



Department for

Communities

An Roinn

Pobal

Department for

Commonities

www.communities-ni.gov.uk

to be best
point of vi
Charity
generous

Independent Review of Charity Regulation NI

January 2022

Contents

Executive Summary	4
Preface	10
Chapter 1 – The Charity Landscape in Northern Ireland	12
Chapter 2 - Charity Regulation: Objectives, Functions and Duties	24
Chapter 3 - The Commission’s Regulatory Approach and Resourcing to achieve it	41
Chapter 4 – Engagement with Stakeholders	63
Chapter 5 – Registration	89
Chapter 6 – Annual Reporting	123
Chapter 7 – Compliance and Investigation	152
Chapter 8 – Enforcement and Appeals	178
Chapter 9 – Sponsor Department Ownership of Policy and Regulation	207
Chapter 10 – Technical Issues	230
Review Panel Conclusion	251
Annex A - Terms of Reference - Independent Review of Charity Regulation in NI	255
Annex B - Stakeholder Engagement Meetings	258
Annex C - Webinar Attendees	259
Annex D - List of Submissions to the Review	268
Annex E - List of Documents that relates to the Assessment of the Commission’s Governance	270
Annex F - Full list of Recommendations from the Independent Review Panel of Charity Regulation in NI	271
Appendix 1 - Charity Commission NI Staff Structure	280
Appendix 2 - Comparative Table of Appointments	281

Executive Summary

Northern Ireland possesses a diverse and vibrant charity sector. Charities are found in every community and council area. They come in all shapes and sizes and respond to a wide range of needs across the region, from the advancement of education, relief of poverty, advancement of health and religion and many other purposes that are beneficial to the community. Individual charities may differ greatly in certain respects: from the amount of money in their bank accounts to the number of staff they employ (if any) or the number of volunteers who swell their ranks to deliver their charitable mission. They do, however, share one great thing in common – all of them leverage private money and voluntary effort for public good and they strive to provide public benefit through their charitable activities in their neighbourhoods. Charities depend upon public trust and confidence and NI -- like many other jurisdictions -- has established a charity regulator (The Charity Commission for Northern Ireland) and created a regulatory framework to provide the public with an assurance mechanism that registered charities are deserving of that continuing trust, confidence and support.

In appointing the Review Panel, the Minister asked us to assess the delivery of the charity regulatory framework to date and to bring

forward options for optimal charity regulation in NI. To this end, our Terms of Reference (available at **Annex A** of this report) required the Panel to examine whether the charity legislation and the Charity Commission's efforts within that legal framework struck the right balance, in light of best practice, between supporting charities to do the right thing and deterring or dealing with misconduct.

A strong evidence base has been vital for the Panel's work and to support the 93 recommendations made. These recommendations are discussed in the course of each chapter as they arise and a full list is reproduced in **Annex F**. Two important findings flow from the Panel's consultation processes referenced in the Preface to this work: firstly, there is broad agreement across the sector that regulation benefits the charity sector itself and its reputation. Secondly, there is a shared consensus that the process of regulation can be improved and that the burden of regulation can be reduced. Knowing these two things, the Review Panel focused its efforts across this report's ten chapters on understanding the current state of charity regulation – including its achievements and its challenges -- and offering pragmatic proposals to bring about the improvements sought and desired by all.

While the Panel finds that the statutory objectives and statutory functions outlined in the Charities Act (Northern Ireland) 2008 (the 2008 Act) remain fit for purpose, two important legislative flaws in the 2008 Act have deeply affected the operation and culture of the Charity Commission and impact the regulatory position we find ourselves in today. Due to a problem with the public benefit test in the 2008 Act, registration of charities did not actually commence until December 2013, following the passage of the Charities Act (Northern Ireland) 2013. This was four years after the establishment of the Commission and a full two years after the Commission was given investigation and enforcement powers. The early focus on compliance duties and the Commission's need to respond to concerns raised by the public about various charities, coupled with the Commission's decision to create a clean register of charities, contributed heavily to the low rate of registration and the continuing delays to registration today. More recently, the 2019 High Court decision in *McKee v Charity Commission* (affirmed by the Court of Appeal in 2020) found that the 2008 Act did not provide the Charity Commissioners with express power to delegate decision-making powers to staff, resulting in the 7,500 orders, directions and decisions taken by such staff being found to be unlawful. The Panel has recognised the implications of these historical drafting flaws and the impact that they have had both on the Commission's regulatory culture and approach (explored in Chapter 3) and upon

trust in the regulatory process (explored in Chapters 4 and 7). Repairing the fissures caused by these drafting flaws requires all stakeholders – the Department, the Commission and the sector – to reset the dial. This will take time and resources and require a clear road map of achievable change, but it will lead to a stronger, more visible charity sector supported by an enabling and responsive regulator.

While the Panel considers that all 93 of its recommendations are important and deserving of implementation, we draw particular attention to some recommendations which by their very nature should be prioritised. The top priority must be completion of the charity register. Some charities have been waiting years to be called forward to register. Registration brings charity visibility for all stakeholders; it is the start of the regulatory journey for charities, and it enables the Commission to have sight of a charity's financial and governance information and activity. In short, you cannot regulate what you cannot see. Allied to the need to clear the backlog of registration applications is a need for a better understanding of the broader non-profit sector in NI of which charities represent a small, albeit important, part. While every charity will be a non-profit, not every non-profit will be a charity. The Panel considers in Chapter 1 the differences between non-profits and charities, the good work done by both and the need for better Departmental mapping of the broader sector in NI.

Turning to the actual process of registration in Chapter 5, the Panel believes that all charities should be registered and that a threshold approach to registration should not be introduced. On balance, we believe that the whole principle of registration and the reputational and public confidence benefits that flow from registration for the entire sector outweigh the disadvantages of mandating registration. The Panel does, however, believe that the registration process can be improved and it makes recommendations to this end.

If all charities are required to register the need for proportionality becomes ever more important. The Panel notes that presently 50% of registered charities record a gross annual income of less than £25,000. The Panel makes recommendations to the Minister to amend the 2008 Act and the associated Charities (Accounts and Reports) Regulations (Northern Ireland) 2015 to lighten the regulatory burden on smaller charities in terms of the type of financial information and reporting that they are required to file each year and the requirement for independent examination. The Panel also makes a series of recommendations that would result in the Commission receiving less, but better quality, financial data each year that would position it to make more targeted regulatory decisions aligned with its new Risk Assessment Framework. How a small charity should be defined for reporting purposes is, of course, an important policy decision for the Minister

and the Panel advises further consultation on the extent to which the threshold should be defined on an income only or combined income/asset threshold.

Proportionality is not just important in annual reporting but also in the Commission's general regulatory approach. The role of every regulator evolves over time and the Panel recommends that having now entered its second decade the Commission should become a more responsive regulator. A move to more responsive regulation would see the Commission follow a truly risk-based assessment system in which proportionate regulation should reduce Commission scrutiny of compliant charities and allow more targeted enforcement where breaches are identified. The shift to a targeted regulation approach, particularly by the UK Regulators that we met, is both well underway and an ongoing process and has much to recommend it. The Panel recognises the steps the Commission has already taken along this path with its Transformation Project and the introduction of its Risk Assessment Framework and we encourage it to continue and increase its efforts.

Striking a balance between encouraging charities to do the right thing and deterring misconduct is a particularly important task when it comes to matters of sector engagement, compliance and enforcement. The Panel consulted widely on the sector's experience in these areas and Chapters 4 and 7 provide a rich tapestry of experiences – some excellent, some good

and some not so good. The Panel makes a number of recommendations about the Commission's engagement with the sector. We believe that the Commission needs to be more outward facing in its dealing with charities so that it can better enable the sector in the task of compliance. **How** the Commission communicates (both in terms of communication tone and pitching guidance at the right level) is just as important in terms of sector impact as **what** the Commission communicates (in terms of technical guidance or advice).

The Panel believes that the Commission should position itself to use the full spectrum of compliance tools available to it – starting with supporting and educating those charity trustees who are eager to meet their statutory requirements to do so effectively and efficiently. Sector buy-in is key to successful regulation and we believe that applying a collaborative, enabling approach means that at every stage along the compliance spectrum the Commission should focus on enabling charities to comply until that is no longer a possibility. When that moment is reached, the Commission needs to have the necessary regulatory powers to allow it to act to properly protect charities and their charitable assets.

In terms of enforcement, the underlying role of the Commission is to act as the protector of charities in the public interest. The full scope of the Commission's enforcement powers is discussed in Chapter 8. Critical to our deliberations is how these powers have

been experienced. We had more limited responses here as there are fewer charities with experience in this area. From those who did share, we learnt that generally the Commission is supportive of charities and knowledgeable about issues they face, that they investigate thoroughly and take steps to resolve issues and act swiftly. Some felt the balance was right while others felt that there was insufficient guidance and that at times there was an unnecessary aggression or heavy-handedness on the part of the Commission. We also gained key insights from our engagement with other regulators. Regulators shared best practices of early resolution of concerns at the lowest possible level of intervention. These exchanges informed our recommendations about powers to promote proportionate enforcement, internal avenues of appeal and higher appeals. The Panel also explored what powers are reserved to Commissioners or their equivalents in other jurisdictions and we make recommendations on delegated powers in Chapter 10.

Turning to the Commissioners, the Panel recognises the key role they will play in the strategic direction of the Commission going forward, and the leadership role that this presents. As the Commissioners currently make all decisions of behalf of the Commission and will continue to reserve certain decision-making powers after the passage of the Charities Bill 2021, we are strongly of the view that the composition of, the skills required for, and the size of

the Board should be reviewed to ensure the Board is properly resourced to carry out the tasks flowing from this report.

In reviewing the relationship between the Sponsor Department and the Commission, the Panel believes that the Department needs to demonstrate to all stakeholders (including the Commission) that it has the skills and expertise to ensure that policy and legislation is developed and kept current in line with best practice. The Department told the Panel that they are currently engaged in a process of strengthening their oversight. The Panel welcomes this and recommends that the Department formally review the metrics by which it measures the Commission's performance so that there is greater focus on outcomes and greater discussion of how the Commission's actions in a given year have contributed substantively to the achievement of its statutory objectives. We make recommendations about fundamental building blocks to underpin their future relationship. Information sharing between the Commission and the Department is an issue and we make a recommendation to improve this.

As we look to the future and the need for possible legislative amendment to bring some of these report recommendations to fruition, the Panel was also conscious of the as yet un-commenced provisions of the 2008 Act with particular regard to the establishment of charitable incorporated organisations (CIOs) and the registration of s.167 institutions. Both matters are examined

in Chapter 10. The Panel believes that while the introduction of the CIO is not a panacea, it nevertheless provides an important legal structure that will enable charitable activity and facilitate greater protection for charity trustees while also reducing the reporting burden on smaller CIOs. The Panel makes a number of recommendations which support early commencement of these provisions. Regarding s.167 institutions, the Panel felt the frustration of affected organisations in this category and recommends the commencement of the relevant legislation after appropriate review and amendment of the language of s.167 to address existing concerns over the operation of this section in terms of the registration and reporting that will be required of these charities.

Not all our recommendations have resourcing consequences but clearly many do, and the Minister will need to consider the type of regulator that she wants to see emerge in the coming years and the associated cost of providing that model. A clear costed and staged plan for this report's recommendations will therefore be required and judgements will have to be made about priority issues. The Panel explores the Commission's resourcing in Chapter 3. Some of our recommendations have resource consequences, others relate to capital; some can be started in year immediately whereas others require staged planning and implementation. Some require a change of approach and a change of tone. The Panel would stress the cost of

getting things wrong far outweighs the cost of getting things right and would urge the Minister and the Department to reflect upon the entirety of the recommendations made, which are intended to bring about a regulatory framework which is collaborative, proportionate and robust. The starting point on this journey remains the same - namely, a greater focus on the registration of charities on the combined list, a task the Panel believes can and should be completed before decisions about thresholds are finalised.

Preface

On January 25, 2021, the Minister for Communities, Deirdre Hargey MLA, announced the appointment of an Independent Panel to review charity regulation in NI. Professor Oonagh Breen was appointed to chair the Review Panel (the Panel), which included the Reverend Dr Lesley Carroll and Mr Noel Lavery and the Panel received its Terms of Reference on February 28, 2021. The Terms of Reference are set out in **Annex A**.

The Panel's Terms of Reference required us to examine whether the charity legislation and the Commission's efforts within that legal framework strike the right balance, in light of best practice, between supporting charities to do the right thing and deterring or dealing with misconduct. To this end, we were asked to prepare a report setting out our "assessment of the delivery of the regulatory framework to date, including the effectiveness of the current regulator in delivering on its agreed objectives and statutory functions; options for optimal charity regulation in NI, including the configuration of a statutory regulatory body; and making final recommendations."

The Panel endeavoured to hear as many voices as possible in the time available. We held 9 community engagement webinars throughout the month of April, which were attended by 306 individuals from across

the spectrum of charities, the general public, lawyers, accountants, and funders. We also held 20 additional meetings with key stakeholders, including representatives from the Department for Communities, the Charity Commission, charity regulators in Scotland, England and Wales and Ireland and responsible government bodies in Ireland and Scotland. We also met with charity support organisations and those parties who had first-hand experience of the Commission's enforcement powers. As part of our engagement process, we invited all interested parties to participate in our online consultation on charity regulation which was available from April 12 to May 12, inclusive. We were delighted to receive 135 online submissions and a further 10 written submissions in response to this invitation. The information that we received from all of these parties – at the webinars, through our various meetings, from the online consultation and other submissions in writing – has enabled us to define the issues at hand, to understand the various challenges that exist when it comes to charity regulation and to now make recommendations to the Minister. A full list of those who informed our views is available in **Annexes B, C and D** and where consent has been provided, you may also access online their written submissions to our consultation.

Our report comprises 10 chapters, beginning with a necessary wide lens on regulation that examines where charities sit within the broader non-profit sector in NI, before reviewing the Commission's statutory objectives and functions (Chapter 2), its regulatory approach to date and how it is resourced (Chapter 3), and its culture of engagement, informed by the manner in which the legislation was commenced (Chapter 4). The important regulatory areas of registration (Chapter 5), reporting (Chapter 6), compliance (Chapter 7), and enforcement (Chapter 8) are each then considered in detail before the Panel turns to the critical issue of Departmental ownership of policy and the legislative framework (Chapter 9) and necessary technical matters requiring attention for the regulatory framework to be fit for purpose (Chapter 10).

Over the course of these 10 chapters, the Panel makes 93 recommendations. The Panel's recommendations are informed by the belief that the underlying role of the Charity Commission is to act as the protector of charities in the public interest. To this end, the Commission facilitates charitable activity for the public benefit through good regulation of those persons or entities who control charities. Our recommendations are for the Department, the Charity Commission, and the charity sector more broadly since the creation

of a good regulatory framework for charities requires the active collaboration of these key stakeholders.

Giving effect to these recommendations will require resources, an overarching workplan on the part of the Department and delivery by both the Department and the Commission. It will require a reset in the culture of the Commission and strong leadership from the Commissioners. It will also require a commitment from across the charity sector to work collaboratively with the Commission on this new regulatory pathway. In essence, the focus must now be on completion of the task of registration as a key priority; recognition of the need for a reduced reporting burden on smaller charities; and the envisioning of a compliance and enforcement regime that is based on proportionality, encourages compliance right up to the moment when enforcement becomes necessary, and when that moment arrives ensures that the Commission has the right powers to hand to properly protect charities and their charitable assets.

Dr. Oonagh B. Breen
Rev. Dr. Lesley Carroll
Noel Lavery

4 October 2021

Chapter 1 – The Charity Landscape in Northern Ireland

1. Introduction

What does the charity landscape look like in Northern Ireland? How many charities are there? What do they do? What sort of funds do they have at their disposal and how do they use these resources for their charitable purposes? Who volunteers or works with these organisations? Can the public have trust and confidence in them? Prior to 2008, it would have been hard to answer these questions – there was no official register of charities at the time the Charities Act (Northern Ireland) 2008 (the 2008 Act) was passed into law. That Act established the Charity Commission for Northern Ireland and created a register of charities, to which all organisations meeting the Act’s charity test are required to be registered. The fact that we can talk more knowledgeably about charities today than we could a decade ago is due to this Act. That is not to say that the regulatory regime introduced by the 2008 Act is perfect or even complete. There remain many gaps in our knowledge of the charity sector. Mapping the charity sector, thereby increasing our knowledge base, is important as it helps society understand the considerable levels of volunteerism and charitable work that is carried out to the benefit of the public and without which

society would be considerably poorer and less compassionate. As we begin this review of the regulation of charities in NI, it is good to take stock of the charity landscape in 2021.

This chapter begins by briefly explaining the differences between charities and other types of non-profit organisations. It explains the privileges that charities enjoy and the responsibilities that justify greater statutory regulation of charities. It provides some context for the scope and scale of NI charities and the important contribution they make to society in return for the broad public and state support that they receive. Having identified the relevant institutions, it sets out the regulatory framework that currently applies to charities and sets the scene for the Review Panel’s report and recommendations.

2. The Landscape of Non-profit and Charitable Organisations

It is often said that, despite history, we live in a caring society. It is certainly the case that we have a strong third sector without which our society would be impoverished. Across the third sector there are both charitable and non-profit organisations. As we begin to map the

sector it is helpful to clarify the difference between a charity and a non-profit organisation and to chart the scope of work carried out by these organisations.

2.1. What is the difference between a Non-profit and a Charity?

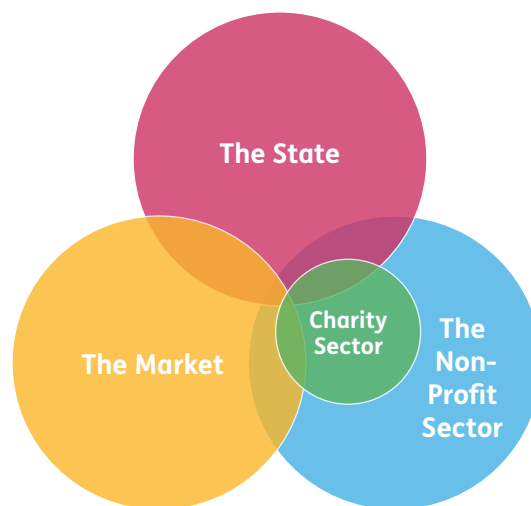


Figure 1.1 The Relationships between Market, State, Non-profit and Charity sectors

Charities form a small but important subset of the larger non-profit sector in NI. We normally distinguish the “non-profit sector” from both the “for-profit” or market sector and from the state. It is known by many names in many different regions, including “the community and voluntary” sector, “the not-for-profit” or “non-governmental organisation (NGO)” sector, the “third sector” or “the social economy.” One of the most widely accepted definitions of a non-profit organisation was developed by the Johns Hopkins Comparative Non-profit Sector Project in 1991.¹ This project sought to develop a common base of data about a similar set of “non-profit” or “voluntary”

institutions in a disparate set of more than 45 countries and covering all five continents. To this end, it identified five key structural and operational characteristics, discussed in the following section, that seemed to define the range of entities most commonly associated with the non-profit or voluntary sector in countries throughout the world.

2.2. What is a Non-profit?

Non-profits often provide much good in their local communities and enrich civil society, but they are not all necessarily charities as they will not meet the charity test (discussed in Section 2.4) – perhaps they won’t have exclusively charitable

¹ Johns Hopkins Comparative Nonprofit Sector Project (CNP), Methodology and Data Sources, available at <https://ccss.jhu.edu/publications-findings?did=105>.

purposes, perhaps they will not meet the standards of the public benefit test, perhaps they are established outside the jurisdiction of the Northern Ireland High Court. Non-profits are not required to register with or be regulated by the Charity Commission and they are not entitled to charitable tax-exempt status. These organisations may take many forms, including community interest companies (CICs), mutual societies, cooperatives, certain social enterprises, community amateur support clubs, trade unions and organisations otherwise set up not to distribute any profits made to their founders and controllers.

The defining characteristics of a non-profit entity, as explained by the Johns Hopkins methodology,² are that the entity must be:

- 1) Organised, i.e., institutionalised to some extent.
- 2) Private, i.e., institutionally separate from government.
- 3) Non-profit-distributing, i.e., not returning profits generated to their owners or directors.
- 4) Self-governing, i.e., equipped to control their own activities.
- 5) Voluntary, i.e., involving some meaningful degree of voluntary participation.

For many non-profit organisations mission matters more than profit, but they do not necessarily meet the stricter tests set down in the Charities Act to be registered as charities. In other words, a non-profit organisation is a catch-all term for organisations that are, unsurprisingly, “not for profit”, - meaning that their activities are not for the financial benefit of any individual or board of directors. As they are not legal structures non-profits may be companies limited by guarantee or they may be unincorporated membership associations or societies.

The main benefit of being a not-for-profit organisation is that these organisations are much freer to carry out their activities as they do not have to comply with charity law. They can, therefore, engage in other non-charitable purposes, political activities, and other non-charitable purposes to a much greater extent than charities can; they can have greater freedom in their commercial activities than charities, and because they do not have to satisfy the public benefit test, they can choose to limit those who benefit from their activities on a mutual benefit basis.

2.3. Non-profits and Choosing to be a Charity

NI has an important and diverse non-profit sector which includes community and voluntary organisations, social enterprises and charities. The first question that any new group establishing

² Ibid.

itself should ask is whether it needs to establish itself as a charity or whether it can equally operate as a non-profit organisation in the community. The Charity Commission, the Department for Communities (the Department) and the many helper organisations in the sector have an important education role to carry out in helping people to understand the variety of options open to them when they wish to support and help their communities.

Not all good initiatives require the creation of a charity. Community Interest Companies, for instance, which are regulated by the CICs regulator, provide ‘community benefit’, a standard which is lower than the public benefit standard required of charities. Non-profit organisations can equally contribute to a community. One respondent to the online questionnaire made the following comment:

“The requirement to register can act as a barrier for older people who wish to form a group which supports older people to come together and which aims to improve the lives of others. The registration threshold would, therefore, address fears and anxieties about a disproportionate burden placed on a group of people, who wish to volunteer and contribute to the life of their local community. Older people are often the glue that supports volunteer activity in a local

community. The range of activities delivered by small, local groups of older people prior to COVID-19, such as luncheon or social clubs, were not able to operate during the pandemic . . . (there is a concern) that, as we move out from the current lockdown and return to the “new normal”, older people may not wish to re-engage and may decide to close their group rather than return to registration and completing annual reports, particularly online.” ID 135

The Panel notes that non-profit organisations can be formed to enable people to come together and contribute to the life of their local community without the requirement in every case of establishing a charity. Not every social outlet needs a charitable structure, many community gatherings that are hobby or interest-focussed could equally be established as non-profit associations based on a principle of mutual benefit. This is one of the important decisions to be made when a group is being established – what is its intended purpose, is there an existing group that fulfils this need that could be joined instead, from where will it derive its funding sources and what liability will flow from its activities?

In having these conversations, sometimes the nature of the purpose and activity will require registration as a charity; sometimes, funding will only be available

to registered charities, which may influence establishment decisions; sometimes, as may often be the case with school related activities, the lure of Gift Aid or other tax exemptions will prompt the formation of a charity, but this is a choice in the hands of those embarking on this venture.

If we take the example of housing alone, one can imagine the provision of housing through all four separate channels identified in **Figure 1.1**:

- housing may be provided by State or local government;
- it may be through a market-led private development;
- it may be supplied through a housing charity or
- it could equally be delivered through a housing cooperative of private individuals coming together on a non-profit basis to assist each other to obtain a home.

The most appropriate way to proceed in the circumstances at hand has always required a choice to be made in each instance. Making that choice may need to become a more deliberate or considered decision on the part of all stakeholders in NI in the future. It may require better information as to these multiple options. It will certainly require better visibility of the various constituent elements that

make up the larger non-profit sector, of which one small but important subsector is the charity sector, to which we now turn in more detail.

2.4. What is a Charity?

The smaller subset of the charity sector sits within this broader sphere of non-profits. The key factor that differentiates the charity sector from non-profit organisations more generally is whether the organisation is eligible to register as a charity with the Charity Commission. While not every non-profit will be a charity, every charity will be a non-profit. Section 1 of the Charities Act (NI) 2008 tells us that:

“For the purposes of the law of Northern Ireland, “charity” means an institution which— (a) is established for charitable purposes only, and (b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities.”

The Act goes on in section 2 to define a charitable purpose as being one of the listed purposes in that section of the Act and that each of those purposes must be for the public benefit. Charitable purposes must also be “exclusively charitable.”³

The main benefits of being a charity include the public trust and recognition that comes with this status, the associated tax exemptions and benefits

3 Charities Act (NI) 2008, s.180(1).

(e.g., exemption from income and corporation tax, Gift Aid), the preference of some public funders to work with and fund charities because of the regulatory regime with which they comply. Charities can also legally last in perpetuity and when they come to an end, any remaining charitable assets or funds are not lost to the charitable sector but are applied to another charitable purpose as near as possible to that of the defunct charity (under the doctrine of *cy-près*).

All charities that meet the charity test in the 2008 Act are required by law to register with the Charity Commission regardless of size, legal form, purpose, or activities. Section 16(2) of the 2008 Act clearly states, “Every institution which is a charity under the law of Northern Ireland must be registered in the register of charities.” Registered charities must then comply with the annual reporting and governance requirements of the Charity Commission which will be discussed in Chapters 5 and 6.

