

Policy Objectives of the Bill

In February 2020 the Court of Appeal dismissed the Appeal by the Charity Commission for Northern Ireland (the Commission) against Madam Justice McBride's High Court Judgment of May 2019, which found that the Charity Commissioners were the body corporate, "the Commission", and that they do not have implied or express power to delegate their functions to staff acting alone. The Judgment rendered decisions taken by Commission staff unlawful where the staff member's authority to take the decision depended on the Commission having delegated a statutory power or duty.

The Bill will amend the Charities Act (Northern Ireland) 2008 (the Act) with retrospective effect to render lawful previous decisions taken by Commission staff in reliance on unlawful delegation in cases where doing so is consistent with rights under the European Convention on Human Rights (ECHR) and the decision is not unlawful on other grounds. It will provide a power of delegation to Commission staff going forward provided the functions to be delegated are set out in a Scheme of Delegation approved by the Department, but will stipulate that certain functions can never be delegated to staff.

In addition the Bill will insert a power to enable the Department to introduce a registration threshold at some future point, via regulations, subject to the draft affirmative procedure [Refer to the Charities Bill](#).

Q5. Do you think that the Bill will meet the policy objectives? If not, why not?

Yes No Unsure

Please provide further comments

NICVA believes that the Bill will meet the policy objectives as outlined.

Q6. Do you foresee any unintended consequences of any of the policy objectives of the Bill?

Yes No Unsure

Clause 1: Actions of Commission staff treated as Commission actions

Clause 1 makes provision with retrospective effect to make the majority of decisions taken by Commission staff lawful and provide fresh appeal rights for those decisions in accordance with Schedule 3 to the Act. Importantly, decisions which are the subject of ongoing litigation or were taken under sections 22(6), 24(1) and decisions to make an order under sections 33-36 will not be subject to the clause in order that individuals' rights under Article 6 or 8 of, or Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR) are protected. Such decisions will therefore remain unlawful, as will decisions which were additionally unlawful on grounds other

than the unlawful-delegation ground. Where an unlawful decision has been replaced by a fresh lawful decision before the Bill becomes law, the Bill does not alter the operation of that replacement decision.

Q7. 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 No Unsure

Please provide further comments

It is important that certain previous decisions made by Commission staff are rendered lawful as it is recognised that it was not necessarily the decision they made which was unlawful but rather that they didn't have lawful delegated authority to make these decisions on behalf of the Commission.

Q8. 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 No Unsure

Please provide further comments

NICVA agrees that contentious decisions that were made by Commission staff remain unlawful so that they can proceed to their natural conclusion, through the courts if necessary.

Q9. Do you feel that the Refreshed Appeal Rights in Clause 1 are sufficient?

Yes No Unsure

If not, what would you propose?

NICVA welcomes that fresh appeal rights are included in this Bill for those that want to challenge the lawfulness of a decision rendered lawful by this Bill ('relevant action') however they are only being given 42 days to make an appeal which is quite a short time. We appreciate that 42 days is the same timeframe in which charities currently have to make an appeal but believe that is too short also. Charities should be given a longer time in which to gather evidence in their support of the appeal, it should be three months.

We appreciate that this Bill is being taken forward at the same time as the 'independent review of charity regulation' and we have raised this as an issue in our response to that review also.

Under the current regime, if a charity is unhappy with a decision of the Commission, it currently has two routes open to it: it can appeal to the Charity Tribunal and the Commission also offer an internal decision review. The deadline to appeal/request an internal decision review is currently set at 42 days from the date of the original decision. The time limit for both routes presently runs concurrently meaning that if a charity availed of a decision review and the decision was upheld by the Commission, the time limit for lodging an appeal to the Charity Tribunal may be passed.

We know there is the option of submitting an appeal to the Charity Tribunal and then asking that this be stayed pending the outcome of the decision review, but most people would not be aware that they can do this. We believe that the Charity Tribunal should be the last resort for charities and not encouraged at the same time as submitting a decision review request.

Q10. Please provide further comments in relation to Clause 1.

Many charities will be pleased that they do not have to go through the charity registration process again and will be relieved to know that previous ‘consents’ obtained such as permission to change charitable purposes and schemes will be lawful when this Bill receives royal assent.

Clause 2: Power of Commission to delegate to staff

Clause 2 inserts paragraph 9A into Schedule 1 to the Act allowing for certain functions to be delegated to staff provided they are set out in a Scheme of Delegation approved by the Department. It also stipulates that the following can never be delegated: power under section 22(1) to institute an inquiry; decisions under section 22(6) that a report or statement be published; power to make an order under sections 33 to 36; and any statutory power of the Commission to make regulations.

Q11. Do you feel the power of the Commission to delegate to staff certain functions that are listed in a Scheme of Delegation is sufficient?

Yes No Unsure

Q12. 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 Scheme of Delegation

It is important that Charity Commission staff should be able to make certain decisions on their own to ensure that charities are able to receive decisions in a timely manner. Certain decisions however which could negatively impact on the reputation of a Trustee or a charity should not be taken by staff as identified.

