participators. The intention behind the proposals is to increase accountability and to provide greater transparency to those making donations.

The proposals can be found in clauses 149 to 158. The following is a summary of the key proposals:

- A professional fundraiser can only collect on behalf of a charity if there is a written agreement in place. The agreement must meet prescribed conditions which will be set out in regulations.
- A professional fundraiser must indicate which charity they are collecting for, how they will be remunerated and, where they are collecting on behalf of more than one organization, how the proceeds of the appeal will be distributed.
- Lower-paid collectors will be excluded from the requirements.
- A person making a donation over £50 by credit card / debit card in response to a radio or television appeal should be able to cancel their payment within 7 days and obtain a refund from the fundraiser.
- A charity can apply to the Courts to issue an injunction preventing unauthorised fundraising on its behalf.
- It will be an offence to collect money for an institution which is not a registered charity by falsely claiming that it is.
- The Department is given a reserve power to introduce further controls if required. In particular the regulations may impose good practice requirements on those involved in charity fundraising. A good practice requirement may be that undue pressure is not placed on members of the public to donate.

⁴⁷ Law Centre (NI) (2006) *The Charities (Northern Ireland) Order 2006 Proposal for an Order in Council Consultation Response*:

<http://www.lawcentreni.org/Policy/Responses/Responses%202006/charities.htm>

⁴⁸ Department of Social Development (2005) *Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005*: http://www.dsdni.gov.uk/charities_consultation.doc

⁴⁹ Institute of Fundraising *Response to the Review of Charity Law in Northern Ireland*: http://www.institute-of-fundraising.org.uk/current_intro.html#4. *Review of Charity Law in Northern Ireland*

ISSUES ARISING

Again those responding to the Department's consultations generally welcomed these proposals. For example, NICVA suggested that the proposals would be of benefit to the public, enabling them to be more discerning about where and to whom they make donations. The Law Society (NI) thought that the existence of written contracts "*will ensure better resolution of disputes where they may arise regarding the arrangements between parties.*"⁵⁰

The Institute of Fundraising, which was supportive of the proposals, already provides model written agreements between charities and professional fundraisers and commercial participators as part of its wider Code of Practice.

The approach in the Bill including the reserve powers given to the Department is consistent with the rest of the UK. Further good practice in the UK is being encouraged through a self-regulatory approach. The Fundraising Standards Board⁵¹ (FSB) is a new body funded by the Cabinet Office and the Scottish Executive (for the first five years). It encourages charities and other fundraising organisations to become members and deals with public complaints about fundraising activity. Memorandums of Understanding have been established with the Charity Commissioners to cover potential areas of overlap and eliminate any areas of duplication. It is not clear as yet if Northern Ireland will, and to what extent, be involved in this approach.

OTHER PROVISIONS

There are a range of other provisions in the Bill that aim to support the better administration of charities. A brief outline is given below.

APPLICATION OF PROPERTY CY-PRES

Part 6 of the Bill covers a range of powers designed to improve the administration of charities. It covers, for example the powers of the Commission to suspend any trustee where any mismanagement in the administration of a charity has been found. This was referred to on the section on the CNNI above.

Part 6 under clauses 26 to 30 also deals with 'cy-pres' schemes. Cy-pres occurs when a gift is given to charity and that gift fails or lapses. Under the 1964 Act the Charities Branch and the courts can create a scheme to change the purposes of the failed gift. Instead of going to the failed charitable purpose the gift goes to a new but related charitable purpose.

The Bill sets out the circumstances in which the original purposes of a charitable gift can be altered by the Court or Commission to allow the property given or part of it to be applied cy-pres. Consideration must be given to the spirit of the gift concerned and the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

Under the 1964 Act there are monetary limits that define the maximum value of charity property with which the Department can currently deal; more valuable

⁵⁰Law Centre (NI) (2006) *The Charities (Northern Ireland) Order 2006 Proposal for an Order in Council Consultation Response*:

<http://www.lawcentreni.org/Policy/Responses/Responses%202006/charities.htm>

⁵¹<http://www.fsboard.org.uk/what-are-we.aspx>

property can only be dealt with by the courts. For example, the power to make Cy Pres Schemes to change the purposes of a charity is limited to £50,000. According to the Department's 2005 consultation paper, "These powers have proved popular with trustees, since they save the charity concerned the cost of an application to the Court."⁵² The Department proposed that the limits on its powers to make such schemes should be abolished, giving the Charity Commission unlimited jurisdiction. This would not affect a charity's right to apply to the Court for such a scheme if it felt this would serve its interests better than an application to the Charity Commission. The Bill therefore does not specify any monetary limits.

CHARITY LAND

In terms of distribution of property, if a charity is being wound up, approval will have to be sought from the CCNI. This protects the public interest as the assets were gained for a charitable purpose.

Part 7 of the Bill under clauses 58 to 63 sets out provisions for the disposal of land held by or in trust by a charity not requiring an order from CCNI. These include a number of requirements in relation to obtaining professional valuations, advertising the sale, and ensuring that the terms of sale are the best obtainable. Certain disposals, for example where the purchaser has some connection with the charity, would still require consent from the Court or the CCNI.

⁵² Department of Social Development (2005) *Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005*: http://www.dsdni.gov.uk/charities_consultation.doc