3. Scope, scale and contribution of Non-profits and Charities

At present, there is no accurate estimation of the size and scale of the non-profit sector in NI. There is no

equivalent to, for example, the Irish database, Benefacts,⁴ which uses open-source data to identify, catalogue and provide transparency on non-profits and which currently contains records for almost 35,000 non-profit organisations, including many Irish charities.

3.1. Available insights into the Non-profit Sector

Limited insights are provided from several sources:

- i. The UK Civil Society Almanac 2020,⁵ produced by NCVO, sets out to estimate the size, scope and finances of the “UK voluntary sector” but limits data to two sources⁶ and only counts charities. To arrive at a UK picture, “aggregate data for Northern Ireland and Scotland is based on financial breakdowns in England and Wales to provide an overall picture for the whole of the UK.” Only limited insight into the non-profit sector is provided from this source.
- ii. The Northern Ireland Council for Voluntary Action (NICVA) produces a State of the Sector Report which it calls “the definitive resource on the size, scope and finances of the Northern Ireland Voluntary, Community and Social Enterprise Sector.”⁷ This online resource uses data from various

⁴ See <https://www.benefacts.ie/>

⁵ NCVO, UK Civil Society Almanac 2020. The Almanac is based on the definition of ‘general charities’ developed by the Office of National Statistics (ONS) to capture the voluntary sector’s contribution to GDP for the National Accounts. In 2008, NCVO expanded the remit of the Almanac to cover a broader range of civil society organisations. However, the focus of the 2020 Almanac is the voluntary sector because of challenges around data quality and availability for organisations that are not registered charities.

⁶ Data for all registered charities based on the Charity Commission for England and Wales (CCEW) register and detailed financial data for a sample of charities using their financial accounts

⁷ <https://www.nicva.org/stateofthesector>.

sources across several different years, primarily the 2015 State of the Sector survey of 4,176 organisations, but also NICVA's Sector Forecast Survey 2016, Individual Giving Surveys 2015 and 2019 and Workforce Survey 2016. The income and expenditure figures are drawn from the 2017-18 funding environment through data collected from the Government Funders Database, Grant Making Trusts, and the Charity Commission. According to NICVA, there are 6,122 voluntary, community and social enterprise sector organisations (VCSE).⁸ However, this resource too is limited as the data for the number of VCSE sector organisations was sourced on 17 February 2020 from the Charity Commission and so is based solely on registered charities, taking no account of those awaiting registration on the Combined List or those non-profit organisations that will not qualify as charities but are active and vibrant in their communities.

- iii. In the case of the VCSE workforce composition, the data was sourced from both NICVA's Workforce Survey 2018 and the Charity Commission (geographic spread and remit) only. The sample used in the Workforce

Survey 2018 consisted of VCSE sector organisations, all of whom are eligible for charitable status even if they are not yet registered. There is thus limited coverage of non-charitable non-profits.

It is therefore difficult to establish a clear picture of the extent of the non-profit sector in NI. Existing statistics on sector funding, workforce size and volunteer participation and governance must be carefully parsed and caveated so that their significance is neither over-estimated nor under-appreciated in sectoral terms.

3.2. What we know about the Charity Sector

The charity sector plays a vital role in NI and the income generated by it is significant. According to the Commission's register of charities:

- There are currently over 6,500 registered charities in NI with many more organisations awaiting registration.
- In a recent analysis of nearly 6,000 sets of accounts received by the Charity Commission in the year 2019/2020, the income reported for all charities combined was over £2.3 billion.
- The same charities reported a total workforce of 41,547 paid employees, 45,579 charity trustees and 135,698 volunteers.⁹

⁸ See <https://www.nicva.org/stateofthesector/profile>.

⁹ Breakdown of the 200,000 submitted figure of the Charity Commission for Northern Ireland to the Independent Review of Charity Regulation for Northern Ireland. This breakdown is based on Commission figures extracted from all annual monitoring returns submitted between 01 April 2019 to 31 March 2020.

While this speaks to the importance of the sector, one should not lose sight of the value that the charity sector brings to society more generally. As charities facilitate the use of private goods for the public benefit, there is a further benefit to society generally. **Vibrant charities are a source of social capital and are vital for voluntary and community efforts. They offer opportunities for leadership and growth.**

The introduction of the 2008 Act was intended to provide the regulatory scaffolding to support and enable these organisations and their charity trustees, to bring visibility to their good work and protect charitable funds for charitable purposes so that the public could continue to have the confidence required to support and benefit from charities.

3.3. What we know about the wider Non-profit Sector

In terms of the broader non-profit sector, beyond the charity subsector:

- There are approximately 334 Community Amateur Sports clubs (CASCs) registered with HMRC¹⁰ and 438 CICs.¹¹ It is not possible for an organisation to be a CASC and a charity, or a CIC and a charity, at

the same time so these entities properly fall into the non-profit sector and will not be registered with the Charity Commission or subject to charity law requirements.

- According to a 2019 report by Social Enterprise NI,¹² there were approximately 843 social enterprises in NI. No database of social enterprises currently exists, and the Department for the Economy has tasked Social Enterprise NI to fill this gap in 2021 with work currently underway to identify and catalogue the level of social enterprise activity, which may result in further changes to the number cited above. Social enterprises, depending on their constitutions, may or may not be required to register as charities so they will either be part of the charity sector or part of the larger non-profit sector.

When it comes to statistics on the broader non-profit sector, getting accurate data is difficult given the caveats previously discussed as to how the sector is defined in NI. Nonetheless, what can be said is that:

- Voluntary and community organisations are an important employer, with an estimated 53,620 employees.¹³ This figure represents 7% of the total NI workforce.

¹⁰ Source: HMRC. Figures correct at September 2021.

¹¹ Source: CIC Regulator. Figures correct at 29 September 2021.

¹² SENI, Rebalancing the NI Economy Report, 2019.

¹³ NICVA, Workforce Survey 2018. This figure will undoubtedly include charity employees too.

- According to the Northern Ireland Statistics and Research Agency (NISRA), 28% of all adults (defined as those 16 years and older) in NI were involved in regular volunteering in NI in 2019/20.¹⁴ Based on current population statistics for 2019 we could estimate in 2019/2020 that 416,948 people volunteered. This number may still under-estimate the full extent of participation in non-profit activities in NI, according to Volunteer Now and other volunteering organisations.
- NICVA cites a figure of £728,761,125 as being the total funding, including grants and contracts to the voluntary and community sector in 2017/18 in its state of the sector report.¹⁵ This update also shows that almost 70% of the total income reported came from central government departments (including non-departmental public bodies) with the largest proportion of central government funding (47.2%) coming from the Department for Communities. Donations from the general public accounted for nearly 22% of income whilst European Union funding accounted for 2%.¹⁶ The Panel also reviewed the level of local government funding to the voluntary and community sector in 2020/21,

which demonstrated significant efforts to promote community, heritage, and cultural activity across NI through financial grants to a wide range of non-profit organisations.

Good policymaking requires the mapping of a sector to assess the contribution of the sector, the importance of that contribution and to be fully cognisant of the sector's strengths or weakness. Visibility of this information is critical.¹⁷ To better inform and guide policy making and to underpin the strength and significance of the charitable sector the Review Panel recommends that:

Recommendation 1: The Department, as the leading state funder whose policy and strategic reach covers the broader voluntary and community sector:

- a) undertakes a mapping and information gathering exercise to develop a clear picture of the non-profit sector and its charity subsector (this should include consideration of the government-supported work of Benefacts in Ireland referenced in Chapter 5, 4.2.);

¹⁴ NISRA, Continuous Household Survey: Experience of Volunteering in NI 2019/20, (2952 respondents).

¹⁵ See <https://www.nicva.org/stateofthesector/income-expenditure>.

¹⁶ See <https://www.nicva.org/article/how-is-the-ni-vcse-sector-funded-nicva-s-state-of-the-sector-research-reveals-the-latest-0>.

¹⁷ See the mapping work of Benefacts in this regard in the Republic of Ireland at <https://www.benefacts.ie/>.

- b) implements a plan to provide greater guidance to government departments, local authorities, other public bodies, individuals and organisations on the range of options outside the charity subsector to better inform choices for those seeking to support their communities through voluntary activities;
- c) develops an action plan to provide ongoing, collated data about the non-profit sector, its benefits, scope, scale and contribution.

3.4. Is the non-profit and/or charity sector growing or contracting?

One consequence of not having a well-mapped sector is that it can be difficult to ascertain its current state of evolution and to know whether it is growing or contracting. We heard anecdotal evidence at our webinars that regulation (or its application by the Charity Commission) is stymieing community and voluntary engagement by discouraging community groups from coming together more formally to carry out good works. When asked, the Charity Commission and NICVA were not able to advise on whether the charity sector as a whole is currently growing or contracting and the Department advised that it did not hold that information.

One respondent to our online questionnaire provided evidence of contraction, citing awareness of:

“a number of small PTAs (Parent Teacher Associations) who closed their association rather than go through the process of registering as a charity and having to adhere to the annual monitoring and reporting thereafter. PTAs like many similar small fundraising bodies are made up with volunteers who are seeking to do their bit to support their local school. They hold 2-3 fundraising events throughout the year which ensure the pupils get a few nice ‘extras’ but the rigorous process of registration and reporting dampened their volunteering enthusiasm.” ID 128

Another respondent told us:

“It would make more people happy to be on the committees of such bodies if they were not also carrying the burden of being a charity trustee. They are volunteers and put effort into the operational side and activities and compliance should be safe but regulation at a minimum.” ID 129

It is important to note that all charity trustees are volunteers by their very nature, no matter what size the charity or what area of activity it is engaged in. While charity regulation may be considered as an additional responsibility on those who run charities, in fact that law always imposed these responsibilities on charity trustees. The 2008 Act merely

served to better articulate the responsibilities of those who control charitable funds and put in place a more transparent and accountable regime for their regulation under the aegis of the Charity Commission.

The framework of regulatory support that now exists for charity trustees is a powerful resource for good compared to past times pre the 2008 Act, when charity trustees still bore these same responsibilities but might have been less aware of their obligations. Volunteering comes in many different shapes but when you volunteer to sit at the helm of a charity and to steer its course in delivering its charitable purposes for public benefit, that type of volunteering (which we refer to as charity trusteeship whether you are a trustee, a company director, a board of management member, a committee member, or an officer of a charity) comes with responsibilities. Regulation is intended to provide the necessary support to assist charities and their trustees to achieve their charitable goals by recognising the importance of their contribution and valuing their input, thereby avoiding the pitfalls of poor governance, mismanagement, or fraud.

3.5. The importance of the Charity Sector and the Role of Regulation

In undertaking this review, the Panel is cognisant of the importance of the charity

sector and the historically significant role that charities have played in NI. We recognise that charities continue to strengthen the social fabric of NI by providing avenues for compassionate and altruistic engagement for the benefit of society. Given the sector's significance, the Panel fully appreciates the motivation to regulate as an assurance mechanism to protect good intentions and good deeds and prevent diversion of assets from their charitable ends, thereby ensuring the public can continue to have confidence in, and trust and support charitable enterprise. In the words of Lord Hodgson:

“That a regulator should promote and ensure accountability and regulatory compliance is entirely uncontroversial. The effective use of resources is appropriate to a sector which exists for public benefit, which to a large extent depends on the generosity of the public for that existence. Effective operation also forms an essential part of the principle that being a charity is a privilege not a right.”¹⁸

The sheer scope and differentiation of the sector provides immeasurable public benefit, and the presences of charities are, therefore, one of the abiding markers of a healthy society. The very diversity of the sector, which is so valued, makes regulation more challenging in that one size will not fit all and appreciation of this

¹⁸ Trusted and Independent: Giving charity back to charities. Review of the Charities Act 2006 (London: The Stationery Office, 2012), at [5.16].

fact by both the legislator and the regulator is critical to a nuanced and proportionate regulatory regime.

In its 2004 Report to the Department for Social Development (DSD), the NI Charities Advisory Panel concluded that charity law in NI had neither kept pace with changes already enacted or proposed in England and Wales, Scotland, and the Republic of Ireland, nor with trends in charitable activity and changes in the sector itself, particularly since the civil unrest.¹⁹ The Advisory Panel noted that the 1964 regulatory regime was particularly deficient as regards systems for registering and regulating charities and supervising fundraising activities.

It therefore endorsed the need “to provide a modern, enabling legal and institutional regulatory framework for Northern Ireland that is fit for purpose and enhances charitable activity, while promoting good practice, transparent accountability and public confidence.”²⁰

It is arguable that the sentiments expressed by the 2004 Panel remain worthy objectives today and provide a benchmark for the Review Panel against which to measure the regulatory success, or otherwise, of the 2008 Act in attaining these goals. It is to this task that we now turn in Chapter 2, as we begin our consideration of the regulatory framework for charities.

¹⁹ DSD, Report of the NI Charities Advisory Panel (2004).

²⁰ Ibid.

Chapter 2 - Charity Regulation: Objectives, Functions and Duties

1. Introduction

It would be wrong to assume that there was no regulation of charities before the introduction of the Charities Act (NI) 2008 (the 2008 Act). This chapter briefly sets out the history of regulation up to the Act and then, in following sections, considers the statutory responsibilities and duties of the Charity Commission for Northern Ireland (the Commission) and explores how statutory obligations and standards have been delivered since 2008.

1.1 Regulation before the Charities Act (NI) 2008

Prior to the introduction of the 2008 Act there was no framework for the regulation of charities in Northern Ireland. Organisations applied to the Inland Revenue (HMRC) to be recognised as charities for taxation purposes, however there was no mechanism for registration or visibility of the sector. Prior to the formation of the Department for Communities (the Department), the Department for Social Development (DSD) was responsible for the policy and legislation relating to charity law and discharged a range of functions under the Charities Act (Northern Ireland) 1964 (the

1964 Act), including changing purposes of charities which could no longer function effectively, cy-près schemes and charity land consents.

In the early to mid 2000's, the DSD came under pressure from sectoral representatives, the Police Service of Northern Ireland, the Northern Ireland Office and HMRC for improved regulation of charities following media scrutiny of two organisations which identified serious concerns about the services provided by these organisations as charities.²¹ They argued that the lack of regulation and associated abuses was impacting public confidence in the charity sector in NI, and there was possible abuse of charitable status by criminal organisations, and tax avoidance concerns.

The 2008 Act was born out of the recognised need to:

- Clarify the meaning of charity;
- Promote transparency and public confidence in charities through the establishment of a register of charities;
- Promote accountability through the establishment of a regulatory framework for charities;

²¹ Report of the NI Charities Advisory Panel 2004.

- Ensure proportionality in regulation;
- Facilitate a simpler process for changes to charities; and
- Ensure best practice in the management and governance of the charity sector.

The framework was drafted broadly in line with the legislation already in existence in England and Wales, and Scotland. It established an independent statutory regulator of charities, the Charity Commission for Northern Ireland and required that ‘Every institution which is a charity under the law of Northern Ireland must be registered in the register of charities.’²²

1.2 Structure of charity regulation post-2008 Act

The Department for Communities (formerly DSD):

The Department is responsible for establishing the legislative and policy framework for regulation of charities and for carrying out meaningful oversight of the Commission in the delivery of its strategic and business objectives. The Minister approves the Commission’s Strategic Plan and the associated annual Business Plan, which give effect to how the Commission intends to deliver on its statutory objectives over the coming three-year (in the case of strategic plans)

or one-year (in the case of business plans) period. The Department also seeks assurances from the Commission in relation to its performance and this accountability relationship is discussed further in Chapter 9. In addition to its sponsorship role, the Department is the custodian of the policy and regulatory framework for charities in NI, bringing forward the legislation under which the Commission performs its role.

The Charity Commission:

The Charity Commission is established as a non-departmental public body²³ sponsored by the Department. The Department is responsible for establishing the legislative and policy framework for regulation of charities and for carrying out oversight of the Commission in the delivery of its strategic and business objectives. However, the Commission is an independent body, responsible for the regulation of all charities and is, therefore, operationally independent of the Department in discharging its statutory regulatory functions. There are important boundaries and responsibilities to maintain.

The 2008 Act requires that the Commission consists of a Chair (Chief Commissioner), a Deputy Chair (Deputy Chief Commissioner) and at least three but no more than five Commissioners, one of whom must be legally qualified.

²² Charities Act (NI) 2008, s.16.

²³ A non-departmental public body (‘NDPB’) is a “body which has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm’s length from ministers.” (Source: <https://www.gov.uk/guidance/public-bodies-reform>).

Currently, the Commission comprises a Chief and Deputy Commissioner and five Commissioners, the most recent appointment occurring in June 2021. Formally, these individuals make up the Board and are referred to as ‘the Commission.’

Staff who carry out the work of the Commission, are led by an Executive Team made up of a Chief Executive, a Head of Corporate Services, a Head of Compliance and Enquiries and a Head of Charity Services. The Senior Management Team are supported by 31 other staff, as of August 2021.

Prior to the May 2019 High Court decision in *McKee v Charity Commission*, the functions of the Commission were delegated to and discharged by Commission staff following manuals approved by the Board. Since May 2019, in line with the decision in *McKee*, all decisions have been discharged by Committees of at least two Commissioners, established under Schedule 1 of the 2008 Act. The staff of the Commission carry out the preparatory work to enable the Schedule 1 Committee to make an informed and legal decision.

The Charity Tribunal:

The Charity Tribunal for NI (the Tribunal) was established in April 2010, by s.12 of the 2008 Act, to enable certain decisions of the Charity Commission to be

challenged. The Charity Tribunal Rules (NI) 2010, regulate the practice and procedure of proceedings before the Tribunal and the first proceedings came before the Tribunal in 2013. The Tribunal has jurisdiction to hear matters brought to it under three different types of procedure: appeals, reviews, and references. It is the judicial forum to hear appeals and reviews of certain decisions of the Commission in the exercise of its statutory functions.

An appeal or review of a particular decision may be brought by the persons specified in the Table in Schedule 3 of the 2008 Act and may include: the charity (if a body corporate), the charity trustees and/or persons directly affected by the decision. An appeal or review must be made within 42 days of the date on which notice of the Commission’s decision was sent to the appellant or within 42 days of the date on which the Commission’s decision was published if the appellant was not the subject of the decision. Appeals are by way of re-hearing, while applications for review are determined in accordance with judicial review principles.

The Attorney General or the Commission, with the consent of the Attorney General, may refer questions relating to charity law to the Tribunal. References do not involve substantive discrete matters of dispute but, instead, involve the Tribunal expressing a view on a general point of charity law in NI on the subject matter of

the reference. The Attorney General is also at liberty to intervene in any proceedings before the Charity Tribunal at any time.

The purpose of the Tribunal is to provide low cost, swift access to justice and to develop a body of quality jurisprudence in charity law in NI. A decision by the Tribunal may be appealed to the High Court, and ultimately the Court of Appeal by either party. Whilst the legislation establishing the Charity Tribunal was made by the former Department (DSD), the rules and regulations pertaining to the functioning of the Tribunal are the responsibility of the Department of Justice.

1.3 Timeline of Commencement of the Charities Act (NI) 2008

The first provisions of the 2008 Act were commenced in March 2009, the key elements of which were:

- to establish the Commission;
- to enable the Commission to issue guidance on the public benefit test; and
- to provide for the disclosure and exchange of information by the Commission.

In September 2009 provisions outlining and expanding the common law meaning of ‘charity’, ‘charitable purpose’ and the ‘public benefit’ test were commenced, along with those establishing the Charity Tribunal for Northern Ireland and granting powers to the Lord Chancellor to make rules regulating the exercise of the Tribunal’s functions.

The Department’s implementation plan for the 2008 Act suffered a major setback and was suspended in June 2010 when a technical difficulty with the public benefit test was identified, which delayed the commencement of registration of charities. The drafting flaw identified with the original legislation was not resolved until January 2013 when section 3 of the 2008 Act was replaced by the Charities Act (Northern Ireland) 2013 (the 2013 Act).

1.4 Introduction of the Charities Act (NI) 2013

The primary reason for the 2013 Act was to amend the public benefit provision of the 2008 Act to provide clarity on the requirement to be met in determining whether an institution is, or is not, a charity within the meaning of that Act. Commission legal advice indicated that the provision in section 3 of the 2008 Act (the public benefit’ test) created legal uncertainty arising from the inclusion of an element of the public benefit provision contained in the Scottish Charities and Trustee Investment (Scotland) Act 2005 (the Scottish Act). The 2013 Act therefore amended section 3 of the 2008 Act by removing the provision taken from the Scottish Act and making provision for the determination of the public benefit requirement based on the law relating to charities in NI.

The 2013 Act also provided a legislative vehicle for several other outstanding amendments to the 2008 Act. Company

law references were amended to reflect changes made under the Companies Act 2006 since the 2008 Act was enacted. Amendments made to charity legislation in England and Wales prior to consolidation by the Charities Act 2011 were replicated to modernise language, clarify existing legislation, repeal obsolete provisions, and make consequential amendments that were previously missed. In addition, the 2013 Act provided for the transfer of functions which are of a regulatory nature, but which remained within the Department's jurisdiction, to the Commission, such as Educational Endowments, sale of a teacher's residence and prior written consent required in the case of a company which is a charity for affirmation of a transaction as required by the Companies Act 2006. It also re-enacted a provision in the 1964 Act to restore the mechanism through which a gift which is for both charitable and other purposes may be regarded as exclusively charitable, that was repealed by the 2008 Act but which on reconsideration was believed to be a worthwhile mechanism for saving a charitable gift that would otherwise fail.

1.5 The practical and regulatory implications of the flawed 2008 Act

Several consequences flowed from the Commission's inability to commence registration under the provisions of the 2008 Act in 2010. Firstly, the Department had a newly established and resourced arms' length body that could not carry out, for reasons entirely beyond its control, its

predominant regulatory responsibility to register charities. While it would take almost three years to overcome this legislative flaw, in advance of its rectification the Department commenced the parts of the 2008 Act which conferred regulatory, investigatory and enforcement powers on the Charity Commission in February 2011, tasking it to now regulate a sector that it had yet to map. In addition, DSD commenced provisions relating to recreational charities and sports clubs, along with all provisions relating to the Charity Tribunal which had not yet been commenced.

Due to the Commission being unable to register charities as a result of the problem with the public benefit test, the Department brought forth an Order to provide that an institution established under the law of NI, which had been recognised as being eligible for tax exemptions by HMRC, should be treated as if it were a charity within the meaning of section 1 of the 2008 Act until such times as these 'deemed' charities were considered for registration by the Commission. The 'deemed list' was created in February 2011 and updated in August 2013. It continues in existence today as part of the Commission's Combined List (see Chapter 5).

With the passage of the 2013 Act in January, June 2013 finally saw the long-awaited commencement of provisions of the 2008 Act relating to the establishment and maintenance of a register of charities,

as well as provisions relating to charity names, application of property cy-près, charities governed by Royal Charter, relief of trustees from liability, alteration of objects and certain other consents required from the Commission by incorporated charities, requirement to disclose charitable status, powers of unincorporated charities, false statements concerning institutions which are not registered charities, charity mergers, designated religious charities, supply of documents open to public inspection and a restriction on the institution of proceedings for certain offences.

Registration of charities in NI formally began in December 2013. Hot on the heels of registration, provisions relating to annual returns by charities were commenced in January 2014. Responsibility for educational endowments was transferred from DSD to the Commission in June 2015, and an Order came into effect in December 2015 which allowed the Department to amend the list of bodies whose members may examine the accounts of certain lower-income charities.

The Charities (Accounts and Reports) Regulations (Northern Ireland) 2015 (the 2015 Regulations) and the provisions of the 2008 Act relating to charity accounts and reports came into operation on 1 January 2016, meaning for the first time it was a legal requirement for all registered charities to file their annual accounts with the Commission. In March 2016, an order

by DSD dis-applied the section of the 2008 Act which deals with persons disqualified from being trustees of a charity for designated religious charities.

The collapse of the NI Assembly in January 2017 and subsequent challenges to the Commission's powers to delegate its functions to staff meant that the Department's commencement plan for the 2008 Act was further stalled. Provisions which have not yet commenced include those relating to the Official Custodian, charity land, charitable incorporated organisations, and charities who are registered in another jurisdiction but operate in NI, also known as 's.167 institutions.' The Department therefore remains responsible under the 1964 Act for charity land disposals, incorporation schemes for charity trustees and common investment schemes – regulatory matters which typically sit with the charity regulator in other jurisdictions.

1.6 Further drafting flaws with the 2008 Act

Two statutory inquiries carried out by the Commission in 2013 and 2014 led to the disqualification and ultimate removal of two charity trustees. Both charity trustees brought challenges to the Charity Tribunal and ultimately to the High Court, where the Attorney General intervened based on his interpretation of the 2008 Act that the Commission had no power of delegation to staff and therefore the Orders made by

staff were unlawful. In May 2019, the High Court held in *McKee v Charity Commission*²⁴ that the 2008 Act, taken together with s.19 of the Interpretation Act (Northern Ireland) 1954, did not provide an express or implied power for the Commission to delegate its functions to staff. McBride J further found that Commission decisions could only be taken by the Board acting collectively or by a committee established by the Board for such purposes. The Commission appealed this decision to the Court of Appeal, which upheld the High Court decision in February 2020.²⁵ All decisions, except the opening of statutory inquiries, had previously been taken by staff as legal advice to the Department assured it and the Commission that it was lawful for them to do so, as is the case in other jurisdictions.