NICVA believes that this Bill provides clarity on the future delegation of decision-making powers to Commission staff including those which cannot be delegated.

Q13. 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)?

As the Department for Communities is responsible for charity legislation and the Charity Commission, it would seem appropriate that it would make the scheme of delegation. This however will only work in practice if it is created in consultation with the Commission staff and Commissioners. It is important that the Commission is part of this process from its inception to ensure that the internal workings of the

Commission are reflected in the scheme. It would appear that this scheme would create a new decision-making framework within the Commission for certain decisions and it should take account of extra time required by staff to prepare reports to the Commissioners. It may also require additional meetings of the Commissioners or extended meetings.

Q14. Please provide any further comments in relation to Clause 2.

The Commission is already under resourced to carry out all of its functions effectively and we would be concerned that this Scheme will result in additional resource issues for the Commission. The Department should provide additional resources to the Commission to allow for this additional time burden that will be created for both the Commissioners and staff in the Commission.

Clause 3: Power to introduce a registration threshold via regulations

Clause 3 inserts new sections 16A to 16C which provide a power to introduce a registration threshold through regulations at some future point, subject to the draft affirmative procedure (except in the case of varying the amount of an existing threshold)". The power will allow for the regulations to:

- exempt charities falling below the threshold from the requirement to register;
- determine the nature of the threshold;
- determine any evidence to be provided to the Commission and allow for that evidence to be used in pursuance of the Commission's functions;
- apply or dis-apply any provision of the Act to any charity exempted from registration by the threshold; and
- amend any offences or introduce similar or corresponding ones as a consequence of the threshold. The clause itself will permit charities falling below the threshold to register voluntarily or be removed from the register if they so wish.

Q15. Do you feel it is appropriate to have this power in the Bill?

Yes No Unsure

Please provide further comments

NICVA welcomes that this Bill includes the power to introduce a de-minimis threshold for charity registration at some future point through regulations. We welcome also that a charity that falls below any set threshold would be able to remove itself from the charity register and agree that any charity not required to register should be permitted to do so if they want to be a registered charity.

Since the enactment of the Charities Act (NI) 2008, we have identified that a de-minimis threshold is needed so that very small charities are not required to register, and we have highlighted this many times to both the Charity Commission and the Department over the years. Most of the respondents to our 2020 survey on issues with charity regulation have also highlighted this as an issue and have called for a

de-minimis threshold to be introduced for charity registration. This issue was also brought up by participants at all of the recent engagement meetings held by the panel for the independent review of charity regulation.

There is a real danger that existing small organisations are going to wind up rather than having to register and/or report annually to the Commission. Trustees of smaller organisations have told us, and other helper groups, that they find the regulations overwhelming. Very small organisations do not have the benefit of staff to help them and many of the small charities that are/have been 'in default' on the register have older Trustees who sometimes find the process of reporting online quite daunting and sometimes difficult. It is also discouraging new organisations from forming as the charity registration and reporting regime is not always welcomed by those small organisations that don't identify with being a charity.

Q16. Please provide any further comments on the list of matters that the regulations will cover? Are there any matters missing from the list?

We interpret that 'dis-apply any provision of the Act to any charity exempted from registration by the threshold' to mean that exempted charities may not have to file annual accounts and reports to the Commission. We have found through working with smaller charities that the reporting and accounting requirements have been overwhelming for some.

NICVA welcomes the plans to introduce proportionate regulation for small exempt charities so that they may not have to file accounts and reports however we are concerned about the reporting requirements for small charities that do choose to be registered. Even with a charity registration threshold in place, a reporting threshold for small registered charities may still be needed as we need regulation that is proportionate to the size of the charity. Expecting a registered charity with an income of £3,500 to conform to the same accounting and reporting rules with a charity who's income is £220,000 is not proportionate. The accounting and reporting thresholds therefore need revised to help relieve the burden on small registered charities.

Also, small exempt charities that may want to be registered could be discouraged from doing so if they have to adhere to the accounting and reporting requirements for registered charities if there is no reporting threshold.

We are unsure if a power is required to be provided in this Bill or if future regulations could exempt registered charities, that fall under a particular threshold, from having to file annual accounts and reports. If it is not possible for small registered charities to be potentially exempted from the reporting requirements via future regulations then perhaps the power should be included in this Bill.

Q17. Please provide any further comments on Clause 3.

NICVA would like to see a timetable in place for the introduction of Clause 3 to ensure that this is implemented as soon possible. We appreciate that this Bill and the Committee scrutiny of the Bill is being taken forward in parallel with the Independent Review of Charity Regulation however, we are concerned that without a

timeframe in place, further secondary legislation may not happen. To demonstrate our concern, we would point to the non-introduction of the Charitable Incorporated Organisation (CIO) which is provided for in the 2008 Charities Act but further secondary legislation was never brought in to make this an option for charities in N. Ireland.

We understand that the Commission must implement the legislation but we would see it as futile to continue to register small charities if new forthcoming regulations mean that small charities will not be required to register.