1.7 Implications for the Charity Commission

The Commission estimated that its staff had made almost 7,500 decisions, orders and directions prior to the High Court decision in *McKee*. Whilst the vast majority of these decisions related to the registration of charities, other orders and decisions included cy-près schemes, educational endowments and other actions taken by charities which required the prior consent of the Commission, such as dealings with charitable property and alteration of the charitable objects of a charity. Decisions also included those

linked to a statutory inquiry, such as the removal of trustees and appointment of interim managers to a charity.

The effect of the judgments is that all decisions taken by Commission staff are unlawful, including the charity register, which in turn removes the legal requirement for those charities on the register to furnish their annual report and accounts to the Commission in accordance with the 2015 Regulations. In addition, charities can no longer rely on the consents provided to them by Commission staff. This has created much confusion in the charity sector and the Department has faced calls from charities and sectoral representatives to implement a legislative amendment to bring legal certainty to previous decisions taken by Commission staff upon which charities had relied.

These implications are layered on top of the already challenging and in many ways impossible situation in which the Commission found itself following on from the flaws listed above, in particular the delayed powers to register charities. The Review Panel believes this is a compelling point, carrying significant responsibility for the difficult position the Commission has found itself in. We will discuss this further in Chapters 3 and 5.

²⁴ [2019] NICH 6 (McBride J).

²⁵ [2020] NICA 13.

1.8 The Charities Bill 2021

To resolve the legal uncertainty brought to bear by the decisions of the High Court and the Court of Appeal in *McKee*, the Department is currently bringing a new Charities Bill before the Assembly. The overarching objective of the Charities Bill 2021 is to deal with the issues raised by the judgments, provide certainty for charities and to restore the pillars of the regulatory framework whilst protecting individual's rights under the European Convention on Human Rights (ECHR).

The Bill proposes to amend the 2008 Act with retrospective effect, to render previous decisions taken by staff of the Commission lawful as if they had always been lawful except where to do so could impinge on an individual's rights under the ECHR or is unlawful on other grounds; or where a charity has sought and been given a subsequent decision taken by Commissioners since the *McKee* case. The Bill will not make lawful certain decisions which in the main were taken during the course of and subsequent to a statutory inquiry, such as the suspension or removal of trustees. These decisions will remain unlawful and will be allowed to proceed to their natural conclusion, by way of the courts if necessary.

The Bill will also provide a future power of delegation to Commission staff provided the functions to be delegated are set out in a Scheme of Delegation made by the

Department. However, it will stipulate that certain functions can never be delegated to staff but must always be exercised at Board level. These functions are:

- a) the opening of a statutory inquiry;
- b) publishing of a report or statement;
- c) the powers to act for the protection of charities including removal of trustees and appointment of an interim manager; and
- d) any statutory power of the Commission to make regulations.

In addition, the Bill will include a power to enable the Department to introduce a registration threshold at some future point, via regulations, subject to the draft affirmative procedure. It is anticipated that the Bill will receive Royal Assent in early 2022. We will return to the subject of delegation in Chapter 10.

2. The Commission's Statutory Responsibilities

Acts of a regulatory nature, particularly those establishing new regulators, commonly set out the objectives of such regulation, the functions of the Regulator in meeting those objectives and the general duties or standards under which the Regulator is expected to act. The 2008 Act is no different in this respect and ss.7-9 of the Act set out the statutory objectives, functions and duties of the Charity Commission.

2.1. Statutory Objectives

The Commission has five statutory objectives:

- to increase public confidence in charities (the public confidence objective);
- to promote awareness and understanding of the operation of the public benefit requirement (the public benefit objective);
- to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities (the compliance objective);
- to promote the effective use of charitable resources (the charitable resources objective); and finally
- to enhance the accountability of charities to donors, beneficiaries and the general public (through its accountability objective).

Regulation can be understood as ‘prescriptive’ or ‘enabling.’ Prescriptive regulation is the ‘thou shalt not . . .’ type of regulation while enabling regulation assists registered charities to achieve their charitable purposes to the best of their ability by supporting charity trustees and protecting charitable assets. The type of regulation envisaged by the 2008 Act is not simply prescriptive but also encompasses enabling provisions. This is important as it influences the types of priorities a Commission will set for its work, the

internal culture of the organisation and how it relates to the wider charitable sector. We will discuss each of these matters throughout the report.

2.2. Statutory Functions

Section 8 of the Act, which lays down the Commission’s statutory functions, directs the Commission on how to give effect to its statutory objectives. Front, right and centre is the task of deciding whether institutions are charities and establishing and maintaining an accurate and up-to-date register of charities.

Without a properly maintained register of charities, it would be difficult for the Commission to deliver on its other statutory functions, which include:

- encouraging and facilitating the better administration of charities (‘the carrot’);
- identifying and investigating apparent misconduct or mismanagement in the administration of charities; and
- taking remedial or protective action in connection with misconduct or mismanagement therein (‘the stick’).

An accurate register is the bedrock of good regulatory practice – you cannot regulate what you cannot see. The information maintained on the register ranging from the contact details for a charity, its charity trustees and details of both charitable objects along with its annual reports and financial statements,

if appropriately proportionate to the risk and resource of charities, enables not only the Commission to better understand and regulate the sector, it also provides an informed window into the charity sector for charity funders and the general public, whether they take the form of supporters of charitable endeavours or beneficiaries of charitable purposes. Crucially, as discussed in Chapter 1, such information also provides important data on the charity sector to inform policy at departmental level. The importance of this policy role is underpinned by the Commission's statutory function to give information or advice or make proposals to the Department on matters relating to any of the Commission's functions or meeting any of its objectives.²⁶ This function includes complying with any reasonable request by the Department for information or advice on any matter relating to any of the Commission's functions.

Given that Part 13 of the 2008 Act -- concerning the funding of charitable institutions -- has yet to be commenced,²⁷ the Commission's function regarding public collection certificates ("determining whether public collection certificates should be issued, and remain in force, in respect of public charitable collections") is currently moot.

2.3. Statutory Duties

The 2008 Act also requires the Charity Commission to meet certain general statutory duties when it is exercising its statutory functions in the pursuit of its statutory objectives. These duties are broad-based, high-level principles and are couched in the language of reasonableness. The Commission must, in performing its functions, act in a way which is compatible with its objectives, and which it considers most appropriate for the purpose of meeting those objectives in "so far as is reasonably practicable". Equally, the Commission's exercise of its functions should be undertaken in a manner which is compatible with the encouragement of "all forms of charitable giving, and voluntary participation in charity work."

As one might expect, in performing its functions, the Commission is required to have regard to the need to use its resources in the most efficient, effective and economic way. It is to recognise the desirability of facilitating innovation by or on behalf of charities and in managing its own affairs, it is to apply good corporate governance principles.

Perhaps most importantly from a regulatory governance approach, the Commission is tasked by the 2008 Act to apply "the best principles of regulatory

²⁶ Charities Act (NI) 2008, s.8(2)(6).

²⁷ With the exception of s.156 (relating to false statements relating to institutions which are not registered charities) and Section 159(1) and (6) (in so far as it relates to section 156), which were commenced by S.R. 2013/145 on 24 June 2013.

practice” which are expressed to include “the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.”²⁸ These principles have informed the Panel’s approach to this review.

3. The Commission’s Delivery of Statutory Responsibilities

3.1. Application of the Review Terms of Reference

The Review’s Terms of Reference ask how the five original objectives and statutory functions have been delivered by the Commission to date, whether they remain fit for purpose and how they could be delivered in the most effective manner going forward.

3.2. The Legislative Framework

With regard to the fitness for purpose of the legislative provisions as written, the statutory objectives of the 2008 Act find resonance in many other common law charity statutes. The wording of the 2008 Act directly mirrors that of the English Charities Act (formerly the 2006 Act, and now the 2011 Act). While the Charities and Trustee Investment (Scotland) Act 2005 does not set out any statutory objectives, as such, its enumeration of the statutory functions of the Scottish Charity Regulator (OSCR) match those of NI and England and Wales. Similarly, Ireland’s Charities Act 2009 provides a very similar list of regulatory objectives and functions in s.14 of its Act (see **Table 2.1**). The statutory functions in all cases focus, rightly, on regulatory compliance.

²⁸ Charities Act (NI) 2008, s.9(4).

Northern Ireland	England & Wales	Scotland	Ireland
Statutory Objectives:	s.14 Act 2011	s.1(5) Act 2005	s.14 Act 2009
Public Confidence	✓	✗	✓
Public Benefit	✓	✗	✓
Compliance	✓	✗	✓
Charitable resources	✓	✗	✓
Accountability	✓	✗	✓
To promote reduction of unnecessary regulation	✗	✗	✗
Statutory Functions:			
Determine if charity	✓	✓	✓
Facilitate better administration of charities	✓	✓	✓
Identify & investigate misconduct	✓	✓	✓
Take remedial & protective action	✓	✓	✗
Give information /advice to Department	✓	✓	✓

Table 2.1 Comparative Charity Statutory Objectives and Functions

In 2012, England and Wales carried out a major statutory review of its charity regulatory framework under s.73 of the Charities Act 2006. The 2012 Hodgson Review²⁹ considered, inter alia, the fitness for purpose of the 2006 Act’s statutory objectives, functions and duties (which echo verbatim the wording of the 2008 Act). It recommended no changes to these elements of the Act. According to Lord Hodgson, “Even in a world where the

focus is on regulation alone, the Commission’s objectives continue to make sense.”³⁰ In the context of NI and the 2008 Act, the Panel would echo the sentiments of Lord Hodgson in this regard.

3.3. The Legislative Framework as Performance Measurement

The Commission’s performance in delivering on its functions must be assessed against the statutory duties

²⁹ Trusted and Independent: Giving charity back to charities. Review of the Charities Act 2006 (London: The Stationery Office, 2012).

³⁰ Ibid, at [5.16].

imposed upon it. Evaluation of the Commission therefore goes further than compliance with the core requirement of high standards of corporate governance already expected of Arm's Length Bodies, important though this is. The statutory duties found in s.9 of the 2008 Act were first introduced in the English Charities Act 2006 and were intended to provide a framework against which to judge the Charity Commission for England and Wales' (CCEW) performance in terms of not just what it had done, but the way in which it had done it. They were to serve as a restatement and reminder of good practice.³¹ Noting that the functions of the CCEW comprised the activities that should be at the core of the CCEW's work, Lord Hodgson presciently commented that:

"It is how the Commission chooses to fulfil these objectives [through the exercise of its functions] that will have most impact on its practical interaction with the sector."³²

Adopting this approach, the Panel sought the Department's assessment of the Commission's performance against annual business plan targets from 2015 onwards. The Department's response was broadly supportive, noting that:

"In overall terms, over recent years the Commission has met almost all of its KPIs and the annual and in-year reports demonstrate that performance improvement is being achieved against business objectives and targets year-on-year. As such the Department is broadly content with the Commission's overall performance to date given the challenging environment which it has faced."³³

The Department acknowledged, however, that the scope of its own oversight of the Commission's performance in the past "may have been too narrowly focussed as the significance of the complaints and concern raised with the Commission as a result of Statutory Inquiries may not have been fully understood."³⁴ The Department also stated that "as a result opportunities to examine and learn from these issues at an earlier stage may not have been recognised and taken" and that "this will inform the Department's approach to strengthening oversight of the Commission going forward to ensure it provides a more holistic assessment of its performance . . .".

The Panel will explore how the Commission has fulfilled its statutory objectives through the exercise of its functions in more detail in the

³¹ Trusted and Independent: Giving charity back to charities. Review of the Charities Act 2006 (London: The Stationery Office, 2012), at [5.20].

³² Ibid, at [5.17].

³³ Department for Communities letter to the Review Panel, September 9, 2021.

³⁴ Ibid.

forthcoming chapters on registration, reporting, compliance and enforcement and will return to the Department's assessment of Commission performance and its oversight of same in Chapter 9.

4. Corporate Governance

4.1. A Statutory Duty

Before turning to the individual aspects of registration, reporting, compliance and enforcement it is useful to consider the final statutory duty imposed upon the Charity Commission which it is to have regard to in managing its affairs, namely "such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it."

4.2. Corporate Structure

In terms of corporate structure, the Charity Commission is a non-departmental public body, sponsored by the Department for Communities. The Minister for Communities "owns the charities legislation", approves the Commission's strategic and annual business plans and is accountable to the Assembly for the activities and performance of the Commission while the Department determines the Commission's performance framework in light of its agreed objectives and the Department's wider strategic aims and current Programme for Government

commitments.³⁵ The Commission's status is thus different from both the CCEW and OSCR, both of which are non-Ministerial departments. In terms of structure, the Commission more closely resembles the Irish Charities Regulatory Authority which similarly has a sponsorship relationship with the Department for Rural and Community Development.

4.3. Performance Targets

Under its Management Statement and Financial Memorandum with the Department, the Board of the Charity Commission has corporate responsibility for ensuring that the Commission fulfils the aims and objectives set by the Department and approved by the Minister and for promoting the efficient, economic, and effective use of staff and other resources by the Commission. This includes "demonstrat[ing] high standards of corporate governance at all times, including using the independent audit and risk assurance committee to help the Board address the key financial and other risks facing the Commission."³⁶ To this end, it develops a three-yearly strategic plan which must be approved by the Minister on foot of which annual corporate business plans are further developed.

The Strategic Plan sets out the Commission's key objectives and associated key performance targets

³⁵ The Charity Commission for Northern Ireland: Management Statement and Financial Memorandum (revised version, 2017), [2.2.1] and [3.1].

³⁶ The Charity Commission for Northern Ireland: Management Statement and Financial Memorandum (revised version, 2017), at [3.4.2].

for the three forward years, and its strategy for achieving those objectives, along with a review of the Commission's performance in the preceding financial year. In particular, the Strategic Plan must "identify those features which CCNI needs to take into account when determining how it can best meet its main aims and needs of its stakeholders."³⁷

The annual Business Plan, for its part, includes key targets and milestones for the year immediately ahead and is linked to the Commission's budget so that the Department can readily identify resources allocated to achieve specific objectives. The Panel reviewed a broad range of documents relating to the Department's assessment of the Commission's performance and also in relation to the operation of the Commission's core operational governance framework. These are listed at **Annex E**. In its response to the Panel on assessing Commission performance against business plan targets, the Department highlighted the registration target and the compliance check target for special mention. According to the Department, "Year on year the Commission has consistently met and exceeded the KPI on progressing registration applications within 5 months (a key customer service target)" while in relation to compliance checks on annual returns occurring prior to the Court of Appeal judgment in

McKee v Charity Commission for Northern Ireland, "the Commission had demonstrated improved performance in relation to the percentage of basic compliance checks undertaken, with the aim of improving the quality of information provided by charities."

Based on this evaluation, the Panel finds that the Commission has largely achieved its key performance targets as laid out in its annual Business Plans, as approved and agreed with the Department. Its annual internal audit ratings have been satisfactory and NIAO has not raised material concerns. In response to a request by the Panel, the Department expressed confidence that "the Commission has the appropriate mechanisms in place to evidence effective business planning, budgetary control and risk management. All of these areas are tested through the framework of accountability and liaison meetings."³⁸ From this perspective alone the Commission has consistently demonstrated a sound track-record of core operational governance. The Panel notes that consistently demonstrating such core operational governance is a minimum requirement for a public body. It is a necessary but not a sufficient condition for full confidence in the Commission. The handling of stakeholders, complainants, and issues such as conflicts of interest must also

³⁷ Ibid, at [4.1.5].

³⁸ The Department's Response to Request by the Panel, August 3, 2021.

be of the highest order to ensure and maintain public confidence, perhaps even more so in a regulator that holds others to these high and necessary standards. The Panel will make further reference to these matters in Chapters 4 and 8.

The operation of the Commission under the 2008 Act, certainly post the decision of the NI Court of Appeal in *McKee v Charity Commission for NI*, is hindered by the Act's failure to recognise that the Commission is a non-departmental public body, as opposed to a non-Ministerial department. It has statutory obligations to give "information or advice, or mak[e] proposals, to the Department on matters relating to any of the Commission's functions or [meet] any of its objectives" which includes "complying, so far as is reasonably practicable, with any request made by the Department for information or advice on any matter relating to any of the Commission's functions.". However, the Commission's staff currently cannot share documents with or give advice to its sponsor department without first going through a Schedule 1 Committee approval process, in order to comply with the provisions of s.24 of the 2008 Act. This matter is discussed more fully in Chapter 9 of this report in the context of Department/Commission relations.

5. Conclusions and Review Panel Recommendations

To return to the opening question of whether the five original objectives and statutory functions have been delivered by the Commission to date, whether they remain fit for purpose and how they could be delivered in the most effective manner going forward, the Panel believes, in light of its review of the statutory objectives of charity regulators in neighbouring jurisdictions that the statutory objectives and statutory functions outlined in the 2008 Act remain fit for purpose and to this end, the Panel does not recommend any change to them.

The Panel recognises, however, the implications of historical drafting flaws elsewhere in the legislation and the impact this has had on setting Commission regulatory culture. We are also conscious of concerns about trust in the regulatory process arising from *McKee v Charity Commission*.³⁹ In our consultations we discerned agreement that **regulation** is necessary for public trust and good governance and an equally broad consensus that **the regulatory process** can be improved. This report, therefore, presents an opportunity for those involved in charity regulation (the Department, the Commission, and the Sector) to set direction together. To this end, the Panel recommends that:

³⁹ [2019] NICH 6; affirmed [2020] NICA 20.

Recommendation 2: The Department develop a workplan for the implementation of recommendations in this Report to be delivered in a timely manner.

Recommendation 3: The Commission embrace this opportunity to reset the culture of regulation.

Recommendation 4: The wider charitable sector commit to collaborate fully with the Commission to create a good regulatory environment for charities.

The report now turns in Chapter 3 to the Commission's delivery of these objectives across its broad spectrum of statutory functions, beginning with an examination of the important question of the regulatory approach adopted by the Commission and its use of the resources made available to it to deliver its regulatory mission.

Chapter 3 - The Commission's Regulatory Approach and Resourcing to achieve it

1. Introduction

This chapter examines the approach of the Charity Commission for Northern Ireland (the Commission) to charity regulation. It reviews the areas where the Commission has concentrated its time and resources over the past decade and it scrutinises the funding and staffing of the Commission in light of resources provided to other regulators. There have been a number of reviews of the Charity Commission's regulatory approach, some commissioned by the sponsor department, others by the Executive Office (TEO) and the findings of these reviews and reports are also considered in this chapter. The concept of regulatory approach is an important topic. It is often not **what** we do but **how** we do it that matters.

As discussed in Chapter 2, the Commission must give effect to its statutory functions in a way that brings about its statutory objectives. It is not left entirely free by statute to determine how it achieves these ends, however. Section 9 of the

Charities Act (Northern Ireland) 2008 (the 2008 Act) requires it to exercise its statutory powers in a manner that encourages charitable giving and volunteering,⁴⁰ that has regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)⁴¹ and that uses Commission resources in an effective, efficient and economic way.⁴²

In assessing the Commission's actions against these standards, we begin by briefly reviewing the focus of the Commission's activities in the early years of its establishment as patterns established at this time have influenced the regulator the Commission has become. Indeed, Commission priorities resulted from how powers were enacted and have inevitably shaped the culture of the Commission. The chapter then proceeds to examine the resources made available to the Commission to deliver on

⁴⁰ Charities Act (NI) 2008, s.9(2)(2).

⁴¹ Ibid., s.9(2)(4).

⁴² Ibid., s.9(2)(3).

its statutory objectives. Comparisons are made to the workloads of other charity regulators in light of the funding received elsewhere to provide a benchmark against which to begin to assess the Commission's achievements to date.

2. The Commission's Regulatory Focus 2009-2016

2.1. Overview

The Commission was established by the 2008 Act and came into being on March 27, 2009.⁴³ In the twelve years of its existence, it has established a register of charities and commenced charity registrations in December 2013. This followed the passage of the Charities Act (Northern Ireland) 2013, which amended the public benefit test. In 2011, two years prior to the register being put in place, the Department conferred regulatory, investigatory and enforcement powers on the Commission, allowing it to investigate mismanagement and misconduct in charities for the first time. These powers included the powers to institute inquiries, call for information from charities, suspend or remove trustees, and give specific directions for the protection of charities.⁴⁴

It is not unusual to stagger the introduction of enforcement powers for any new regulatory agency. Allowing a

regulator to establish itself in a sectoral space, to equip itself with the information and knowledge that it needs to regulate effectively often assists in the bedding in process both for the regulator and for the sector itself. What is unusual here is that the Department for Social Development (DSD) granted the Commission investigation and enforcement powers two years before it was given power to establish a register of charities. This regulatory approach puts the cart before the horse in many respects and empowered the Commission to begin work on investigation and enforcement proceedings long before it had the opportunity to develop a panoramic view of, and a sufficiently developed relationship with, the sector through the population and completion of the charities register.

2.2. Implications of the 2008 Act for the Commission's work priorities & relationships

The fact that drafting flaws in the 2008 Act meant that the public benefit test was unworkable without further legislative amendment, as discussed in Chapter 2, meant that the Commission could not carry out its registration functions and it may have been felt that granting of enquiry powers to the Commission would enable it to tackle urgent cases of mismanagement or misconduct in respect of those charities on the combined list to

⁴³ The Charities (2008 Act) (Commencement No. 1) Order (Northern Ireland) 2009.

⁴⁴ The Charities (2008 Act) (Commencement No. 3) Order (Northern Ireland) 2011.

whom its powers applied. One other consequence of the delayed introduction of registration powers and the alternative focus on compliance matters was that not all the sector perceived the Commission as engaging with it in a supportive way but rather only on occasion to challenge their actions. For some, the most significant contact they had with the Commission was when a problem arose. There was, of course, an inevitability about this given the way the legislation was enacted. The Commission was fulfilling its responsibilities in as much as it could but as some webinar attendees informed the Panel this led to a sector feeling that the Commission was not a proactive regulator for the charities who just wanted to be registered.

Given the early commencement of its statutory investigation powers, it was inevitable and understandable that members of the public, charities themselves and other stakeholders would rightly bring concerns to the Commission's attention for action. The upshot of this unorthodox approach to setting up a new regulator was that by 2014/15 -- the first full year of the register's existence -- the Commission was already diverting resources away from the key task of registration. In that year alone, it received 116 concerns about charities. Many of

these related to what can be described as "minor governance issues, easily put right with the correct guidance"⁴⁵ but the issuing of such guidance by a new regulator takes time and resources when every issue is a new one.

2.3. Applying enquiry powers

In that same first year of registration, the Commission used its enquiry powers to deal with more serious issues of mismanagement and misconduct and published three statutory inquiry reports during the 2014/15 period.⁴⁶ The initiation and execution of such inquiries can be extremely time-consuming and resource intensive for any regulator, but particularly for a fledgling regulator such as the Commission which was still grappling with the task of registration. Institution of such inquiries led to new powers being exercised for the first time and the need for new procedures to ensure the appropriate and proportionate use of such powers. Commission Board papers from this time involve ongoing discussion and revision of procedure manuals for staff relating to investigations and reviews of lessons learned. This is evidence of the seriousness with which the Commission approached its work albeit from the horse before the cart situation it found itself in because of the way in which the legislation was commenced.

⁴⁵ Charity Commission Annual Report 2014-15, p. 5.

⁴⁶ Charity Commission Annual Report 2014-15, p. 5.

2.4. Accounting and Reporting Standards

Throughout 2014/15, the Commission worked with the DSD to prepare the Charities Accounting and Reporting Regulations 2015, which came into force in January 2016, and required registered charities to submit more detailed annual reports and accounts to the Commission. The availability of this data required increased due diligence by the Commission to review this additional information in its overall regulation of registered charities. By February 2016, with the charities register a little over 2 years old and many charities awaiting a Commission call forward for registration, the Commission marked the fifth anniversary of receiving its powers of enquiry and had already received its 500th concern about a charity.⁴⁷

2.5. Implications for the Commission's Approach to Regulation

From this brief summary of the establishment and early years of the Commission, it can be seen that in terms of regulatory approach, the Commission has never had the opportunity to focus solely on completion of the charities register. This task was even more crucial given the Commission took the decision to vet each individual organisation before entering it on the register. This was -- and is -- a time-consuming and resource intensive approach which is

unique amongst the approaches adopted by neighbouring regulators (see further in Chapter 5). In effect, the Commission was engaged in regulating charities, some of which had not at that point in time been registered on the register of charities and in respect of which it was still striving to build a relationship in a new regulatory space.⁴⁸

3. Regulatory Approaches and current status

3.1. Not set in stone

A regulator's approach evolves over time in much the same way as the sector that it regulates develops, matures and changes. In the early stages of new regulation, it is not unusual for the system to be rules based and appear prescriptive in nature as a regulator strives to establish its presence. As it becomes more familiar with the sector and the different levels of risk that different cohorts of the sector present, it is common to see further adaption to the risk assessment framework as the regulator can begin to target particularly egregious practices and offer flexibility and more proportionate responses to well-intentioned, well-motivated organisations that are doing their best to comply. These changes to a regulatory model are normally flagged in strategic plans, worked out in annual corporate plans and reported against in annual reports.

⁴⁷ Charity Commission Annual Report 2015-16, p.7.

⁴⁸ The Commission opened an inquiry into the USPCA in December 2013. This charity started its registration application with the Commission in 2015.

The ability to stand back from regulatory functions and reflect on the impact of your regulation over time is extremely valuable. One regulator that has communicated this in a clear and articulate manner is the Scottish

Regulator, OSCR. It describes its regulatory journey and provides a useful insight into how its regulatory approach towards charities has changed over the course of its existence.

2006 →	2014 →	2019
Prescriptive	Framework based	Variable assurance
Interventionist	Targeted	Risk-based approach informed by intelligence
One size fits all	Proportionate	Proactive and preventative
Regulator focussed	Customer focussed	Service focussed based on digital first delivery model
Rules based	Increasingly flexible	Transparent processes and decision making

Table 3.1 OSCR’s Regulatory Journey (source: OSCR Annual Report and Accounts 2018/19)

3.2. Risk Appetite

At the heart of any risk based analysis lies the inescapable truth that a regulator will neither have the resources nor the capacity to proactively regulate every single registered entity. Choices must be made about where to focus resources. We will consider resourcing in the next section but it is evident that resources are limited not least given the impact of the Covid-19 pandemic and the now urgent need to direct resources to basic human need. In this climate of limited resources good choices are critical. These choices require to be informed in order that the risk appetite of any organisation can be properly directed. Furthermore, making

good choices requires a regulator to know and have a relationship with its regulated entities. This further emphasises why completion of the register was and remains a vital task for effective charity regulation in NI. Implementing an effective and proportionate compliance model requires the Commissioners to articulate their risk appetite and with the guidance of Commission staff to decide where the risks lie for **the sector** if a charity is the subject of mismanagement or fraud. Chapter 7 looks in more detail at the Commission’s scaled compliance model but it is important in this chapter to stand back from the substance and to gauge the Commission’s overall approach to the exercise of its regulatory powers.

It is important that the approach to regulatory powers and the informed risk appetite of the Commission is also considered in the broader landscape of how it has evolved and plans for further development as this not only enables learning to be gathered and applied but also provides encouragement and inspiration for further evolution.

3.3. Current regulatory approach

Where does the Commission currently sit on the OSCR spectrum of regulation, set out in **Table 3.1**? Has it truly moved away from the prescriptive model of trying to regulate all charities to the same standard? By its own admission, the Commission has not yet advanced to the right hand column of **Table 3.1** whereby variable assurances are acceptable to the Regulator, on a risk-based approach informed by intelligence.

The Panel's view is that the Commission should be aiming for the middle of this table, adopting a framework based approach to targeted regulation which has strong characteristics of both proportionality and flexibility. This would allow the Commission to draw on its growing knowledge of the sector as more charities are registered and commence annual reporting, while simultaneously making greater use of the Commission's decade of regulatory experience to recalibrate its approach to risk in a way that lessens the regulatory burden on

compliant charities. This is, at least in part, what the Panel believes the Commission means when it speaks about the need for trend data.

The importance of trend data was acknowledged by the Department when, in 2018, there was an attempt to advance the regulatory approach of the Commission. The Department's Deputy Secretary and his officials proposed that the Commission should depart from a 'business as usual' approach and instead adopt a more prioritised regulatory approach. Officials suggested "using trend analysis and business intelligence about the charity sector's risk profile to identify and consciously decide not to pursue some lower risk aspects of work, taking account of the available resources".⁴⁹ The Department's meeting notes reveal that "The Commissioners argued strongly that this would be unacceptable as regulation of the sector would be partially based on de minimis levels or thresholds that would be difficult to justify. The CEO added that sufficient trend data was not yet available to support such an approach."

Trend data is important but it takes some time to gather. While the Commission has a significant information base from its more than 10 years as a regulator the ability to muster that information into informing trends to guide priorities is not yet in place. This should not constrain the Commission in applying an effective risk framework to its work.

⁴⁹ Note of Meeting with Board of the Charity Commission NI, 10 August 2018.

Applying a risk framework and the trend data when it is available should, the Panel would expect, result in a shift in Strategic and Annual Plans, along with a shift in priorities about engagement with the sector which we will address in the following chapter. This shift would result from clearer proportionality in approach and sharper assessment of risk to charities, assisting the Commission to prioritise and streamline responses in a more sectoral focussed manner. In effect, this would be evidence of a cultural change within the Commission arising from a management approach that allows for more strategic regulation that lifts a burden from staff and allows them to build on the positive engagement with the sector that many webinar attendees spoke about. This shift would also set the appropriate balance between regulatory responsibility at Commission level and at the level of charities themselves. Neither can deliver effective regulation without the other: the Commission does not have the resources to do all the regulation by itself and requires a responsible sector; the sector cannot bear the burden of regulation without the guidance and support of the Commission. A clear outcomes based accountability approach -- specifically in strategic or corporate and business planning -- will also assist with and support this careful balance.

3.4. Evolution of the Commission's Regulatory Approach to a new Risk Assessment Framework

There is some evidence that the Commission's regulatory approach has changed over time. In its 2019/20 Corporate Plan, the Commission noted:

“In the early days the Board adopted a low risk appetite for what was new and untested regulation and approved the operation of procedures by staff which were detailed and had significant levels of assurance checks. After several years of operation and experience, combined with limited resources, the Board intends during this plan to change its risk appetite.”

That changed approach to risk has been embodied in the Commission's Transformation Project which began in 2018 and continues currently as a Risk Assessment Framework is being developed following consultation with the sector. During the course of the Transformation Project the Commission began work with the Strategic Investment Board to benchmark the nature of risk in regulating charities elsewhere and to develop its own proof of concept through which it identified 4 risk pillars:

- a) safeguarding (risk to vulnerable people),
- b) assets (risk to charity assets),
- c) compliance (risks to effective governance) and
- d) public trust.

These risk pillars sit alongside 2 areas of risk which are assessed:

- i) Organisational risk which focuses on the presenting level of risk to the charity concerned, and
- ii) Situational risk which helps indicate when and how the Commission needs to act.

Here we again see a careful balance between each charity and the Commission. It is an important shift from the more traditional pyramid models for regulation which tend to push risk down to the charity concerned as if the charity alone bears the risk and responsibility. It also enables the Commission to be proactive in a more collaborative way. This helpful regulatory shift needs to be accompanied by a cultural shift within both Commission and sector and we will address this matter in Chapter 4.

The Panel reviewed the Risk Assessment Framework which the sector has had an opportunity to contribute to as part of the Commission's consultation on its draft Strategic Plan 2019-22.⁵⁰ While, due to other pressures the implementation of the Risk Assessment Framework has been delayed and will not now be fully implemented until 2023, it is an important piece of work which will first of all allow the Commission to begin to prioritise work more effectively. In the longer term the risk framework will allow the Commission to gather trend data to scope risk and respond accordingly.

The Panel was struck by how the Commission's approach to risk may have been informed by the early years of its establishment and in particular the way in which powers were given to the Commission. This approach, which initially placed the Commission in a position to investigate a sector that it had no power to register, had an inevitable impact on Commission culture and delayed the Commission's ability to form positive connections with the broader sector. The Panel believes that the new Risk Assessment Framework should be developed in a manner that informs the culture of the Commission to mirror a transformation in regulatory approach. Given the pivotal role the Risk Assessment Framework will play the Panel recommends:

Recommendation 5: The Commission should prioritise completion of the new Risk Assessment Framework and the supporting IT and the Department should provide additional resources should they be required (recommendation 10), to assist.

In respect of this recommendation the Panel is conscious that there will be a lag while the system is completed and then while awaiting the desired trend data to ensure proportionality. We encourage the Commission to take steps to ensure proportionality and flexibility in approach in the interim.

⁵⁰ A report of the consultation is available on the Commission's website at: Strategic plan 2019/2022 - feedback report.

Recommendation 6: The Commission should move towards a targeted regulatory approach in line with its proposed Risk Assessment Framework. The Risk Assessment Framework should be tested for proportionality and flexibility in functionality.

In respect of this work, the Panel believes the adoption of such an approach should result in a shift in Strategic and Annual Plans with greater articulation of risk appetite, along with a shift in priorities about engagement with the sector and a focus on outcomes.

The Panel will make further recommendations on the application of the Risk Assessment Framework in the context of compliance matters in Chapter 7.

4. Reviews of the Commission's Regulatory Approach

4.1. History of reviews

Over the past decade, the Department (formerly Department for Social Development (DSD)) and latterly the Department for Communities (the Department) have commissioned a number of regulatory reviews of the Commission. In the first five years these reviews scrutinised the capacity of the Commission to deliver on its statutory objectives; in the latter five years, the

focus turned more to the Commission's exercise of its regulatory powers. These reports therefore traverse two topics of interest to the Panel, namely regulatory capacity and regulatory approach. The Panel begins its consideration of these reports here but this is a matter to which it will return again in Chapter 8, when it addresses the issue of enforcement.

4.2. DSD Capacity Review of the Charity Commission (2012 & 2016)

A Light Touch Review of the Commission was conducted by DSD between October and December 2012, to ensure that the Commission had the capacity, capability and resources to credibly discharge its current functions and deal effectively with anticipated workloads over the following 5 years.⁵¹ The preferred option was a three directorate structure with 29 staff, reducing to 25 after frontloading registration. The review did not consider compliance monitoring and acknowledged that, as the Commission took on more powers under the Charities Act, its resourcing would likely become inadequate and that with the anticipated ramping up of its workload and profile over the coming years resourcing would require further consideration.

A further capacity review was undertaken by DSD in February 2016. Its purpose was to "conduct a review of the Charity Commission for Northern Ireland to ensure best use of available resources, taking

⁵¹ See DSD, Capacity Review of the Charity Commission NI, (May 2016).

account of potential efficiencies, to enable it to credibly discharge its functions and deal effectively with anticipated workloads over the next 5 years.”⁵² It detailed the effects of workloads and staffing of the Commission based on 6 optional models that ranged from 5%, 10% and 15% increases and decreases of the Commission’s annual funding. In its best case scenario of full compliance requiring an additional 15% annual increase to the Commission’s budget, it envisaged “25 current staff, plus secondees to end of Nov 2016 and 7 additional permanent posts to assist compliance,” costing almost £1.4m in staff costs.⁵³ Worst case scenario, it envisaged budgetary cuts of 15% resulting in “22 staff, 0 secondees, 0 additional posts and internal reallocation of posts in year 2 and 3 to assist compliance” costing £967,711 in staff costs.⁵⁴

The 2016 Capacity Review saw additional resources being necessary to assist the Commission in its compliance activities rather than in tackling registrations. Given the growing level of challenges to the Commission’s use of its enquiry powers and the increased number of cases before the Charity Tribunal in the period of this review, this comment may have been prescient. At the fully funded budgetary option, the Review noted that a benefit of its adoption would be that “Reputational

damage to the Commission would be lessened as the process of registration would be maintained and a view could be taken on the status of all deemed organisations.” It is interesting to compare these budgetary figures with those in **Table 3.2 below**, which would seem to indicate that the Department did not deprive the Commission of the resources it requested in the years following 2016, even if the Commission promises made in the Capacity Review as to what could be achieved in return were not fully delivered.

4.3. Draft Scott Review 2016

The Capacity Review was followed by a further Departmental Review in August 2016, this time in response to a request by then Minister for Social Development, Paul Givan MLA. The Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008⁵⁵(more commonly referred to as ‘The Scott Review’, after its civil servant author) arose after the Minister expressed concerns at the regulatory approach being adopted by the Commission. The draft report was never finalised or published due to the fall of the Assembly in early 2017. The Review Panel has seen a December 2016 draft of the report and its recommendations. In commenting on

⁵² Ibid, at p.3.

⁵³ Ibid., p. 24.

⁵⁴ Ibid., p. 27.

⁵⁵ The Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008 (draft dated Dec 2016).

the ability of the Commission to deliver within available resources, the draft Report concluded:

“The Review Team found that CCNI operates overall as an effective body, but the current approach to regulation is causing unsustainable pressure on current resources. CCNI reports that it is not yet in a position to define specific areas of focus because of a lack of detailed sector intelligence to allowing effective targeting for regulation activity. This destabilises the argument that additional resources should be applied at this time. Until there is better understanding of risk, additional resources cannot be justified.”⁵⁶

Understanding risk to the sector thus remains a critical issue for the Commission nearly five years on. Increased resources will not make the Commission a more effective regulator per se. In a recent response to a request from the Panel to comment on the Department’s assessment of the Commission’s performance, the Department’s comments echoed those it made in 2018, i.e., to call on the Commission to prioritise its regulatory efforts, with the Department noting the ongoing challenging nature of resources make “prioritising of the Commission’s workload more important than ever as the Department considers commencing other parts of the Act.” The Panel believes that the Commissioners play an important role

in setting the strategic direction of the regulator when it comes to regulatory approach, risk appetite and risk management (a matter that will be further addressed in Chapter 9). The Panel emphasises that as completing the register of charities is a primary statutory objective of the Commission it should be the top priority. The Panel recommends:

Recommendation 7: The Commission refocus its regulatory efforts on its primary statutory objective to complete the register of charities by clearing the backlog of registration applications.

In respect of this recommendation the Panel will propose supporting measures to achieve this in Chapter 5. The Panel is also aware that Royal Assent to the new Bill has yet to be given and it will take some time to implement. It is the Panel’s view that the intervening time should be used to register as many charities awaiting registration as possible.

4.4. The Executive Office Review of the Department’s Handling of Complaints and Concerns (2020)

Subsequent to the spate of litigation resulting from some of the earliest statutory inquiries undertaken by the Commission and the fallout from the Commission’s engagement with stakeholders in those cases, the then Head of the Civil Service, David Sterling, commissioned a former Whitehall senior

⁵⁶ Ibid., [6.7.5] – [6.7.6].

civil servant, Jonathan Baume, to review how the Department had handled complaints from a member of the public in relation to a specific statutory inquiry carried out by the Commission (hereinafter, 'The TEO Review').

Completed in August 2020, the TEO Review included a recommendation to the Department to consider its role as the custodian of charity regulation and sponsorship of the Commission (a matter addressed more fully in Chapter 9 of this report). At the time that the TEO Review was being progressed, as part of its own due diligence, the Department's Head of Governance carried out a wider review of the correspondence between the Department and charity stakeholders in the statutory inquiry at the heart of the TEO Review. The correspondence review made two recommendations which are relevant to the issue of regulatory approach:

- 1) The Department should engage with the Commission to obtain assurances that the Commission has in place a sufficient range of responses short of the use of statutory powers and that the decision making process to institute a Statutory Inquiry adequately addresses the issue of proportionality, risk and value for money.
- 2) The Department should seek assurances from the newly appointed Chief Commissioner that, in the specific case of the charity in question, all Commission responses short of the use of statutory powers were applied in seeking to achieve a consensus way forward between the Board of charity trustees in the interests of the charity and that the decision to institute the Statutory Inquiry was, in hindsight, proportionate in the circumstances.⁵⁷

To assist in the provision of these assurances, the Commission initiated a review by Independent Counsel, which is now nearing completion. The Panel understands that the Chief Commissioner will consider Independent Counsel's Review to support the provision of the assurances requested by the Department. In response to a request by the Panel, the Department, while recognising both the independence of the Commission in taking regulatory decisions required of it under the 2008 Act and the professionalism of Commission staff and the Commissioners themselves, pointed to the Department's ambition (which it stated was jointly shared by the Chief Commissioner) to "improve the culture within the Commission, which has at times been perceived to be overly defensive and disproportionately focused on enforcement."⁵⁸

⁵⁷ Department for Communities, Charity Commission NI Statutory Inquiry – Review of Correspondence, August 2020.

⁵⁸ The Department's Response to Request by the Panel, August 3, 2021

4.5. Panel Analysis

In its own review of Commission Board papers and records, the Panel was struck by the Commission's recognisable and laudatory attempts to capture moments of learning from its regulatory practice. This was particularly noticeable in terms of internal discussion documents on the Commission's experience of exercising new powers, its review of registration processes and compliance procedures and its assembly and publication of thematic reports, highlighting lessons learnt in the application of the Act aimed at informing both future Commission application of and charity sector compliance with the law. The Commission's transparent and well-recorded learning approach is in itself significant in terms of demonstrating a willingness to seek improvement. It could achieve greater effect if it were regularly reviewed to consolidate learning at a strategic and systemic level, for example, by applying the approach to learning about how systems contribute to culture, and set the Commission in the forefront of learning approaches.

It is important to note that while there was significant discontent with the regulatory approach there was also feedback at our webinars that was positive and a recognition that while hard questions had to be asked they were asked respectfully. Staff, we heard, handled themselves well in some of these

difficult situations. The learning approach should gather such positive feedback to provide guidance to the Commission about what positive cultural change could look like. A clear focus on outcomes will also assist with this learning approach.

In terms of regulatory approach, the Panel endorses the shared ambition of the Chief Commissioner and the Department to develop an environment within which the Commission is an enabling regulator. To this end, the Panel strongly encourages the timely roll out of the Risk Assessment Framework, discussed in section 3.4 above, as a way of embedding both proportionate and responsive regulation. The Panel also recognises this may require the Commission to reflect on its organisational culture in its regulatory approach and engagement with the sector, a matter discussed further in Chapter 4.

Recommendation 8: The Commission should develop its learning approach to include how the new Risk Assessment Framework and the IT to deliver it, informs the culture of the Commission to mirror a transformation in regulatory approach.

In respect of this recommendation the Panel is conscious of the need for there to be a meeting of strategic and operational thinking on the approach necessary to support a culture that enables the sector, focuses on responsive regulation and leads to an enabling regulator.

5. Resourcing to Deliver the Regulatory Approach

5.1. History of budget provision

Section 9(2)(3) of the 2008 Act provides, “In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way.” To assess the Commission’s effectiveness here, one must ascertain the extent of the resources provided in the first instance. In its first year of existence, the Commission began life supported by a secretariat within the former DSD before moving to its own premises with seconded staff and its own identity.⁵⁹

Table 3.2 below provides details on the sponsor Department resourcing of the Commission to date and the number of

staff directly employed by the Commission. When established in 2009, the Commission received a budget of £364,338 from DSD. This budget more than doubled in 2010/11, as the Commission began to recruit its own staff and became fully independent from DSD’s secretariat, although it still had the benefit of seconded staff at this stage of its existence. Growth of staff numbers and budget continued apace through to 2013/14, when staff numbers almost doubled on the previous year. This growth in numbers coincided with the commencement of registration. Since 2014, both budget and staff numbers have remained fairly steady. A noticeable increase in budget to enable the Commission deliver its strategic plan 2019/22 is apparent from 2019 onwards.

Charity Commission Financial Year	Total Expenditure (resource only) - £*	Staff Costs - £** <small>From Annual Report Statement of Comp Net Expenditure table</small>	Commission Staff Employed including Seconded staff	Staff seconded from Depts / Other	Comments
2009-10	364,338	224,667	7	7	Secretariat staff provided by DSD
2010-11	829,541	447,576	11	10	Secretariat staff provided by DSD
2011-12	1,004,401	583,970	15	4	Staff seconded from DSD and Courts & Tribunal Service for part of the year
2012-13	1,064,479	692,726	17	5	Staff seconded from DSD and Courts & Tribunal Service for part of the year

⁵⁹ Charity Commission Annual Report 2009-10, p. 6.

Charity Commission Financial Year	Total Expenditure (resource only) - £*	Staff Costs - £** <small>From Annual Report Statement of Comp Net Expenditure table</small>	Commission Staff Employed including Seconded staff	Staff seconded from Depts / Other	Comments
2013-14	1,571,856	995,416	32	6	Staff seconded from DSD for part of the year / Other staff costs relate to temporary agency staff
2014-15	1,800,522	1,173,125	31	6	Staff seconded from DSD / Other staff costs relate to temporary agency staff
2015-16	1,745,357	1,223,400	31	6	Staff seconded from DfC / Other staff costs relate to temporary agency staff
2016-17	1,918,178	1,327,356	31	6	Staff seconded from NICS / Other staff costs relate to temporary agency staff
2017-18	1,804,977	1,257,771	29	4	Staff seconded from NICS / Other staff costs relate to temporary agency staff
2018-19	1,743,538	1,225,094	27	3	Staff seconded from other government departments / Other staff costs relate to temporary agency staff
2019-20	2,396,175	1,436,970	31	2	Other staff costs relate to temporary agency staff
2020-21	2,099,839	1,516,578	33	3	Other staff costs relate to temporary agency staff

*Source: Charity Commission NI Annual Report Statement of Cash flow grant in aid

**Source: Extraction from Charity Commission NI Annual Report and Accounts & breakdown of staffing figures

Table 3.2 Commission budget and staff numbers (source: Annual Reports of the Charity Commission)

5.2. Is the annual budget sufficient?

One noticeable feature about the Commission's annual resourcing is the extent to which its final budget is dependent upon regularly securing significant additional in year allocations when money becomes available during the financial year. While many public

bodies have experience of this type of resourcing, to the Panel's mind, it is the worst approach both for the Department and for the Commission. It should be noted that one outcome of a 2018 strategic direction meeting between the Department and the Commission was the Department's subsequent approval of temporary three year budget uplift of

£300k per annum for the Commission. This additional funding is due to end in 2021/22.⁶⁰

From the Commission's perspective, in-year bid allocations mitigate against planning (as the funding is not present in the budgetary model at the start of the financial year) and create risk and uncertainty in that a public body has no guarantee that this essentially discretionary funding will continue into the future, no matter how much the body has come to rely upon it for its day to day operations and existence.

From the Department's funding perspective, ongoing funding in-year bids may disguise the actual resources regularly committed by the Department to the public body and may not be fully assessed against performance in strategic statements and annual business plans (given their uncertain and last minute nature). For example, in the five financial years from 2016/17 to 2020/21 the Commission received on average an additional £217k resource per annum, in year, which equates to an average increase of 12.6% from its original budget allocated by the Department at the beginning of the year.⁶¹ To this end, the Panel believes that the Department should review its funding model for the Commission with a view to better understanding the full extent of its regular

ongoing support of the regulator and examining whether greater baseline funding is required (or not) in light of the type of regulation the Department expects the Commission to deliver over the short to medium term.

Recommendation 9: The Department should review its funding model for the Commission with a view to better understanding the full extent of what is required for regular ongoing support of the regulator and examining whether greater baseline funding is required (or not) in light of the type of regulation the Department expects the Commission to deliver over the short to medium term. This should happen within 4 months of this Report and result in the required appropriate funding for the implementation of the recommendations in this Report.

5.3. Is the Commission sufficiently well-resourced to deliver its statutory objectives?

In measuring regulatory success, one must always be careful to take note of the scale of the regulatory tasks asked of a regulator in tandem with the resources made available to it. Howsoever charities are regulated, such regulation normally involves a registration and review process which, if successful, leads to a charity

⁶⁰ Panel Correspondence with Director, Voluntary & Community Division, Department for Communities, September 3, 2021.

⁶¹ Source: Budget figures provided by Department for Communities.

being placed on the register of charities which then obliges the registrant to comply with annual reporting obligations.

From the state’s perspective, the establishment of a new government agency, its staffing and the introduction of new regulatory requirements involves certain sunk costs. As these establishment and registration costs level out over the initial years, they are replaced by annual monitoring costs (depending upon the level of sample audit of compliance undertaken), rolling reviews of the register (depending upon how clean the initial register was upon its primary population), and education and enforcement costs (depending upon the regulator’s level of active engagement with the charity sector). Thus, costs may change with the age of the regulator but may not necessarily lessen. It follows that regulating a smaller cohort of charities is not always proportionately cheaper.

A good comparator in this context is the Scottish Regulator, OSCR. Its establishment date precedes the Commission by only a few years (making it a better comparator than CCEW, which is long established and on a different scale entirely to the Commission). OSCR is currently responsible for the regulation of 25,370 registered charities (nearly 4 times the number of currently registered charities in NI; and more than 3 times the number of possible registered charities if the 2,342 organisations actively awaiting call forward for registration were registered).⁶² In 2020/21 it had an annual budget of £3.198 million and an overall permanent staff of 48, with 10 staff working part-time and one staff member seconded out of OSCR. As **Table 3.3** below shows, OSCR’s additional annual budget of £1m enables it to hire more staff (just over a third more in terms of FTEs). Yet each member of OSCR’s staff is responsible for more than double the number of registered charities per head than the Commission.

Agency	Budget 2020/21	Staff	Registered Charities @ September 2021	Actual Staff Costs: Total Resource Budget Ratio	FTE Staff: Charity#
Charity Commission NI	£2,092,000	33 FTE	6,504	£1,516,578(73%)	1:197
OSCR	£3,198,000	48 (45 FTE)	25,370	£2,466,000 (77%)	1:564

Table 3.3 Comparison of OSCR & Charity Commission NI Budget and Staffing (source: Annual Reports 2020-21)

⁶² See Table 5.1 in Chapter 5 for further detail.

It would thus appear that, overall, the Commission has been adequately resourced by the Department both in terms of staffing numbers and resources over its life to date, albeit (as discussed above) more by way of in-year bids and temporary budget uplifts. Furthermore, there has been a strong willingness to second staff at the EOII case-worker level to the regulator particularly, though not exclusively, in the early years with a four year period from November 2013-2016 when those staff were intended to support the processing of registrations. Commission staff are responsible for less charities per head than their Scottish counterparts. If the Department accepts the Panel's recommendation to review its net funding of the Commission to determine appropriate baseline funding levels, such clarification (and adjustment, if appropriate) would bring greater certainty in planning the Commission's workload but would equally demand accountability by the Commission for delivering on its key performance indicators in return.

The Panel also understands that there is a difference between long-term regular funding and a short term, interim injection of resources that will be required to assist the Commission to start resetting and adopting new approaches. In the case of regulatory approach and the urgency of completing the task of registering those charities awaiting registration, this is likely to require

additional short-term staffing support and measures, where possible, to escalate delivery of the new Risk Assessment Framework. To facilitate the Department to address the short-term funding need the Panel recommends:

Recommendation 10: The Department should examine the need for short term, interim resources to be provided to the Commission before legislation has completed. This should allow immediate work to begin on aspects of the new regulatory framework and form an aspect of the funding required for the implementation of the recommendations in this Report.

5.4. Staffing

As the Panel learned from its consultation with neighbouring charity regulators and indeed from the Commission itself, effective use of resources is not just about actual staff numbers but it is also, critically, a question of having the 'right' staff at the right level. Within the arrangements approved by the Minister and the Department of Finance, the Commission is responsible for the direct recruitment of its own staff. To this end, under its Management Statement and Financial Memorandum (MSFM) with the Department, the Commission is responsible for ensuring that "the level and structure of its staffing, including grading and numbers of staff, are appropriate to its functions and the

requirements of efficiency, effectiveness and economy;” and that “the performance of its staff at all levels is satisfactorily appraised and CCNI’s performance measurement systems are reviewed from time to time”. A diagram of the Commission’s staffing structure is included at **Appendix 1**.

As at August 2021, the Commission has 34 staff at the grading levels represented in Appendix 1, with half its staff at EOII level. The Panel heard that there is high staff attrition in the Commission’s legal division, normally based on more competitive salaries available elsewhere. In their meeting with the Panel, Commissioners shared their frustration over the Commission’s difficulty in retaining staff who have spent years developing expertise. Some Commissioners felt that the Commission should have the freedom to offer such staff enhanced terms and that they should not be locked into NICS equivalent pay grade scales. In terms of whether the Commission has the right level of staffing, we heard that “the numbers of staff is not the problem – it is the capacity of staff and processes they have to follow at present.”⁶³

The Panel benefitted from informed discussions with neighbouring regulators on the subject of the ‘right’ level and type of staff. The Scottish regulator, OSCR, confirmed that at current staffing levels, it is sufficiently resourced to carry out its

statutory functions and that OSCR enjoys a high staff retention. There is a conscious approach at OSCR to focus less on the seniority of staff and more on staff development and flexible ways of working. To this end, the Board of OSCR seeks to prevent staff becoming overspecialised in areas and thus less agile, by preferring a portfolio working approach in which tiers of staff do multiple tasks as opposed to concentrating on silo tasks, such as registration or compliance. OSCR’s interim Chair commented that this approach allows a regulator to be more proactive rather than reactive and the regulator could move resources to where the issues are.

The English Regulator, CCEW, also believed that its current team of 350 staff provided it with the required skillsets for its regulatory tasks. CCEW is able to recruit widely (including within the charity sector) and employ staff with a varied mix of skills who become civil servants once employed. These staff are directly employed by CCEW and not seconded, with the majority of case-workers at junior level (grade 3/4). Staff attrition again is low and issues around staff retention are usually related to pay but CCEW is viewed as an attractive place to work with good employee engagement feedback.

In Ireland, the Charities Regulatory Authority (CRA) is staffed by civil servants

⁶³ Review Panel Meeting with the Chief Commissioner and Charity Commissioners, April 2021.

who are assigned by the Department of Rural and Community Development to the Regulator. CRA hopes to move to corporate independence in the next year or two and will hire its own staff who will be public servants. CRA is transitioning from a predominance of staff at lower grades to more mid-level decision maker posts but without increasing the regulator’s pay budget. Again, there was support from CRA for the notion that it is more important to have staff at the right levels with the right skills (e.g., forensic accounting skills) for decision-making reasons than necessarily always to have more staff.

The Panel fully recognises that the Commission must work within the public expenditure control regime in NI including the constraints of its annual budget and implications in respect of staff costs. The Panel also notes the existing flexibilities the Commission has in the hiring of its own staff. However, the Panel appreciates the difficulties expressed by the Commission in terms of retaining qualified legal staff. It is interesting to note that in the Code of Good Practice: Partnerships between departments and arm’s-length bodies (2017), there is acknowledgement of the fact that partnerships work well when departments and arm’s-length bodies share skills and experience in order to enhance their impact and deliver more effectively and to this end, the Standard recommends:

“There is a regular exchange of skills and experience between the department and arm’s-length bodies, different arm’s-length bodies within the departmental group, as well as arm’s-length bodies outside of the departmental group. This may include secondments, joint programme or project boards, targeted recruitment from staff within bodies or the department, and forums for staff from bodies and departments to learn from each other.”⁶⁴

The Panel believes the Commission could benefit from drawing on skills and experience elsewhere. The Panel also believes that particular consideration should be given to how legally trained staff can be retained within the Commission and recommends:

Recommendation 11: The Department, should, as a matter of priority, explore, with the Commission how skills exchange can happen whether from the civil service to the Commission or from other sources, particularly in the area of legal services to supplement legal capacity within the Commission.

Recommendation 12: The Department should critically review how legally trained staff are provided to the Commission, including grading and salary levels for retention of same.

⁶⁴ In March 2019, the Department of Finance issued an equivalent NI Code of Good Practice which expresses a similar sentiment on the value of staff interchange. See Department of Finance, Partnerships between Departments and Arm’s Length Bodies: NI Code of Good Practice (DAO (DoF) 03/19, [4.2]).

5.5. ICT Resources

Apart from staffing, another important element when it comes to the resourcing of any regulator is the information communication technology (or 'ICT') infrastructure that it uses to carry out its operations. When it was established, the Charity Commission worked in partnership with CCEW to develop a tailored ICT system based on the system used by CCEW to meet the needs of NI.⁶⁵ Its integrated IT system comprises the Commission's registration database, a Customer Relationship Management (CRM) facility, and the Commission's website.

Being based on the CCEW ICT system, the Commission's registration and reporting system mirrors both its operation and its limitations. In its 2018/19 Annual Report, the Commission made reference to issues it had experienced in implementing planned ICT developments. It noted that it identified a weakness in relation to the implementation of the ICT Memorandum of Understanding by CCEW, resulting in the non-progression of several orders for developments. The Commission nevertheless acknowledged the benefits of its shared service arrangement.

It is unclear to the Panel the extent to which it remains open to the Commission to further tailor this ICT system to respond to some of the challenges that charities

raised regarding their engagement with the Commission. While the perception amongst some charities was that the Commission was bureaucratic and heedless of the difficulties that charities faced in filing online returns (a matter discussed more fully in Chapter 6), it would appear rather that some of these difficulties are systemic and that on occasion, the Commission is equally frustrated by its inability to extract data uploaded through the CRM system in a way that is of use to it. Similarly, complaints regarding the zero-tolerance of late filed reports before a red-flag is raised on the system relate to system controls apparently beyond the control of the Commission.

Another aspect of communication involves stakeholder contact with the Commission. Up until 2018, an individual who rang the Commission reached a member of its staff directly. In 2018, as a resource saving measure, the Commission engaged the services of NI Direct which now triage calls made to the Commission and answer many basic queries from scripts prepared by the Commission, directing callers to online resources or assisting them with general queries. The move away from direct phone contact with the Commission was a matter much commented upon by charities in our community webinars and is discussed further in Chapter 4 on Engagement.

⁶⁵ Charity Commission Annual Report 2009-10, p. 12.

Maintenance of the Commission's website, which the Commission views as central to its engagement with charities, is currently the responsibility of the Commission's communication officer, who is also responsible for media inquiries, Freedom of Information and subject access requests.⁶⁶ The implications of the unwieldy and non-user friendly state of the website is discussed in Chapter 4 but points to the need for a reallocation of resources to enable better site navigation at the very least.

First impressions count and for many charities that first impression of the Commission is formed when they search the Commission's website, reach out to the Commission through the NI Direct call service or seek to submit their annual returns through the Commission's online service, powered by CCEW. It is one of the consequences of using another's IT design that it may not fit perfectly one's own needs. When resources are limited, however, choices must be made. Changes to engagement approaches are discussed more fully in the next chapter but the Panel notes at this point that improvements to engagement may incur staffing and resource implications.

⁶⁶ Second Submission by the Charity Commission NI to the Review Panel, p. 25.

Chapter 4 – Engagement with Stakeholders

1. Introduction

“Regulatory frameworks must provide protection from the minority who wish to exploit others, perpetrate harm, or otherwise abuse the system. In a bid to prevent damage, however, a regulatory framework that concentrates on enforcement rather than on building strengths exposes a regulator to considerable risks. The regulator risks destroying the goodwill and cooperation that has converged around the reform agenda for [not-for-profits].”⁶⁷

Good regulation is all about engagement. A regulator will never have sufficient time or resources to police every single entity with a zero tolerance approach to compliance breaches. In lieu of such prescriptive regulation, enabling regulation both encourages and supports charities to engage in good behaviour. It creates an informed arena in which other stakeholders – whether funders, the general public, other regulators, umbrella bodies and even charities themselves – become allies of the Commission in scrutinising the actions of registered charities and holding them to account.

Developing a regulatory framework that recognises the goodwill and willingness of most charities to comply is key to successful regulation. This chapter assesses the Commission’s engagement with charities and the public more broadly. It considers the Commission’s culture and ethos when it comes to communication and engagement and it assesses how the Commission is perceived within the sector it regulates. Culture and ethos are critical factors as they determine how the regulator works with charities to co-create and deliver an effective, collaborative environment of compliance. Finally, it makes recommendations on how to further improve Commission engagement.

2. Good Regulatory Engagement

2.1. Appreciating the People Side of Regulation

In 2015, Professor Cary Coglianese of the Penn Program on Regulation’s Best-in-Class Regulator Initiative published a report that set out to define the attributes of regulatory excellence and how it might be achieved and maintained.⁶⁸ At its core, regulatory excellence demands the

⁶⁷ Valerie Braithwaite, A regulatory approach for the Australian Charities and Not-for-profit Commission: A Discussion Paper (Regulatory Institutions Network, February 2013), at 6.

⁶⁸ Cary Coglianese, Listening, Learning, Leading: A Framework for Regulatory Excellence (Penn Program on Regulation, 2015).

consistent achievement of three fundamental attributes: utmost integrity, empathic engagement, and stellar competence. While any regulator worth its salt will require integrity, engagement and competence to perform its role, it is the achievement of the adjectival levels of these attributes that make the good and excellent regulators stand out.

I. Utmost integrity

For Coglianese, **utmost integrity** embodies a commitment to serving the public interest, to respecting the law and duly elected representatives, to taking evidence and analysis seriously, and to admitting and learning from mistakes. It also requires a regulator to possess courage:

“[since] seeking to act in a way that advances overall public value will, by necessity for a regulator, require making decisions that will displease some segments of society, including sometimes some of the most powerful segments.”⁶⁹

II. Stellar competence

Stellar competence focuses on delivering substantive outcomes and achieving high performance – and everything else a regulator must do to advance those substantive outcomes that yield maximal public value. Not only is competence concerned with efficiency, it is also about

various qualities related to best practices, such as proportionality, flexible instruments, and risk-informed priority-setting.⁷⁰

III. Empathic engagement

Empathetic engagement concerns transparency and public engagement; it is about how a regulator interacts with charities and the public. Does it, for example, provide adequate public notice of its activities? Does it affirmatively solicit public input and seek to educate the public? Just as importantly, empathetic engagement encompasses the culture and attitudes displayed by a regulator and its staff when they engage with others. Do they treat others respectfully – even those being investigated? Do they assume at the outset that noncompliance might not stem from ill will? When they make decisions, do they provide clear, sincere, and coherent and understandable reasons for them? ⁷¹

The value of this last attribute of empathic engagement in a regulatory regime should not be under-estimated or seen as an optional add-on under a customer service charter. In the words of Coglianese:

“To move from good regulation to excellent regulation, the regulator also needs to master the people side of regulation. Regulation, after all, is relational. It is motivational. It is

⁶⁹ Ibid., p. 23.

⁷⁰ Ibid.

⁷¹ Ibid.

fundamentally about affecting the behavior of people. The regulator is seldom directly fixing problems; rather, it is working with and through members of the public to identify problems needing to be prevented or redressed...”⁷²

2.2. What might good regulatory engagement look like?

It is quite common for public agencies to adopt service charters, setting out the standards by which the agency commits to treat those who engage with it. This approach arises from the belief that a regulator that brings the sector with it along the journey of regulatory compliance and that incentivises and acknowledges good behaviour is more likely to achieve these regulatory goals.

The Charity Commission, for its part, subscribes to such a charter.⁷³ This charter sets out procedural expectations regarding response times to phone calls, written correspondence and complaints and serves a useful purpose in its own right. The type of engagement under discussion in this chapter, however, is not limited to these procedural aspects of stakeholder interaction.

If we were to move away from a services charter and think more so in terms of a Charity Commission engagement charter, what would this look like? One such Australian model, reproduced at **Table 4.1** below, sets out possible attributes that an engaged regulator and compliance-minded charity might display if wishing to build mutual stakeholder trust.

The Regulator commits to:	Charities commit to:
1. Treat you fairly and reasonably.	1. Be truthful.
2. Help you to get things right.	2. Be reasonable and fair minded.
3. Make it easy for you to comply.	3. Keep the required records.
4. Be accountable.	4. Take reasonable care.
5. Value your feedback.	5. Report by the due date.
6. Respect your right to a review.	6. Notify the Regulator of changes.
7. Treat you as being honest unless you act otherwise.	
8. Offer you professional service and assistance.	
9. Explain the decisions that are made about you.	
10. Accept you can be represented by a person of your choice and get advice.	

Table 4.1 Braithwaite’s Not-for-Profit Engagement Charter, adapted from the Australian Tax Office Taxpayers’ Charter

⁷² Ibid, p. 52.

⁷³ Charity Commission NI, Customer Charter: Our Service Standards, available at <https://www.charitycommissionni.org.uk/media/1028/20201215-our-service-standards-customer-charter-v4.pdf>

2.3. Good Regulation built on Collaboration

It is noteworthy that engagement is a two-way street. It requires buy-in by both the regulator and the sector.

A Commission commitment to treat charities fairly and reasonably is easier to deliver if charities, for their part, are living up to their promise to act reasonably and to be fair-minded. Absence of charity cooperation by some raises the compliance stakes for the Commission, and as a body charged with regulating the sector, the Commission may then escalate enforcement levels. While we will discuss compliance matters more fully in Chapter 7, the important takeaway for now is that absence of cooperation by some charities should not trigger a ripple effect of higher enforcement against all charities. The ability to know the sector, to be aware of the varying levels of regulatory engagement and to understand both the rationale for and the associated risks of such differences in compliance is key to responsive regulation. It is important to remember that regulation is not an end in itself. The purpose of the regulatory framework established by the Charities Act (NI) 2008 (the 2008 Act) is to enable registered charities to better carry out their charitable missions to the greater benefit of society.

The commitments in **Table 4.1** offer a useful benchmark of behaviours against which to consider the Commission's performance. Engagement seeps into

most of the Commission's activities – whether it is registering charities, monitoring charities based on their annual reports, responding to charity queries or concerns or initiating compliance actions against charities. All of these specific matters are dealt with in more contextual detail in subsequent chapters in this report.

And yet, it is often **not what you do** but **the way that you do it** that colours relations between a regulator and its stakeholders. Correspondence tone matters; timeliness of reply matters; so too does the perception created in the sector by the regulator's actions and inactions. To achieve the full impact of resetting the regulatory dial, charities too must buy into the process and be willing to work with the Regulator to co-create a dynamic, co-operative sector marked by mutual respect and collaboration to build public confidence, trust and ensure regulatory compliance. This will take strong leadership. The Panel believes this should be led at Board level and recommends that:

Recommendation 13: The Board should take the lead in setting tone and direction for taking full advantage of every relationship building opportunity (e.g., registration, annual reporting etc) and develop a plan for collaborating with Commission staff to achieve this. In all forms of engagement, tone matters.

This chapter turns now to consider general levels of public trust in the Commission before examining the particular feedback provided by webinar attendees and questionnaire respondents on the issue of engagement.

3. Views about the Commission's Engagement

3.1. Reported Trust and Confidence Levels in the Commission

As part of its commissioned surveys on the level of public trust and confidence in charities in NI, conducted in 2016 and again in 2021, the Commission asked about the public's awareness of the Commission and the perceptions of its effectiveness as a regulator. In 2016, the majority of participants (64%) had never heard of the Commission, while those who had heard of it perceived it to be like an ombudsman for charities.⁷⁴ By 2021, 50% of the public had heard of the Commission and more than half (55%) of the public had a high level of trust and confidence in the Commission.⁷⁵

In 2021, three-fifths (61%) of the public felt that charities were regulated effectively, which is a notable increase when compared to the number (52%) who felt this way in 2016. Interestingly, around a quarter (26%) of the public in 2021 did not know how effectively charities were regulated.

The incomplete draft of the Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008 (hereafter referred to as 'the Scott Report') in 2016 recommended that the Commission needed to develop a forum to engage with the charity sector. Such a forum, if properly constituted, could provide an important avenue for the Commission to hear the lived experiences of charity regulation from those most affected by the Commission's actions. At the launch of the Public Trust in Charities Report in June 2021, the Chief Commissioner referenced movement on the future establishment of such a forum and the Panel understands that a forum comprising 14 charities and chaired by an independent chair will meet for the first time in September 2021. This is an important shift in the aftermath of the NICA decision in *McKee v Charity Commission*.⁷⁶ The Review Panel supports the Scott recommendation in this regard and endorses the Commission's recent steps towards the establishment of such a forum, albeit the Panel notes that it is more than five years since this was first mooted.

Plans are also afoot to have more visible Commissioner involvement and engagement at public events and training workshops and for the Commission to

⁷⁴ Charity Commission NI, Public Trust and Confidence in Charities Research Report 2016.

⁷⁵ Charity Commission NI, Public Trust and Confidence Research Report 2021, available at <https://www.charitycommissionni.org.uk/media/1839/20210624-public-trust-and-confidence-research-report-2021.pdf>.

⁷⁶ [2020] NICA 13.

reach out to the sector to a greater extent through social media.⁷⁷

In support of the recommendation in the draft Scott Review and endorsing the Commission's recent steps towards the establishment of a Stakeholder Forum, the Panel recommends that:

Recommendation 14: Board members should play an active role in the Commission's Stakeholder Forum.

When compared to the trust levels placed in charity regulators in other jurisdictions, the rate of public awareness of the Commission at 50% compared very favourably with that of the Office of the Scottish Charity Regulator (OSCR) (in 2018) at 33%;⁷⁸ was similar to the Charity Commission for England and Wales (CCEW) (in 2018) at 52%;⁷⁹ and was only slightly behind the CRA (in 2021) at 56%.⁸⁰ This certainly paints a broadly positive picture of the standing of the regulator in the community. We turn now to consider the views of those most directly affected – the charities themselves.

3.2. Day to Day Engagement

Charities may routinely contact the Commission for a variety of reasons.

It may be as part of the process of making

an annual charity return or to seek the Commission's advice in relation to a live issue within the charity – such as a registration or governance issue. It may be in response to correspondence from the Commission itself – perhaps seeking further clarification of Commission self-regulation advice or stronger regulatory guidance. The charity might be making a serious incident report to the Commission or seeking Commission consent or a Commission scheme. In fact 87% of respondents to the Panel's online questionnaire had direct experience of engaging with the Commission.

The method of user engagement ranged from Commission website guidance (82% of respondents), phone support (53%), with Commission roadshows/events also figuring strongly with 37% of respondents. Just under one-fifth benefitted from either helper group support or a helper group roadshow or event. The predominance of website engagement as a starting point for engagement is not surprising and reflects the Commission's own records of website usage. In 2019/20 the Commission's website had 432,754 unique website visitors. The Commission had a further 203

⁷⁷ Comments of Chief Commissioner Nicole Lappin at the launch of the 2021 Report on Public Trust and Confidence in Charities available at: <https://youtu.be/efPqKs6LB0w>.

⁷⁸ OSCR, Scottish Charity Survey 2018, General Public (March 2018) available at: <https://www.oscr.org.uk/media/3156/2018-05-17-scottish-charities-survey-general-public.pdf>

⁷⁹ CCEW, Trust in Charities, 2018 (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723566/Charity_Commission_-_Trust_in_Charities_2018_-_Report.pdf)

⁸⁰ The Charities Regulatory Authority, Irish Public Survey (an Amárach Report, April 2021) at: <https://www.charitiesregulator.ie/media/2179/public-survey-report-april-2021.pdf>

subscribers to its monthly e-newsletter and its Twitter channel had 3,516 followers.⁸¹

In terms of usefulness of these different methods, the vast majority of respondents valued most face-to-face engagement whether provided directly by the Commission or facilitated by helper groups – 80% of respondents rated helper group roadshows or events as either quite useful or very useful while 78% of respondents rated Commission roadshow or events as quite or very useful. A significant proportion of respondents (64%) found helper group support (i.e., beyond roadshow events) to be quite or very useful with 63% of respondents placing Commission phone support in this bracket. Finally, 62% of respondents valued the Commission’s website, with some webinar attendees particularly noting that this was often the only resource available to them “after hours” when much of the business of charity trustees and charity volunteers is actually transacted.

3.3. The Commission’s engagement performance: what we heard

The Review Panel heard about engagement experiences with the Commission from a number of sources – from webinar attendees, from respondents to our online questionnaire and from key stakeholders. In broad brush, we heard of courteous Commission staff and good one-to-one experiences;

we also heard of adversarial meetings and frustrations with accessing advice or updates or difficulties in finding or understanding the requisite information. We were told of the limited resources under which the Commission operates – not only by the Commission, but also by the sector.

We received many proposals on how communication and engagement could be improved, with many pointing to the need for change in the tone adopted by the Commission or a lessening of the Commission’s suspicion that the sector was not complying with charity law. As Chapter 3 explains, the Commission’s regulatory approach is informed by its own experience as it was being established and in particular the fact that its enforcement powers were developed before it received registration powers. However, given that good regulation is as much about assisting charities to comply as it is about enforcement to achieve compliance, some re-calibration of the Commission’s approach is likely to assist it in becoming a more effective charity regulator.

The majority (87%) of respondents to the online questionnaire had experience of engaging with the Charity Commission. Over half (51%) of all respondents who had engaged with the Charity Commission advised they had a positive experience of engagement, rating it as either a four or a five. Just under one in five (19%) had a

⁸¹ Charity Commission, Annual Report 2019-20.

negative experience, rating it as either one or two. The remaining 31% had an average experience.

The majority of comments from both organisations and individuals who had provided a positive rating were about the staff at the Commission. While not universal from respondents, staff were described by a significant number of respondents as being helpful, understanding, and having provided clear and useful advice.

Organisations that gave a negative rating raised several issues. Some commented on the Commission's unclear advice and guidance, stock email replies, slow responses to emails, and no clear information provided on response turnaround times. Another comment was that everything was conducted via email and it was very difficult to talk to anyone over the phone. Of the individuals who provided a negative rating the most common comment was with regards to Commission staff, who were described as poorly trained and incompetent [IDs 52, 74, 78]. Other complaints were that the Commission had little understanding or empathy for smaller charities, and that they did not respond to requests for help and guidance.

For those respondents who provided an average rating, responses were mixed. Some said the Commission staff were always helpful and courteous, while

others said the responses they had received to queries were useful. Others described contact as being remote, always via email and impersonal or expressed difficulty in speaking to Commission staff by phone. In further analysing what we heard through the course of the Review, we return to the benchmarks of engaged regulation, set out in **Table 4.1**.

a) Does the Commission treat you fairly and reasonably?

In its second submission to the Review Panel, the Commission spoke to the many ways it seeks to engage with charities in carrying out its regulatory role, both through broad outreach and engagement events and more specifically in respect of advice and guidance to charities. Attention was drawn to the 69 pieces of guidance made available through the Commission's website, relating to registration, annual reporting, and governance matters, along with an appendix to the submission, detailing many practical examples of Commission engagement with charities.⁸² There is no doubt that the Commission has made significant efforts over the years to provide information to charities. However, despite these efforts, charities felt that further steps in relation to how the Commission communicates (and not necessarily what it is communicating) could be taken that would allow for fairer treatment by the Commission.

⁸² Charity Commission NI, Second Submission to the Independent Review Panel, at pp. 55-56.

In the words of one respondent:

“Whilst there are members of the charity commission staff who try to be helpful, they seem to work for an organisation that would be more akin to a secret society than a publicly accountable body. There needs to be a change in the culture of the organisation and unfortunately, despite the changes that have occurred, in recent times, within its senior staff, there does not appear to be any significant change.” ID 7

On the issue of tone, another stated:

“The tone of correspondence from the Commission was overly officious and not helpful. The speakers at the event I attended showed very little understanding of or empathy for the difficulties facing trustees of very small organisations.” ID 110

In terms of reasonable responses to regulatory issues, a respondent suggested that it would be helpful if the Commission disclosed expected processing timescales for charities waiting a call forward for registration:

“having advanced notice of the likelihood of being called forward is not unreasonable; as prepared documentation can easily change over time, which then puts pressure on the 30-day application window.” ID 112

Another respondent spoke to there being an imbalance of power between the standards that the Commission applied to charities and the standards it applied to its own performance:

“This can sometimes leave a perception of disconnect and/or an imbalance of power, particularly when information is being requested by CCNI and the timeframe given to collate and the way in which it must be presented. It can appear that CCNI work slowly yet when information is requested, it must be provided within an exceptionally short timeframe.” ID 124

We heard of a Commission focus on non-compliance that was not encouraging from a sector perspective. In this vein, reference was made to the adoption of an overly punitive approach towards reporting errors or failures that could invoke a heavy response from the Commission, while others thought that the speed at which the Commission escalated matters to the opening of statutory inquiries in some instances was not warranted and resulted in the use of a ‘sledgehammer to crack a nut.’

b) Does the Commission help you to get things right?

In large part, those engaging with the Commission confirmed they had not met challenges (62%) while 38% said they had and challenges were experienced more often by individuals (55%) than by organisations (32%). On a positive note, we heard:

“The regular stakeholder meetings are welcome and beneficial for sharing of information/updates, consideration of operational matters arising in practice and issues of mutual interest/concern.”

ID 134

Others who made similar comments as to the quality of the Commission’s assistance did however point to the need to improve the process of Commission communication:

“Any questions I have had have been answered appropriately and in an appropriate timeframe. However, I do find the means of contact to be quite impersonal. It’s impossible to get speaking to anyone – everything is done by email, and sometimes a quick call would be more appropriate.” ID 4

And:

“Key individuals are excellent and very helpful, but the overall ease of contacting the Commission for everyday enquiries is not always easy for groups and some of the correspondence is very formal.” ID 66

Respondents were asked to define the challenges they met in engaging with the Commission and these challenges covered a number of areas, including:

- The slowness of the registration process;
- Unclear advice and guidance;
- Not being able to speak directly with a staff member;

- Over-reliance on emails and the website;
- Lack of proactivity with regards to unlawful registrations;
- No complaints process or guidance to charities about how to make a complaint;
- A few individual respondents found the staff unhelpful, aggressive, lacking empathy or bullying in their behaviour.

As part of its management of resources in 2018, the Commission outsourced its phone service to NI Direct, a budget saving move which freed up Commission staff but has generally received a poor rating from respondents. Attendees at 7 out of 9 webinars listed the NI Direct phoneline as a “big negative” in their dealings with the Commission but there is a general agreement that when it is possible to connect with a member of staff in person (by phone) that staff are courteous and helpful. In the words of one respondent:

“Not happy with NI direct responses when I contacted them as a helper group. They tried to answer my queries but did not have enough knowledge. As a helper group I would have preferred to go straight through to Commission staff. I was able to email specific staff directly but I understand for groups this would have been frustrating not knowing who to speak to / contact.” ID 133

The Commission acknowledges that callers would prefer direct Commission contact but resources do not allow it to manage the volume of calls it would receive. By way of example, from 1 April 2018 – 31 March 2019, with the assistance of NI Direct, the Commission processed 17,794 general queries via calls and e-mails.⁸³

The Panel observed a certain mismatch between respondents' understanding of engagement and that of the Commission. In assessing the tone of Commission engagement, respondents tended to scrutinise and judge the Commission on only those occasions where direct contact was had – whether by way of written correspondence or phone/email contact – with the individual or organisation. Charities reading the website for guidance or using the website for reporting etc. did not necessarily view those instances as the Commission “engaging” with and supporting them. Rather, receipt of a legalistic letter or a red-flagged set of accounts for some amounted to an unsupportive Commission in their eyes.

The Commission, on the other hand adopted a broader understanding of its role as a communicator to encompass its website guidance, its toolkits, its video tutorials and its thematic reports on lessons learned from compliance and enforcement events. From the Commission's perspective, its first and

predominant method of engagement is its website guidance (which many respondents found to be copious, not always easy to navigate and not always responding to their particular issues). Support by the provision of more impersonal material online while reserving face to face meetings or direct feedback to a charity for those situations actually requiring it, in the Commission's eyes, fulfilled its role to manage its resources effectively, given budget pressures, and provided support and guidance to the whole breadth of the sector, thereby encouraging good behaviour with lower compliance costs.

Taking a holistic approach, it is not sufficient to provide online guidance if it is not easily accessible or to provide feedback via thematic reports, if charity trustees are not reading and learning from these resources. A short video summary of lessons learned in an e-newsletter or on twitter might be far more widely watched (particularly if subscription numbers to the newsletter rise above the current 203 subscribers). The Panel recommends that the Commission should review its communications strategy as part of a bigger re-calibration of its engagement with the sector.

In this broad area of engagement it is important for the sector to understand that the Commission has made significant

⁸³ Charity Commission for NI, 2019/20 Annual Report & Accounts.

efforts, within its resource constraints, to provide what is needed in the form of information, for example via the website. It is equally important that the Commission understand that providing information (e.g. through its website) is not experienced by the sector as engagement. From the Commission's perspective the provision of information and answering queries via NI Direct has been important to enable staff resources to cope with sector demand. However, from the sector's perspective, in some significant cases at least and more broadly as evidenced in the Panel's evidence gathering, engagement from the beginning is critical to the ongoing relationship with the Commission, a relationship that can facilitate good compliance as we will speak to in Chapter 7.

It is important that the Commission understand that if the first face-to-face contact a charity has with the Commission is at enforcement and in inquiry then the perception and belief about the Commission will be that it is interested only in policing the sector rather than supporting and developing it to collaborate in the process of good regulation. This is further emphasised by events and support that is provided by secondary bodies, NICVA in particular, thus further distancing the Commission from the sector. The Panel does not believe this has been intentional on the part of the Commission but at this critical

time in the Commission's history we do believe a recalibration is required. In this respect we reference the reader back to Recommendation 13 and the need for this project shifting engagement to collaboration for good regulation will require to be strongly led by the Board.

c) Does the Commission make it easy for you to comply?

Attendees at 5 out of 9 webinars told us that the Commission was 'too focused on compliance' rather than helping charities and that it needed to be more positive and engaging.

"The commission has a reputation for being heavy handed, however that said some of the outcomes have been very good both in helping organisations get themselves on the right path or removing those who should not be trustees or officers in the first place." ID 60

Respondents, however also told us that generally engagement about compliance is good:

"CCNI is diligent in its approach to compliance and intelligent in its engagement with trustees." ID 48

The Commission places great reliance on the information, guidance and toolkits provided through its website. Yearly references are made in annual reports to the high level of user 'hits' on the website. The Commission publishes its sector learnings in the form of thematic reports

(informed by anonymised lessons learned from concerns about charities as a result of self-regulation advice or regulatory guidance) and statutory inquiry reports.

There was mixed views on the effectiveness of the website, which the Commission views as its primary mode of communication with stakeholders. Webinar attendees' views ranged from finding it useful to finding it non-user friendly and overwhelming. Of those respondents to the questionnaire who used the website, 61% rated it as quite useful or very useful. A vocal minority expressed great frustration with the website – a perspective acknowledged by the Commission in its second submission to the Panel. According to the Commission, while the website:

“... is used extensively by stakeholders (432,754 unique visitors in 2019/20), it is also a source of frustration to them. We receive regular feedback that it is difficult to find guidance on the website and that the search engine is not good. We try to respond to this feedback but with only one communications officer who also deals with other key areas such as media queries, FOI's and SARs it has been difficult to find the resource time to improve the website.”

Respondents pressed for better search tool and navigation functionality to be built into the website. Other suggestions for improvement suggested streamlining

the copious information on the website and making it more user-friendly.

In practical terms more generally, several charities found Commission correspondence heavy handed and 'brash' in tone with references to long, legalistic, anonymised letters, lacking case-worker signatures. Others referred to the inappropriateness of 'stock email' replies or slow responses to emails that did not always provide clear guidance when received. Speaking about the tone of correspondence, one webinar attendee told us:

“There needs to be more understanding of volunteers, the pressures they are under and why they are volunteering.”

Room for better engagement around compliance was also mooted:

“Where any compliance issue is raised it would be sensible for CCNI to discuss this with the charity trustees before rushing into enforcement action. That might avoid misunderstanding of the facts by CCNI staff and expensive legal action.” ID 52

A number of respondents also stated that the Commission was secretive and not as publicly accountable or transparent as they would like. For example one respondent cited this feeling about the Commission in relation to an information request which could be turned into a complicated FOI process. While the impact of GDPR has increased the

obligations on regulators releasing information, a requestor should be guided positively, not resisted or obstructed. The Commission's perceived defensive approach in the FOI space may stem from the Commission's formative experiences as a regulator which, from its inception, had enforcement powers. While this does not excuse any overly bureaucratic approach to FOI requests, it is helpful to be aware of its possible origins so that the past can be left behind and allow for the conscious turning of a new page on the Commission's culture of engagement with the sector. It is also important to say that the Commission has experienced sometimes high levels of requests which were, at times, combative and as for all public bodies there is a need to ensure best practice in responding. This particular aspect of the history between some within the sector and the Commission is part of the recalibration that needs to take place and a commitment, across the board, to collaborating together to achieve good regulation. Such a recalibration is unlikely to either fix the ills of the past entirely or to avert all disputes in the future but it is important that there is an opportunity for the Commission to evolve further in its approach and that requires resources to be available to apply themselves to the future focused task.

d) Is the Commission accountable?

Accountability comes in two forms – upwards to higher level Boards (in the Commission's case to the Charity

Commissioners and to the Department for Communities (the Department) and downwards to lower levels (in the Commission's case to the charity sector and the broader public). There is a tendency among regulators to view regulation as primarily a technical enterprise and to underappreciate the essentially social nature of regulation. When it comes to accountability, much emphasis can therefore be placed on upward accountability and more technocratic box checking and not sufficient attention paid to downward accountability. In terms of upward accountability, as Chapter 2 has discussed, the Commission is accountable to the Department on a quarterly basis and its performance in this space has always been satisfactory.

In terms of downward accountability to the sector, there is a perception of the Commission being distant, aloof and at times heavy handed in its approach to charities. Several charity respondents, however, pointed out that the Commission is under-resourced for what it does. Given the resource constraint, respondents told us that the Commission sends people to helper groups rather than answering queries itself and while this may be understandable on a cost-basis, it creates an appearance of the Commission 'not wanting to touch what is difficult'.

The lack of feedback on submitted returns was also a cause of concern for many

charities who would welcome such engagement and for funders who commented on the poor quality of some of the annual returns posted on the charities register. Some respondents also detailed the silence that followed the submission of serious incident reports to the Commission, which left them unable to judge whether the mitigating actions that they had either proposed or taken in relation to their charity satisfied the Commission from a compliance perspective.

According to Coglianesi:

“the excellent regulator works to establish an organizational culture that fosters and reinforces humility, empathy, and a steadfast commitment to public service on the part of the people who serve in the regulator’s name – and on behalf of the public to which the regulator is accountable.”

Finding ways to engage with the sector that is both digestible for charity trustees and yet on message from a regulatory perspective is an active challenge for all regulators. Several charities spoke of the Commission’s deafening silence following the High Court decision in *McKee v Charity Commission*⁸⁴ and how they were initially left in a state of legal uncertainty regarding decisions taken by the Commission that affected their operations whether from a registration perspective or relating to cy-près or merger decisions. Respondents recognised that the

Commission was powerless at that point to change the outcome but it was more the lack of regulator empathy for affected charities that struck home.

e) Does the Commission value your feedback?

Feedback comes in two forms – solicited feedback through a formalised process of consultation whereby the regulator is actively seeking input from charities and the public in developing new strategic plans or rolling out new regulatory regimes (e.g., around registration or reporting, for instance) and secondly, unsolicited feedback that may occur on an ad hoc basis from charities who perhaps have encountered difficulties complying with a Commission requirement (e.g., making an annual return) or who wish to complain about the activities of another charity (by raising a concern) or to complain either about a Commission decision or the level of service provided by the Commission itself.

With regard to the former, the Commission actively seeks public feedback. Recent examples include its formal consultations on new and amended questions in the Annual Return Regulations 2019 and the online registration application in 2019 and its proposed action for charities that have failed basic compliance checks in 2018. The Commission sought the views of stakeholders on its draft Strategic Plan

84 [2019] NICH 6.

2019-2022 in 2018, publishing a feedback report in 2019, sharing what it had heard and what it planned to do in response to comments received.⁸⁵

With regards to unsolicited ad hoc feedback, at the more formal end of this spectrum, the Commission received an average of 16 complaints per annum in the last two years about its processes. In 2020/21, 3 complaints were dismissed; 4 partially upheld; 6 resolved informally; 1 complaint was ineligible, 1 complaint was referred to and handled by the Department and 1 was still under consideration at year-end.

The Commission received six recommendations from the Northern Ireland Public Service Ombudsman (NIPSO), which it implemented. In its second submission to the Review Panel, the Commission cited examples of behavioural changes it had adopted following complaints received, illustrating its valuing of feedback.

At the other end of this spectrum, respondents expressed some frustration that the Commission did not seem to hear or act upon charity feedback given even when the charity's engagement was a regulatory requirement (as in the case of the making of a serious incident report). We heard:

“Serious incident reports submitted (2 incidents); on neither occasion was there any feedback, or even acknowledgement of receipt. The charity was prepared to work with the CCNI in terms of any questions/investigations, yet there was no approach from the CCNI.” ID 16

Another respondent suggested that:

“CCNI needs to take the same approach as OSCR took in the early days of the reporting regime in Scotland to adopt a comprehensive review of reports and accounts submitted and provide feedback to charities where there are deficiencies.” ID 15

When lower risk compliance breaches arise (such as might give rise to the issuance of self-regulation advice or regulatory guidance), the Commission's practice has been to gather such examples together and to share these learnings with the sector through the publication of thematic reports. The difficulty with this approach is that the richness of these learnings can be easily lost when charities have limited time and capacity to read these reports and would prefer more direct assistance in resolving their issues (“Not much flexibility or assistance just referenced large bulks of reading to complete prior to completing.” ID 55). In Chapter 3 the Panel has discussed the new risk framework which we believe should assist in this area.

⁸⁵ Charity Commission NI, Setting the Charity Commission for Northern Ireland's strategic agenda: feedback report (February, 2019).

f) Does the Commission respect your right to a review?

Webinar attendees raised two particular types of difficulties with the Commission's approach to reviews. Attendees at the lawyers' webinar highlighted the fact that while (prior to the decision in *McKee v Charity Commission*⁸⁶), it was possible to seek an internal review of a Commission decision against a charity, charities often had to initiate a Charity Tribunal decision challenge in tandem with a request for an internal review as these were parallel and not sequential processes. Awaiting the outcome of an internal review could leave a charity time-barred from challenge before the Tribunal if the clock ran down. In its second submission the Commission noted that it had no control over the Charity Tribunal processes and therefore the decision review had to run concurrently with the Tribunal process to ensure applicants did not lose their Tribunal appeal rights. Looking at the practices adopted in other jurisdictions in which internal reviews are used, it is possible in England and Wales for the CCEW to seek a stay from the Charity Tribunal (thus stopping the clock on a Tribunal hearing) whilst a decision review is undertaken. The granting of the stay is at the discretion of the Charity Tribunal, which enjoys a wide discretion to manage its procedures as it sees fit.⁸⁷ Normally,

the appeal will not yet have been through CCEW's internal decision review process and it is at the agreement of both parties to stay the tribunal to allow for this process to take place. The Panel observes that The Charity Tribunal Rules (Northern Ireland) 2010⁸⁸ may not currently offer the Charity Tribunal the same flexibility on staying proceedings as is enjoyed by its English counterpart and will make recommendations regarding these rules in Chapter 8.

Since the Court of Appeal's decision in *McKee v The Charity Commission* in 2020, resulting in all statutory decisions made by the Commission now being taken at Charity Commissioner level pending the introduction of an effective delegation provision in the 2008 Act, the Commission has temporarily suspended its internal review procedures, a matter to which the Panel will return in more substance in Chapter 8 of this report. The Panel reviewed the internal review procedures provided by both OSCR and CCEW. The clarity with which CCEW explained its review procedures and set out clear and separate procedures for complaining about a service provided by CCEW versus complaining about a decision reached by CCEW commended itself to the Review, which believes that similar clarity by the Commission when it begins to operate its

⁸⁶ [2019] NICH 6 (HC), affirmed by [2020] NICA 13.

⁸⁷ See The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

⁸⁸ The Panel is cognisant of the fact that The Lord Chancellor makes the following Rules in exercise of the powers conferred on him by section 13(1) of the Charities Act (Northern Ireland) 2008(1).

review procedures again in the future would be helpful.⁸⁹

g) Does the Commission treat you as being honest unless you act otherwise?

The Commission's regulatory approach is dealt with in Chapter 3. In its public guidance and in the staff procedure manuals that we reviewed, the Commission advocates a tiered compliance and enforcement sanctions scale that seeks to work with charities to bring about good behaviour rather than using its statutory powers to compel compliance in the first instance. The Panel noted the somewhat unfortunate choice of language used in the Commission's regulatory pyramid, which spoke about "applying pressure downwards" on the sector in the compliance space. While intended to portray a proportionate response by the Commission, whereby self-regulation and regulatory guidance would be preferred tools to statutory directions and orders, the term 'applying pressure downwards' could easily be interpreted as the Commission burdening the charity sector or being heavy handed in its treatment of the sector.

The very nature of regulation is that the regulated party is not paying for the service, often does not want it and will not be pleased by it. Perceptions of Commission treatment in this space can be coloured by the outcomes of

investigation or enforcement procedures. The majority of webinar and questionnaire respondents (91%) had not experienced the Commission's investigation procedures. For the small number of those respondents who had experienced this type of enforcement, the experience had not always been a positive one and for these respondents (referred to below as 'complainants'), the Commission would not meet this benchmark. In particular, the complainants raised concerns regarding the Commission's motivation behind the initiation of investigations. Issues were also raised around the accuracy of the published statutory inquiry reports and the fact that individuals were publicly identified in those reports in relation to relatively low level matters.

Complainants felt that there was not always proper consideration of complaints made and that the Commission's complaints processes were difficult to navigate. In short, their opinion was that the complaints' process, the Commission's responses and the process timescales were all unsatisfactory. On more specific matters of process, complainants expressed concern at the Commission's use of robust language in its written correspondence and the fact that emails were not signed by individual Commission staff. One complainant stated that their complaints were intercepted by conflicted

⁸⁹ See <https://www.gov.uk/government/organisations/charity-commission/about/complaints-procedure#complain-about-a-decision-by-the-charity-commission>. See also CCEW, Guidance on how requesting a review at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784065/Dissatisfied_with_one_of_the_Charity_Commission_decisions.pdf.

Commission staff and expressed a broader concern around declarations of conflicts of interest by Commission staff more generally.

Another complainant cited significant concerns regarding data breaches and information being leaked to the media. This was an issue that had previously arisen at the Community webinars. One webinar attendee told the Panel:

“The Charity Commission should not have any authority to comment to the media or respond to their requests for information in relation to the specifics of any registered charity. . .The Charity Commission informed the media that they were conducting a review of our charity, for a period of six months, without having informed us that they were undertaking any review nor had they communicated to us in any shape or form. The first we learnt about this review was by reading it in the press.”

On other occasions, the Commission’s failure to communicate or to communicate effectively with complainants has resulted in referrals to and determinations by NIPSO against the Commission. On its website in 2020, NIPSO noted the outcome of the Ombudsman’s earlier investigation of the Commission, finding that “the complainant should have been given the chance to comment on the factual accuracy of a report by the Charity

Commission prior to its publication. However, the complaint that the report was biased and written in ‘bad faith’ was not upheld.”⁹⁰

Complainants viewed the Commission’s approach to complaints as being inherently defensive, with a culture of avoidance and an aim to protect the reputation of staff and Commissioners. Complainants felt ignored and this all contributed to a toxic relationship with complainants. One respondent told us:

“CCNI’s investigative process in respect of [our charity] involved aggressive use of its statutory powers, rather than engagement with the charity to resolve any perceived problems. The fault was the people operating the procedures, not the procedures themselves. The regulator in England and Wales (CCEW) operates very differently, working with charities to agree ways to improve governance etc. whereas CCNI’s approach was always to adopt the most aggressive approach possible.” ID 52

h) Does the Commission offer you professional service and assistance?

Most respondents viewed the Commission as offering professional service with clear praise for staff:

“I have always received excellent advice and common sense from the staff, who have always been professional.” ID 10

⁹⁰ See <https://nipso.org.uk/nipso/our-findings/complainant-treated-unfairly-over-publication-of-charity-commission-report/> (accessed September 13, 2021).

Some commented that staff were:

“overwhelmed with an impossible workload.” ID 74

This led to staff not being:

“in control of their brief” and “unable to answer any queries to my satisfaction, however on the other hand the staff were very helpful and courteous and did their very best to help.” ID 74

Some respondents were less satisfied with their engagement experiences and viewed staff efforts as less than professional:

“As a method of working and engaging with charities, the Commission uses stick and no carrot. Staff are generally abrupt with an undeserved air of importance in their dealings with trustees under investigation. This leads to both sides circling the wagons, the inquiry stalls, the trustee or charity become increasingly frustrated, no one wins.” ID 113

i) Does the Commission explain the decisions that are made about you?

Empathetic engagement requires good listening by a regulator but it also requires consistent and transparent reason-giving in a way that is accessible to the listener. This is particularly important if the regulator must make a decision that will be opposed or disliked by some. In such cases, especially, the affected parties and the public more generally deserve a full and forthright account of the policy reasons underlying the decision.

The need for better explanation for Commission decisions was highlighted by some charities. One respondent pointed to the need for the Commission to explain its decisions in plain English to charities, commenting on the need for:

“‘friendly’ communications . . . so that legal issues are explained in ‘plain speech’ to help smaller charities which don’t have a lawyer to advise on day to day matters.” ID 115

Another told us, “we had to go through court proceedings to challenge the initial outcome of our Charity Registration. It was a very stressful period that also cost us £7000 in legal fees. We are still unsure what additional information, at the stage of Court proceedings, led to our Charity status being approved. It was a very negative experience.” ID 92

Some respondents also expressed frustration at the reluctance of the Commission to engage with charities when a problem arose to help those charities to understand better the Commission’s concerns and to work together to resolve them without the need for statutory enforcement. In some cases, respondents felt that the Commission was more interested in defending (without explaining) its approach than working with the charity to improve governance. In the words of one respondent:

“The CCNI generally is very protective, and secretive of its practices and processes. Simple requests for information are transformed by them into FOI requests, needlessly frustrating the requester, causing confusion and creating suspicion.”
ID 113

In its formal response to the Panel’s request to the Department to evaluate the performance of the Commission, the Department also noted the, at times, overly defensive approach of the Commission. In the words of the Department’s respondent:

“Concern has also been expressed that the Commission is not approachable, transparent or helpful. This again is an important area which must be improved. The Department takes these concerns seriously and the Chief Commissioner shares my ambition to improve the culture within the Commission, which has at times been perceived to be overly defensive and disproportionately focused enforcement.”

For their part, professional advisers told us of their experiences of sitting through investigations with trustees at statutory inquiry. We heard that on these occasions, Commission staff set a serious but fair tone and that in these instances a statutory inquiry ‘did not come out of the blue’ and was not a result of heavy-handedness on the part of the Commission but rather because the

Commission was struggling to get their client to comply.

The Review’s Terms of Reference specifically reference the Commission’s handling of FOI procedures as a matter for consideration.

In its second submission to the Review, the Charity Commission stated that it had received 88 FOI requests in the two year period from 2019-21, of which there were 5 review requests. In 69% of cases, the Commission granted full or partial disclosure. In 18% of cases, no disclosure was made and in 10% of cases the information sought was not held by the Commission.

The records of the Information Commissioner’s Office (ICO) further reveal that between 2014 and 2019, there have been ten complaints over the course of seven appeals to the ICO against refusals of the Charity Commission to disclose information requested. Of these ten complaints, only one was partly upheld in 2017.⁹¹ The ICO found in a number of instances that the Commission had correctly refused the requests made on the grounds that the requests were vexatious within the meaning of s14(1) of the Freedom of Information Act 2016 (‘FOIA’), or that the Commission was entitled to refuse disclosure of the requested information under s. 44(1)(a) of FOIA (i.e., the information was exempt) or

⁹¹ ICO Decision notice FS50628820 (April 12, 2017).

under s.12(1) (i.e., the cost of complying with the complainant’s request would exceed the appropriate cost or time limit, as defined by the regulations),⁹² or that on the balance of probabilities that the Commission did not hold the information sought by the complainant.

Given that a regulator’s culture and ethos underpins the tone of engagement the Panel recommends that the Commission review its approach to engagement and communication to facilitate better collaboration. This is a significant undertaking and will require commitment and resources. To enable this to happen the Panel makes the following granular recommendations:

Recommendation 15: The Commission should build into its values and planning a commitment to proportionate enforcement that allows sufficient resources to be directed towards supporting charities to achieve compliance (see further Chapter 7) and takes steps to ensure that this commitment is central to staff approaches.

Recommendation 16: The Commission should develop action plans to embed a commitment to supporting charities to achieve compliance. In this respect the Commission should at least consider:

- Resourcing or delivering trustee training, both initial and refresher sessions;

- Improving the website (see recommendation 19);
- Reviewing how guidance is pitched and communicated to charities. This may involve simplifying guidance or going beyond the posting of technical guides on the Commission’s website.
- Increasing roadshows and attendance at them by using the emergence of virtual platforms (e.g. Zoom, YouTube) to provide low-cost, wide-reaching, recordable (and re-playable) sessions;
- More front facing engagement by Commission staff (see recommendation 18);
- How communications by letter or email are signed, either by a staff member or the Chief Executive.

Recommendation 17: The Commission should review its communications strategy as part of the bigger recalibration of its engagement. Such a review should include:

- The website;
- A review of standardised letters, particularly in relation to compliance matters, to improve tone and clarity of content;
- A review of how the submission of annual reports and accounts is acknowledged and the level of feedback provided to charities;

⁹² Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations).

- A review of how internal review procedures operate and are communicated;
- The use of virtual technology for engagement, training, clinics, roadshows and other methods of engagement.

Recommendation 18: The Commission should ensure that its phone service helpline (whether operated by NI Direct or otherwise) allows escalation of a call directly to a Commission staff member if there is not an immediate connection to a staff member.

The Panel understands the resourcing issue related to answering calls. While it would be preferable to connect directly to a staff member, other mechanisms to manage the resource required could be considered: for example, an options menu to triage calls; default referral to existing online resources in the first instance; and limited hours service with an out-of-hours answering service that is responded to in a timely way.

Given the website is identified as a key mechanism for engagement, learning and reporting the Panel makes a specific recommendation:

Recommendation 19: The Commission should draw up a plan to improve and update the website in light of recommendations in this Report:

- The website should be re-designed so that material and guidance is easier to find.
- Online guidance should be updated so that important information is conveyed at a level that is understandable to the average charity trustee who will not be well versed in charity law or charity accounting procedures.

The Panel notes that all stakeholders, the Commission included, have expressed dissatisfaction with the unwieldy nature of the Commission's website.

4. Other Regulators' approach to engagement

4.1. CCEW

In speaking to CCEW about its engagement processes, the Panel was struck by that regulator's focus on the importance of charities thriving under regulation and with how their interventions were shaped by this emphasis to take an enabling as opposed to an adversarial approach. To this end, CCEW espoused a pragmatic approach to engagement that focused on greater support at the lower end of engagement

mitigating the likelihood of costly intervention at the higher end of engagement. To give effect to this, the CCEW has strived to move from officious, bureaucratic, and stern language to simple, clear, and yet authoritative language when engaging with charities. It sees its mission as being to support charity trustees to get things right and the driver for this cultural change focuses on the benefit that charities bring to society. Regulatory engagement and correspondence with charities is always by way of an identified member of Commission staff.

A regulator’s approach to engagement should always be evolving, both as it learns more about the sector subject to regulation, and as that experience informs its risk-taking appetite. CCEW admitted flux on its own engagement tone over time, pointing to a natural progression in regulatory style being a feature even in a more established regulator.

4.2. OSCR

The Panel’s interactions with OSCR, revealed a similar and proactive charity centred-focus with the interim Chair of OSCR strongly stating that ‘regulation is a people business.’ OSCR strives business to be an enabling regulator operating within a helpful, preventative and proactive space for the charity sector. The language

of an ‘enabling regulator’ is an important demonstration of how OSCR has evolved and a guide for the Commission as it recalibrates and seeks to embed a culture that supports compliance.

4.3. The Panel’s View

Given the experience other regulators on these islands have of an evolving culture of regulation that has impacted how they do things, the Panel believes that it would be helpful for engagement with these other regulators to take place and so we make the following recommendations:

Recommendation 20: The Commission should set up a learning opportunity, for both the Board and staff, with CCEW to better understand both the importance of a language shift to authoritative and engaging and how that shift can be achieved.

Recommendation 21: The Commission should set up a learning opportunity, for both the Board and staff, with OSCR to better understand what is meant by becoming an ‘enabling’ regulator.

The Panel believes that the Commission needs to reset its culture and ethos both for its own sake and to assist the sector, where it requires this, to recalibrate its relationship with the Commission. The role of the regulator in the charity space is very much one of “*Parens Patriae*.”⁹³ Its

⁹³ *Parens patriae* is Latin for “parent of the people.” Under the *parens patriae* doctrine, a state or court has a paternal and protective role of its citizens or others subject to its jurisdiction. In the charity sphere under common law, this would traditionally be recognised through the AG’s common law authority to protect property held for charitable purposes. As many countries have created new statutory regulators for charity, we see an embodiment of this protective role of charities in the powers of the charity regulator.

predominant objective is to proactively enable the vast majority of charities to deliver on their charitable purposes while protecting charitable assets and beneficiaries from maladministration and misconduct in those cases where it may arise. The Commission needs to change its approach to regulation to a more responsive and enabling one that finds expression in its engagement with charities. Much can be learnt from the experiences of others in this space, as the Panel saw in its own discussions with these regulators, and the Panel will make recommendations in this area.

The Panel is conscious of the menu of work that emanates from this discussion. We are conscious, too, that this chapter may read like a list of criticisms. It is important that the sector's voices are heard and important to state that many of the suggestions for improvement that have come from the sector have arisen not out of a spirit of criticism but rather from a desire to see things improve both for the sector and for the Commission. The considerations presented here sit within the scope of the evolution of a regulator that we have addressed in Chapter 3 and are intended to empower the Commission to continue to evolve and become a more overtly enabling regulator that encourages the sector to step up as collaborators for good compliance. Providing the kind of supports that allows the sector to do what it can for itself is

critical, for example via an easily navigated website that provides less complex guides and face to face or person to person contact when required.

To correspond with that kind of provision it is critical that the Commission evidences a commitment to collaboration by the way in which it communicates, at every level, with charities and the level of interest it demonstrates from Board level through to staff, for example by engagement with the stakeholder forum, roadshows etc. That the Commission is interested more in compliance than in enforcement, as an enabling regulator, will be demonstrated by clear emphasis on education for trustees, support for those charities struggling to make returns or those who find themselves in crisis. Building relationships with the sector at these levels is essential for those challenging times when enforcement is required and will support Commission staff who deal with charities respectfully in some difficult circumstances. Developing a tolerance for good engagement and an intolerance of invisibility will be central. In this sense, the Panel is seeking to make recommendations that will result in a highly visible, present and engaged Commission that is openly and energetically positive about charities and that provides tools to support charities and opportunities to collaborate for good compliance.

The Panel is well aware that this will take time, effort and resource to achieve. It is, therefore, critical that the sector shows an equal willingness to engage with the recalibration work. There is no doubt that resources are channelled away from such evolutionary activity when there are legal challenges to deal with. While these challenges are important and can assist change, the Panel believes that if the Commission is to progress, then it needs to be able to focus resources on the future

project set out in this report. We therefore encourage the sector to engage with the Commission positively and to support their commitment to improvement. We firmly believe that these recommendations can assist the Commission to become a regulator that enables the sector to collaborate in the work of regulation and our hope is that recommendations will assist both the Board and the Staff at the Commission to play their part effectively.

Chapter 5 – Registration

1. Introduction

In every charity regime, registration is the gateway to regulation. Only those non-profit entities that meet the charity test (i.e., have one or more charitable purposes, can demonstrate public benefit and are exclusively charitable) will be entered on the register of charities.

The pivotal nature of registration as the door to charity regulation bears examination. At its heart, whether all charities should be required to register or not is a policy decision for the Minister. The purpose of regulation arises from the fact that at their core, charities hold private money for public good. In the for-profit world the payor is often the consumer and can hold service providers directly to account. In the charitable world, direct accountability is more difficult. External regulation plays a critical role in providing accountability to donors who entrust their funds to charities and rely upon charities to assist unrelated beneficiaries. Those beneficiaries may have no legal claim to the service provided or any direct connection to the original donors to hold the charities to account.

A functioning system of charity registration and regulation should provide the necessary accountability

and assurance mechanisms to facilitate and encourage both greater charitable activity in society and greater public support of charities more generally. This basic principle -- based on transparency, accountability, and trust -- holds true whether you are a large or a small charity.

1.1. Terms of Reference

The Terms of Reference (ToR) asked the Review Panel to examine the current registration process and to advise the Minister on whether:

- a) all charities should be required to register in NI; and
- b) whether the current system of charity registration is fit for purpose.

The ToR also posed a related registration question as to whether the particular requirements envisaged for the registration of s.167 institutions are fit for purpose.

This chapter begins by outlining the current regulatory framework for registration and comparing it to neighbouring charity registration systems before examining the principled question of whether all charities should be required to register. Moving from principles to pragmatism, the chapter considers whether the current registration system is fit for purpose before finally addressing

the issues raised by the particular requirements for the registration of 167 institutions.

2. The Current Regulatory Framework for Registration in NI in comparative context

The Charities Act (NI) 2008 (the 2008 Act) requires charity trustees to register all charities established in NI, regardless of size, with the Charity Commission. NI’s blanket approach to registration (‘no exceptions, no exemptions’) is a regulatory approach also found in Scotland and in the Republic of Ireland. In England and Wales, exempt⁹⁴ and excepted charities⁹⁵ are not required to register. Charities with an annual income of less than £5,000 are also not required to register in England and Wales unless they are charitable incorporated organisations (CIOs) or choose to register voluntarily. Notwithstanding this provision, over 58,000 charities with income of £5,000 or less (accounting for approximately 34% of the 170,000 charities registered in England & Wales)⁹⁶

have chosen to voluntarily register in England and Wales. In Scotland, 29% of registered charities have an annual income of less than £5,000, while in the Republic of Ireland,⁹⁷ approximately 11% of charities have an annual income of less than €5,000.⁹⁸

It was the intention of the NI Assembly at the time of the passage of the Charities Bill to introduce compulsory registration for all charities. Hansard reveals a broad welcome for the introduction of both charity registration and regulation in 2008.

“It is important that the Bill establishes a compulsory register that will comprise all charities that operate throughout Northern Ireland. That register must be open to public scrutiny.” (Alban Maginnis, SDLP, January 15, 2008)⁹⁹

“As a member of the Committee for Social Development, I welcome the Charities Bill, which will introduce an integrated system of registration and regulation, including control of charitable fund-raising as well as supervision and support of registered

⁹⁴ The Charities Act 2011, Schedule 3 provides for exempt charities. Exempt charities have charitable status and are required to comply with charity law, but unlike other charities, cannot register with the CCEW; are not directly regulated by it and instead have a principal regulator. They may only be investigated by the CCEW as part of a statutory inquiry at the request of that principal regulator. Exempt charities include, inter alia, educational charities, museums, and social housing providers.

⁹⁵ In England and Wales, some charities are ‘excepted’ from charity registration. This just means they don’t have to register or submit annual returns. Apart from that, the Charity Commission regulates them just like registered charities and can use any of its powers if it needs to. A charity is excepted if its income is £100,000 or less and it is in one of the following groups: churches and chapels belonging to some Christian denominations; charities that provide premises for some types of schools; Scout and Guide groups; charitable service funds of the armed forces; and student unions.

⁹⁶ Source: CCEW website as of 21 September 2021.

⁹⁷ Source – Scottish Charities Register as of 24 September 2021.

⁹⁸ Source: figures provided by the Irish Charities Regulatory Authority (CRA) on 20 September 2021, based on information provided to the Charities Regulator by 83.6% of the registered charities who are required to file their annual report and accounts (excluding schools) for the financial year ending between 1 January 2019 and 31 December 2019.

⁹⁹ <https://www.theyworkforyou.com/ni/?id=2008-01-15.3.7>.

charities. It is good that, for the first time, we will have effective regulation and a statutory definition of charities in Northern Ireland.” (Jonathon Craig, DUP, June 3, 2008)¹⁰⁰

The Charities Register helps to map the charity sector for policy development and funding purposes and assists the Commission to ensure that charitable funds are used for charitable purposes. Importantly, a comprehensive register reveals the breadth of charitable work delivered to and by communities and demonstrates how charities provide crucial pillars for society’s good functioning. As noted, in Chapter 2, the Commission’s statutory functions include:

- To determine whether institutions are charities or not;
- To enter charities on the charities register; and
- To maintain an accurate and up-to-date register.

In establishing the NI charities register in December 2013, the Commission, in its operational discretion, actively adopted a ‘clean’ register approach, committing itself to vetting every single organisation, whether a new organisation or a long-established charity, seeking charity registration before entering it on the register. This approach differed from that of neighbouring charity regulators in Scotland and Ireland, who instead

imported their respective tax authority’s existing lists of charitable tax-exempt organisations on the day their registers were established, deeming those tax-exempt organisations automatically to be registered charities and requiring only new organisations to come forward for the actual registration process.

2.1. The Commission’s Combined List

The Commission’s regulatory approach means that eight years on, the register of charities is not yet complete and as the Commission necessarily must now also fulfil its compliance and enforcement duties, the rate of registration has fallen. The consequences of this purist approach are that at the time of writing, the Charities Register currently holds 6,504 charities. A further 7,000 organisations have self-identified as charities and currently sit on a separate ‘Combined List’.

Given the importance of the register to every other function that the Commission undertakes, it is useful to scrutinise the composition of the Combined List of organisations awaiting registration. The Combined List comprises two categories of prospective charities:

1. Those that were “deemed charities” at the commencement of the charities register in 2013, comprising a list of organisations that had previously enjoyed charitable tax exemption from HMRC and thus self-identified as

¹⁰⁰<https://www.theyworkforyou.com/ni/?id=2008-06-03.5.26>.

- charities prior to the 2008 Act; and
2. Those organisations that came forward since the introduction of the 2008 Act seeking to be registered as charities (labelled as ‘expression of intent’ bodies on the Combined List). These organisations range from newly established charities seeking registration for the first time through to long established charities that never had HMRC charitable tax exemption and were thus not ‘deemed’ charities in 2013.

2.2. Analysis of Combined List

At first glance, a backlog of over 7,000 charities awaiting registration could suggest that the Commission’s effectiveness as a modern regulator is in question given that eight years into a registration process there appears to be

as many charities awaiting registration as are currently on the register. However, examination of the Combined List reveals a more nuanced story, as **Figure 5.1** reveals: of those 7,063 organisations, 1,376 closed before their registration could be processed; a further 1,974 charities failed to apply when the Charity Commission called them forward for registration, resulting in the Commission contacting HMRC to revoke the charitable tax-exempt status of those which had it. More than 700 charities’ contact details were not up-to-date, resulting in the Commission being unable to make contact with them to call them forward for registration. Approximately 500 applicants are charities that are established outside NI and are awaiting the commencement of s.167 of the 2008 Act before they can be called forward for registration by the Commission.

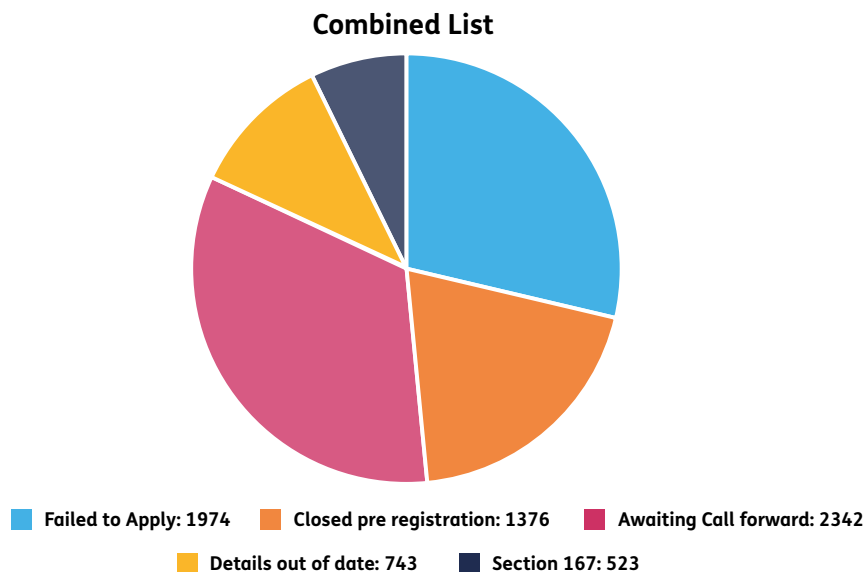


Figure 5.1 Breakdown of Combined List by Category

Table 5.1 below sets out the mitigating factors relevant to the Combined List and it reveals that when these various circumstances are taken into account,

approximately 2,342 charities established in NI are presently awaiting call forward by the Charity Commission to apply for registration.

Mitigating Factor	Deemed charities	Expression of Intent (EOI) charities	Total
Closed	1128	248	1376
Failed to apply	87	374	461
Contact the Commission	690	53	743
Failed to apply – HMRC informed	1000	513	1513
Refused registration	31	49	80
Registration not applicable	7	18*	25
Section 167 institutions	51	472	523
Awaiting call forward	143	2199	2342
Total	3137	3926	7063

*includes one charity which submitted an expression of intent but is not yet established

Table 5.1: Sourced from the Combined List of the Charity Commission for NI, as updated 21 September 2021

According to the Commission, the ‘Combined list’ allows stakeholders to make informed decisions about whether or not to make a donation or leave a legacy to a charity; whether to provide sponsorships/enter into partnerships; whether to volunteer or take on a trusteeship role with an organisation and to provide funding/grants.¹⁰¹ The Panel

notes however that charities on the combined list awaiting registration are not required to file annual reports with the Commission (thereby reducing transparency and accountability) and unless they are ‘deemed charities,’ the Commission’s statutory powers over them, pending registration, are limited.

¹⁰¹See Charity Commission, Second Submission to the Review Panel.

2.3. Analysis of Registration Wait Times in other Jurisdictions

Experience in neighbouring jurisdictions is that charities do not wait years to become registered. In Scotland, 66% of charity applications are concluded within 90 days of receipt with an average of 95 days between receipt of an initial status application and decision.¹⁰² The Office of the Scottish Charity Regulator (OSCR) applies a risk management framework to its registration process, resulting in almost 70% of cases being deemed low risk for registration purposes and thus reducing the number of applicants awaiting registration to approximately 100, although this number can fluctuate from time to time. Where group registrations are in play, OSCR works closely with the group headquarters to streamline the registration process.

In England, The Charity Commission for England and Wales (CCEW) reduced the average time to register all charities to 45 working days from 65 working days in 2019-20.¹⁰³ In Review Panel meetings with CCEW, we heard that CCEW receives approximately 700 applications per month and the number of cases awaiting registration fluctuates. Cases enter a

queue where they are categorised as either allocated or unallocated. Allocated cases are actively assessed and CCEW strives to keep the number of unallocated cases low.¹⁰⁴ The approval rate for applications for charity registration in 2020-21 remained in line with the previous year, at 60%.¹⁰⁵ In Ireland, the Charities Regulatory Authority (CRA) reported there is not a large backlog of registration applications, noting that it purged applicants from the list who fail to engage with the registration process.¹⁰⁶

In its assessment of Commission performance against registration targets, the Department for Communities (the Department) noted that:

“the Commission has consistently met and exceeded the KPI on progressing registration applications within 5 months (a key customer service target). Whilst this target was extended in 2020-21 to allow a 7 month window to account for the need to take registration decisions by schedule 1 Committee, the Commissioners made 82% of registration decisions against a target of 60% which reflects the commitment of the Commissioners and Commission staff.”¹⁰⁷

¹⁰²OSCR Management Information – May 2021.

¹⁰³CCEW, Annual Report and Accounts for year ended March 31, 2021, p. 9.

¹⁰⁴Panel Stakeholder Meeting with CCEW CEO Helen Stephenson, May 2021.

¹⁰⁵See n.103 above.

¹⁰⁶Panel Stakeholder Meeting with CRA CEO, Helen Martin, April 2021. CRA Business Plan 2018 set a KPI of reducing average processing times for complete applications measured by 25% to below average of 50 working days by Quarter 4, 2018. This KPI has not been reported against since.

¹⁰⁷Department for Communities Response to Panel, September 9, 2021.

The Panel firmly believes that urgently completing registration must be a top priority. While the Department may be content that existing targets have been met, Department and Commission expectations (and, indeed, ambitions) in regard to the completion of this vital task must be raised significantly. We believe dealing with the Combined List is critical to this task and we will make recommendations to facilitate this.

2.4. What we heard

The combination of the time it takes to register, the perceived complexity of the registration process (particularly with regards to public benefit) and the existence of the Combined List in its current format give rise to a great sense of frustration on the part of charities waiting to be called forward in the first instance. Several respondents suggested greater resourcing be given to the Commission to encourage it to expedite charity registrations; that waiting organisations be given some indication of likely registration timelines and that greater efforts should be made to expedite group registrations. Another suggested greater clarity around the meaning of the Combined List was needed. In the words of one respondent:

“The Commission needs more resources to enable it to register more charities from the Combined list. The Public benefit test needs improved. The Commission

should consult with Helper Groups to make improvements on this, as this is quite often the stumbling block for a lot of organisations completing the registration process, both large and small organisations.” ID 117

In the words of another:

“Registration has been very slow and only about the estimated 50% of charities had been registered and this registration has been undermined by the Court of Appeal decision. . . It is not practical nor sensible that every registration decision needs to go to Commissioners or the Schedule 1 Committee.” ID 120

Webinar attendees shared with the Panel the additional regulatory burdens felt by small branches of national charities in the form of brownie and beaver groups and local parent-teacher groups. According to the Commission:

“Where an umbrella body has a number of smaller organisations connected to it, for example, the Scouts or Riding for the disabled, the Commission will facilitate a grouped registration by agreeing key parts of the application, especially the public benefit statement, in advance so that it can be used by the membership in their applications for registration.”¹⁰⁸

While this facilitates the registration process, each of these local organisations then has its own charity registration

¹⁰⁸See Charity Commission, Second Submission to the Review Panel, p.6.

number and is responsible for its own annual reporting, which can overwhelm these local units.

The Panel observes that for national bodies with many local ‘moving parts,’ the mode of registration pursued will depend upon the level of autonomy enjoyed by those local units. Where the parent organisation has direct control over the branches, it may be that only the parent registers with the Commission and through the preparation of annual consolidated accounts, it then accounts for all its local branches under the one charity number. In other cases, the parent may facilitate a group registration process for its more autonomous branches which results in them having individual charity registration numbers and individual obligations to report annually to the Commission. The Panel believes that the appropriate method of registration in each of these cases (i.e., whether single or group registration) is best left to the discretion of the parent charity in question. The Panel recognises that where the group registration option is chosen, local charity branches sometimes struggle with meeting the Commission’s annual reporting requirements. The Panel will make recommendations in Chapter 6 aimed at reducing the reporting burden on these smaller charities. Here we make recommendations to assist the Commission to deal with the Combined List in a reasonable manner that will allow

them to progress the urgent work of registration. In regard, then, to the Combined List the Panel recommends that:

Recommendation 22: The Commission should make the completion of the Charities Register a priority.

In respect of this recommendation the Panel notes the importance that registration plays in the regulatory framework. Clearing the backlog of organisations awaiting registration will require the Commission to manage its staff and resources so that registration is front and centre in terms of staged priorities. No charity should be waiting prolonged periods of time – in the Commission’s current regime, years -- for its registration application to be processed.

Recommendation 23: The Commission should separate those charities on the Combined List who are awaiting registration call forward from those which are dormant or closed and those who have failed to come forward for registration.

In respect of this recommendation it is important to note that the “unfinished business” nature of the Combined List can become a tool of disempowerment for both the Commission and the sector. With this in mind, the Panel further recommends:

Recommendation 24: The Commission should not list charities that fail to come forward when called as actively applying for registration and once removed, the onus should be on the charity trustees to reapply.

In respect of this recommendation the Panel notes the Commission’s view that the current Combined list “is an asset.” The Panel appreciates that this is the Commission’s view but finds it is not a view shared by the sector.

Recommendation 25: The Commission should, given the ‘resource-intensive’ nature of maintaining the Combined List, review the purpose of the list.

In respect of this recommendation, the Panel believes that adapting the Combined List to indicate current call forwards and estimated waiting times for the next tranche of applicants would be of greater service to the sector in the registration process and of greater service to the Commission allowing staff to focus on delivering registrations without further delay.

3. Should all charities be required to register in NI?

3.1. The Pros and Cons of Registration

Compulsory registration – which is common in Ireland, Scotland, and NI – when done well, should provide an accurate and functional map of charitable

activity. This sectoral visibility, when it is maintained on an accurate and up-to-date register, enables good policy planning and development in areas of need; it provides reliable information to funders – whether state, private or individual members of the public; and it should enable volunteers and beneficiaries to link up with charities in their locality or region of which they might otherwise be unaware. A comprehensive registration system, which places all charities on the public radar, should enable the Commission to better support charities and their charity trustees in their good governance and delivery of their charitable mission. The availability of good quality and user-friendly information on the register is a key mechanism for building public confidence in the charity sector and enabling interested parties (whether funders, policymakers or the public more generally) to learn more about a charity before engaging with it.

The disadvantages of compulsory registration under the purist regime of a “clean register” approach, as adopted by the Commission, are that many charities may wait a long period of time to be ‘called forward’ by the Commission for registration. In the intervening period, a charity’s officers and contact details may change, rendering the charity uncontactable when subsequently called forward. Additionally, smaller groups find the process of registration burdensome or

difficult to meet. Even where registration processes are proportionate or more streamlined, the ongoing annual reporting and compliance requirements, which kick in automatically once a charity becomes registered, may be burdensome for smaller organisations and may discourage them from engaging in charitable activity in the first place. The fact that the same registration process applies to all charities regardless of their size was a factor raised by respondents as disproportionate for smaller charities without the benefit of paid staff. The current reporting requirements and their proportionality will be considered separately in Chapter 6.

As noted in the introduction, the decision as to whether or not all charities should be required to be registered is, at its heart, a policy decision for the Minister. At their core, charities hold private money for public good. The underlying rationale for registration and regulation is to provide the necessary accountability and assurance mechanisms to facilitate and encourage greater charitable activity in society and greater public confidence in, and support of, charities more generally. This basic principle -- based on transparency, accountability, and trust -- holds true whether you are a large or a small charity.

3.2. The Implications of the Introduction of a Registration Threshold

The Commission estimates that introducing a £5,000 registration threshold, based solely on annual income (and not taking account of any balance sheet assets) could take circa 35% of the sector out of charity registration in NI.¹⁰⁹ A move of this nature would have several consequences.

While it would remove the registration and reporting requirements for a large section of the charity sector and thus have attendant implications for the Commission's workload and resourcing, if the CCEW model was followed, the Commission would remain the regulator of these unregistered charities and would be responsible for them without having sight of them. From a charity perspective, it would lessen the regulatory burden on smaller charities who would not be required to register or report but it would also lessen their overall visibility in the charity sector.

If voluntary registration was permitted below the threshold, the Commission's workload might not necessarily decrease, and if anything would increase, if previously registered small charities now opted to deregister. More generally, registration of small charities helps to protect the reputation of the charity sector as a whole and so removing

¹⁰⁹Submission of the Charity Commission NI to the Independent Review of Charity Regulation for NI, [3.1.2].

compulsory registration, by leaving a substantial cohort of charities outside the charities register, could impact public trust in charities more generally.

3.3. What we heard

Those in favour of compulsory registration

Just over three-fifths (61%) of respondents to the Panel's online questionnaire believed that there should continue to be a statutory requirement that all charities register. Organisations who favoured a comprehensive register of all charities believed that it was important to have an accurate register, and that this provided regulation and accountability for the entire charity sector. In its questionnaire, the Panel did not inquire further into the reasons for this view. The questionnaire did explore potential negatives that could arise if registration was no longer compulsory, and the Panel heard that some downsides could include the fact that unregistered charities would not be able to avail of Gift Aid or might not have access to certain grants. A few respondents also commented that donor confidence might be reduced if not all charities had to register. Attendees at four webinars viewed registration as a positive thing in terms of transparency and good governance. The ability to see all charities on the register was particularly valued by funders. Lawyers and accountants also viewed registration as a positive feature.

Those opposed to compulsory registration

Of those respondents who were opposed to compulsory registration, the most common benefit cited for introducing a monetary threshold below which registration would not be required was the reduced regulatory burden on smaller charities, as registration had the potential to be costly in both a monetary and an administrative capacity. A few also said the process was daunting for those working in smaller charities and would discourage volunteers from signing up with charities. Several respondents mentioned that some small, community-based charities had closed down when they discovered what was required of them to register given that most trustees were volunteers. The Panel notes, however, that charity trustees are, by their nature, volunteers and are not remunerated for their service as trustees and that this is the starting point for all charities. Some charities may have paid staff to assist trustees in the registration process, but the 2008 Act makes it clear that the responsibility for charity registration and for charity compliance falls to the charity trustees in every charity.

Several organisations suggested adopting a Charitable Incorporated Organisations (CIO) structure as in England and Wales, as an easier way of obtaining registration for smaller charities. The Panel notes that the availability of the CIO structure would not change the substantive registration

requirements for charities although it would change the reporting requirements for some charities – a matter that is discussed further in Chapters 6 and 10.

The Panel heard anecdotal evidence at a webinar that small organisations that could well be set up as non-profit organisations (as discussed in Chapter 1) were of the belief that, in order to stay on the right side of the law, they were required to apply for charitable registration and await a Commission decision to the effect that they were not charities. Such an approach is not in the interest of charities, the regulator or broader civil society as it places an unnecessary brake on community engagement. It highlights the importance of the Panel's recommendations in Chapter 1 on the need for the development of a greater understanding of the various legitimate non-profit options open to those interested in engaging in community activities so that only those bodies clearly engaged in charitable activity or truly wishing to be recognised as charities proceed through the registration process.

The Panel notes that not every organisation that comes forward for registration will meet the charity test. Not every non-profit organisation or informal community group with a written constitution for the good that it wishes to bring about in its neighbourhood will necessarily be, or need to be, a charity and require registration. Empowering

society's broader understanding of what it is to be a charity and what is legitimate non-profit activity outside of the charity sector is key. All stakeholders have a responsibility in this space for sharing this knowledge – the Commission, the Department, legal and governance professionals and helper group organisations advising on the establishment of new community groups.

3.4. What would a registration threshold look like?

For those respondents who supported the introduction of a monetary threshold for registration, there was almost an equal division of responses on how best to determine that minimum threshold with 49% of respondents believing it should be a combination of annual income and assets and 51% believing that it should be based on annual income only. Asked to confirm the figure at which any such threshold should be set, suggested figures ranged from £1,000 to £250,000.

Almost half of those who provided a response suggested £5,000, with some stipulating that this would be in line with England and Wales. This was the case across individual and organisational respondents. As noted earlier, the effect of a £5,000 threshold, according to the Commission, would remove 35% of registered charities from the register. If the Minister were minded therefore to introduce a registration threshold at a

future time, the Panel recommends that she consult further with affected parties on both the composition (i.e., whether it should take account of gross income only or whether it should also take account of balance sheet assets) and level of that single/combined threshold. Such a change, if adopted may also have broader implications for reporting thresholds more generally which are also currently based solely on annual gross income.

In informing the Minister's policy decision in this respect, the Panel points to the broad societal benefits that flow from having a comprehensive register of charities. An accurate and well-maintained register is the bedrock for public trust in charities. A well-functioning register assists in the protection of the reputation of the entire charity sector by making all charities visible and subjecting them to proportionate Commission oversight. The act of registration defines the scope of the Commission's jurisdiction. The Commission should be responsible for registered charities and only those unregistered active bodies who meet the charity test and yet have actively failed to register. Community and voluntary groups that do not have exclusively charitable purposes or who fail the public benefit test should fall outside the Commission's oversight, unless they are masquerading as registered charities without completing the registration process.

The adoption of a comprehensive register and the subsequent implications of annual reporting on smaller charities, if managed effectively, should not discourage, or deter voluntary activity in the community. Neither should it unduly burden volunteers with administrative bureaucracy at either the registration or annual reporting phases. These issues were to the foremost of concerns of respondents who opposed compulsory registration. For example, a small, local charity serving a specific need within the community and meeting the Charity Test may not be resourced for a heavy burden of reporting flowing from registration. More proportionate approaches to reporting will enable such charities to channel more resources to their core charitable missions, work for which charities exist, which is for the benefit of the community. The Panel agrees with respondents that the registration process should be a clearly defined and timely one and that the reporting obligations that flow from registration (and which are further discussed in Chapter 6) must be proportionate.

Registration is intended as a gateway process whereby those within the charity fold are granted all the privileges of charitable status (whether they chose to avail of them or not) but must meet the higher standards expected of charitable organisations. Charity trustees need to be able to meet the statutory requirements for registration and should be assisted by

the Commission to understand their statutory obligations in managing their charity and its assets for the public benefit. The Panel recommends, therefore, that:

Recommendation 26: The requirement to register all charities, regardless of size, should remain.

In respect of this recommendation, the Panel believes that the statutory requirement to register all charities serves a valuable purpose to society as it makes visible the significant work charities carry out and the crucial contribution they make to the fabric of society.

Recommendation 27

(If Recommendation 26 is accepted): The Commission should simplify and streamline the process of registration and make it proportionate to the size of charity applicant.

In respect of this recommendation, the Panel commends the Commission on the changes that it is introducing to its registration process via its Transformation project. This will streamline and simplify registration and the Panel would encourage greater efforts along this vein. Finding the right balance between facilitating charities to deliver their charitable missions and ensuring that they do so in compliance with charity and other legal requirements is critical.

Those outside the charity fold in the larger non-profit field will not be entitled to the many related benefits of charitable status (in terms of public recognition and public trust and possible tax exemption) and so are therefore not subject to the regulatory requirements made of charities.

The Panel therefore alerts the Commission to the need -- in line with its statutory duty to perform its functions in a way which is compatible with voluntary participation in charity work¹¹⁰ -- to ensure that the operation of the registration process does not disincentivise community action for the public benefit, thereby making civil society a poorer place in NI, to the detriment of all. This will require action on two fronts: firstly, further sector education and guidance on the differences between charitable organisations and other legitimate non-profit organisations that do not require registration (as discussed in Chapter 1); and secondly, a proportionate approach to the registration requirements particularly when interacting with smaller charity registrants. To this latter end, adopting a proportionate approach may require the Commission to further streamline and simplify its registration processes. To assist in the overall registration process, the Panel therefore recommends that:

¹¹⁰Charities Act (NI) 2008, s.9(2)(b).

Recommendation 28: The Commission should prioritise the provision of guidance and education of prospective applicant charities, in conjunction with helper groups and the Department, to ensure that non-profit organisations seeking guidance about charity registration are aware there may be other options for them (see Chapter 1).

In this context the Panel believes that the regulatory approach of the Commission should clearly delineate the charity sphere from the broader non-profit sphere and that only charities or those truly wishing to apply for charitable status are channelled towards the registration process.

Recommendation 29: The Commission work with its helper group organisations and with its Stakeholder Forum to better understand charity trustees' existing knowledge of regulatory requirements and engage in an ongoing education programme to raise charity trustee awareness of their statutory responsibilities.

4. Should the Commission be responsible for unregistered charities?

4.1. The Commission's role regarding unregistered charities

In exercising its statutory function to decide who is and who is not a charity, the Commission has power to pursue charities who are active and have not come forward for registration. Under the 2008 Act, if a charity fails to apply to register, the charity trustees are in breach of their statutory duties and the Commission has power under s.173 of the Act to give directions by order to ensure the default is made good. If the trustees fail to comply with orders under s.173 the Commission has the power under s.174 to apply to the High Court. A similar power is enjoyed by neighbouring charity regulators and is typically used in a proportionate manner to pursue only those bodies that are holding themselves out to be charities while remaining unregistered.¹¹¹

¹¹¹In Ireland, the CRA can issue cease and desist orders or prosecute such unregistered charities in the district court. See Breen and Smith, *Law of Charities in Ireland* (Dublin: Bloomsbury, 2019), p. 437. In Scotland, OSCR can issue a direction under section 31(5) of the Charities and Trustee Investment (Scotland) Act 2005. It can publicise such decisions by way of published report and can ultimately refer such cases to the Court of Sessions if it considers it proportional to do so.

It could be argued that beyond this, it is unreasonable to expect the Commission to regulate (in any positive sense) charities that are not on the register. Without some insights into a charity's annual reports and financial status and details of its charity trustees, and an ability to survey the field of registered charities – which registration provides – it would be difficult for the Commission to use its resources in the most efficient, effective, and economic way or to approach its regulatory activities in a way that is proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

4.2. The Commission's current approach to unregistered charities

In a recent report shared with the Panel, the Commission sought to estimate the size of the charity sector “to estimate how long it will take the Commission to complete the registration process and when it might open up the registration process.”¹¹² Its calculations spanned from a “lower estimate of 13,775” charities, based on already registered charities and the total number of charities sitting on the Combined List (which includes organisations that no longer exist) to an average upper estimate of 21,552 charities, based on “open searches and estimates using the registers from the Office of the Scottish Regulator (OSCR) and the Charity Commission for England and Wales (CCEW).” Leaving aside issues with

the methodology used in this research, the Panel would disagree with the Commission's asserted usefulness of this type of exercise or with its proposal that it should be carried out on a frequent basis.

Unlike the Australian regulator, whose title ‘the Australian Charities and Not-for-Profit Commission’ clearly extends its ambit beyond just the regulation of charities to all non-profits (even if its current statutory powers do not go so far), the Charity Commission for NI is responsible for just charities. Its primary purpose is to keep a register of charities (s.16 of the 2008 Act), and to decide whether institutions are charities or not (s.8), and to register and regulate the former. It remains, however the primary responsibility of charity trustees to apply for the registration of their charities (s.17).

While the Commission does have powers under the 2008 Act both to prosecute false statements made relating to institutions that are not registered charities (s.156) and power to require charity trustees who have not complied with their s.17 obligations to seek registration of their charity (ss. 173-174), it is not the responsibility of the Commission to seek to round up every non-profit and to pressgang them into applying for charity registration so that the Commission can make a determination on their status. Egregious cases of non-registration will usually

¹¹²Charity Commission NI, Size of the Sector, Background and Methodology Report (July, 2021).

come to the Commission’s attention for other conduct reasons in which case the powers available to the Commission discussed above provide a ready avenue to bring about registration or seek redress against an organisation that is mis-informing the public as to charitable status.

To this end, the Panel firmly believes that the Commission’s main initial focus should be on registering those charities which have come forward and are actively awaiting registration. It is not the task of the Commission to estimate how many unknown charities might presently exist in NI and speculative research to this end should not be a Commission priority at this present stage of its development.

Recommendation 30: The Commission’s main focus should be on registering those charities which have come forward and are actively awaiting registration and that this focus should frame how the Commission sets its priorities at this time.

The Panel observes that it is in the interests of the Department, however, as the leading state funder whose policy and strategic reach covers the broader voluntary and community sector to know

its sector. Such sector mapping at government level is important when Departments regularly open funding calls to non-charitable community groups, thereby recognising the legitimate contribution of non-profits to the community outside of the charitable realm.¹¹³ To this end, the Department should consider the government-supported work of Benefacts¹¹⁴ in mapping the non-profit sector in Ireland.

4.3. The Case of Deemed Charities

The Charities Act 2008 (Transitional Provision) Order (Northern Ireland) 2011 gave the Commission regulatory powers over charities marked as ‘deemed’ on the combined list. Deemed charities are those organisations that were in receipt of charitable tax status from HMRC on 18 February 2011, which was updated on 18 August 2013 prior to the commencement of the Charities Register. The provisions of the 2008 Act which apply to those deemed charities are set out in the schedule to the 2011 Regulations.¹¹⁵

Of the original HMRC list of approximately 7,000 deemed organisations supplied to the Commission in 2011 and 2013, there are approximately 200 of these organisations still remaining on the

¹¹³See, for example, the Dept of Health’s Mental Health Support £10m fund which was made available in 2021 from the Department’s COVID allocation. Under the terms of the funding call the fund “is only open to organisations in the community and voluntary sector or with charitable status.” (emphasis added) at <https://www.health-ni.gov.uk/news/fund-will-provide-vital-support-mental-health-charities-swann>.

¹¹⁴See <https://www.benefacts.ie/>.

¹¹⁵See <https://www.legislation.gov.uk/nisr/2011/12/schedule/made/data.pdf>.

combined list which have not yet been called forward for registration.¹¹⁶ Given that these organisations have now been waiting 8 years to be called forward for registration and already enjoy charitable tax exemption from HMRC, the Commission should prioritise these registration applications as a matter of urgency. Completing the registration process for those charities entitled to apply under s.16 of the 2008 Act would regularise the Commission's statutory oversight of these charities, leaving only those deemed organisations awaiting s.167 registration outstanding on the combined list and subject to the provisions of the Charities Act 2008 (Transitional Provision) Order (Northern Ireland) 2011 (see further below and Chapter 10 of this report).

The long delays associated with charity registration have led HMRC to allow organisations on the Combined List to apply directly to HMRC to register for gift aid. Normally, a prerequisite to this application is that an organisation must be a registered charity. However, in 2018, in recognition of the slow pace of charity registrations in NI in comparison with England and Wales and Scotland, HMRC allowed NI charities to apply to it directly for recognition. It is worth noting that the Commission has no regulatory powers over these non-deemed charities on the Combined List, as they (rightly) fall outside the 2011 regulations.

The existence of such HMRC recognised charities in tandem with their ongoing non-appearance on the NI charities register, as they await their call forward for registration, is unlikely to aid public understanding of charities or build public confidence in the sector more broadly. The Panel recognises that a number of deemed charities are applying for s.167 status (discussed further in section 6.5) or are schools of the class discussed in **section 4.4** below, making registration more complex at this time. However, the Panel recommends that the registration of all other deemed charities on the Combined List should be prioritised.

Recommendation 31: The Commission should prioritise registration of the remaining deemed charities on the Combined List.

The Panel recognises that separate issues arise with regards to deemed s.167 institutions (see further recommendations in section 6.5 below). In the case of deemed schools, the Panel recommends that the Department for Communities and Department of Education liaise on resolving matters relating to how these bodies operate that lie beyond the competence of the Commission.

4.4. The Case of Schools

The case of schools is a complex one. The Commission holds a list 1,190 schools (ranging from primary, nursery,

¹¹⁶Approximately, 51 of these deemed organisations are s.167 institutions, meaning that they are established as charities elsewhere in the UK.

secondary, grammar and special schools) which were supplied to it by the Department of Education (albeit without contact details). These schools may or may not be required to register as charities but they do not currently form part of the Commission's Combined List for reasons discussed below. The Deemed List provided by HMRC in 2011 and updated in 2013 listed 120 schools that enjoy charitable tax exemption and would thus be required to register if they are to retain this exemption and these schools do appear on the Combined List at present. The Charity Commission informed the Panel that it is not in a position to call forward schools. Its website alerts schools that some will be required to register and states that the Commission is currently revising its guidance in this area but it gives no clear advice on whether schools should register an EOI or not.¹¹⁷

The designation of schools as organisations requiring charitable registration has been an issue for neighbouring jurisdictions. The CRA requires schools to register. Benefacts data for 2021 reveals that of the 3,965 schools in Ireland, 3,584 of them are registered charities.¹¹⁸ In England and Wales, some schools are exempt from registration so that this registration issue does not commonly arise. In Scotland, when the Charities and Trustee Investment (Scotland) Act 2005 came

into force, independent schools were able to demonstrate their main purpose was exclusively charitable, namely the advancement of education. Where schools struggled was in satisfying the 'public benefit' test. Charging fees imposes a condition, which in turn restricts access to those wishing to obtain the benefits from a school's functions if only a section of the public can meet that condition. In order to satisfy the second aspect of the test, schools had to prove that, on balance, they did provide public benefit. Certain measures were introduced across the sector, such as means-tested fee remissions and bursaries, and widening access to school facilities such as playing fields to community groups and others. It made sense for independent schools to implement such measures, as it was in their interests to maintain charitable status, and to benefit from the advantages that flowed therefrom, including tax reliefs and the legitimacy of the charity brand.

The education system in NI currently consists of seven different types of schools which are overseen by the Department of Education and a range of other education bodies. Whether a school meets the definition of charity, required for charity registration, depends on how they have been established. The Charity Commission highlighted the difficulties encountered in progressing some of the

¹¹⁷<https://www.charitycommissionni.org.uk/manage-your-charity/schools-and-charity-registration/>

¹¹⁸<https://www.benefacts.ie/insights/reports/2021/nonprofits/>

applications relating to integrated schools, Catholic maintained schools and voluntary grammar schools. According to the Commission, independent schools are required to apply to register as a charity with the Commission whereas certain, but not all, grant-maintained schools will also be required to register.

In the case of grant-maintained schools, these are subject to a Scheme of Management, between the charity trustees of the school and the Department of Education. The Scheme provides for the establishment of a Board of Governors who manage the activities of the school, and any grant funding. If the school is established solely under a scheme of management (and there is no other constitutional document), the Commission informed the Panel that the school is not an institution for the purposes of s.1 of the 2008 Act and is not required to register.¹¹⁹ If the school, however has both a scheme of management and a separate governing document (e.g., a deed of trust, a lease or conveyance with a declaration of trust, articles of association or educational endowment scheme), it may be eligible to register as a charity depending on the terms of that constitution.¹²⁰

It would appear that in the past, HMRC granted charitable tax status to certain grant-aided schools established solely by

way of a scheme of management who will not be eligible to register now as charities and may have their charitable tax status revoked.

According to the Commission, these schemes of management are:

“...insufficiently limited to the achievement of charitable objectives that the school in question should not be considered as having been established for charitable purposes only Therefore, under current charity legislation, there are financial implications for schools that are currently recognised by HMRC as charities and consequently receive tax benefits. Those that do not meet the definition of charity, required for charity registration under the 2008 Act, would be likely to lose these benefits Furthermore there is also a risk that, in the event that such schools are refused entry to the register of charities, HMRC may seek to recoup monies in lieu of relief on VAT that was granted, from a number of such schools who had received capital grants for new builds.”¹²¹

It is beyond the power of the Charity Commission to do other than consider the governing documents of a school and determine whether it is charitable or not. Those schools that meet the charity test should be called forward and registered. For those schools that do not meet the charity test, registration will not be possible regardless of any previous HMRC

¹¹⁹Charity Commission NI, Registration of Post Primary Schools Paper (July 7, 2017).

¹²⁰Ibid.

¹²¹Charity Commission NI, First Submission to the Review Panel, May 2021, p.46.

tax decision to the contrary. The Panel advises that leaving these organisations indefinitely in limbo does not assist with effective charity regulation or encourage resolution of the issue by the relevant Government Departments. The Panel observes that the Department for Communities and the Department for Education will need to work together to resolve the policy issues that may arise from the inability of certain schools to qualify for charitable status in the future.

4.5. Dormant Charities

A related set of currently unregistered charities are dormant charities. Dormant charities are an occurrence in every jurisdiction and with dormancy comes the risk that charitable assets intended for charitable purposes will sit forgotten in a bank account somewhere or otherwise may not be properly applied to charitable ends. If a charity is a registered charity, charity trustees can apply to the Commission for assistance to wind up their charity and to ensure that any remaining surplus funds are applied for a purpose as near as possible to the closing charity's original purpose.

In other jurisdictions (e.g., Ireland and Scotland), where the charities register was pre-populated with tax-exempt organisations, those regulators inherited many dormant (but now registered) charities for which there may no longer be active trustees capable of coming

forward to request a cy-près scheme. In NI, these organisations typically lack the capacity to actively come forward for registration so many dormant charities sit on the Combined List and will never become registered charities.

According to the Commission, approximately 1,128 deemed charities and 248 EOI charities on the Combined List¹²² have indicated their closed status to the Commission since 2013 though the number of dormant charities may be much higher (given that a failure to come forward for registration may in some cases be caused by dormancy and, equally, registered charities may also cease to operate, although failure to file annual reports makes dormancy easier to spot on the Register than on the Combined List). We know, for instance, that approximately 690 'deemed' organisations are marked 'contact the commission.' Organisations are marked with this status when the Commission has tried to contact them but failed. Some of these organisations were provided by HMRC to the Commission without contact details in the first instance. The Commission may have tried to call them forward for registration or it may have contacted them to update their EOI but the emails have bounced back as undeliverable. While they may simply have changed their contact details, they may well also no longer be in operation.

¹²²Figures obtained from the 'Combined List' on September 21, 2021.

The Panel was pleased to learn of the ‘Revitalising Trusts Programme’ operated by the Department for Digital, Culture, Media and Sport (DCMS)¹²³ in England and Wales. A similar programme is currently being rolled out in Scotland in conjunction with Foundation Scotland. Under this programme, the CCEW working in partnership with UK Community Foundations will contact a charity if it has:

- not spent any money in the past 5 years; or
- spent less than 30% of its income in the past 5 years.

The aim of this contact is to discuss with charity trustees their charity’s future if the charity has found it difficult to get new trustees or spend its income or perhaps it has had trouble identifying beneficiaries or finding time to run the charity. The programme can assist a moribund or inactive charity to both transfer its assets to another charity and close down, or ‘wind up’, or to change its charitable purposes to continue working more effectively. To date, the programme has so far ‘revitalised’ £32 million in England alone. The Panel believes a similar programme should be considered for NI that could be operated under the auspices of the Department and the Charity Commission and a suitable charity partner. In both England and Scotland, the respective Community Foundation has

played an important role, which may suggest that the Community Foundation for NI might have a part to play in a similar endeavour in NI. Such a programme would require Department for Communities funding and leadership.

In the case of those charities on the Combined List who have notified the Commission of their closure prior to being called forward, this contact opportunity should be used to procure a final set of accounts to confirm the onward destination of any surplus funding in line with the programme. Such closed entities should then be removed from the public Combined List.

In the case of truly dormant organisations on the Combined List, the Commission should work with the Department and the chosen charity partner to oversee an onward re-direction of remaining charitable funds to related charitable causes. Much can be learnt from CCEW in its experiences of engaging with dormant charities in this regard. There was broad support for such an approach at the community webinar for funders and the Panel recommends that the Commission should develop a list of potentially dormant charities from the Combined List to form the basis of a pilot revitalising trust project for NI once the Commission has reduced its backlog of charities actively awaiting registration.

¹²³<https://www.gov.uk/guidance/get-help-for-your-inactive-or-ineffective-charity>.

Recommendation 32: The Commission should develop a list of potentially dormant charities from the Combined List to form the basis of a pilot revitalising trust project for NI once the Commission has reduced its backlog of charities actively awaiting registration.

5. Is the current system of registration fit for purpose?

5.1. The Prolonged Period awaiting Registration Call forward

Upon the establishment of the charities register in December 2013, the Charity Commission adopted an unusual administrative approach to populating the register. To create a ‘clean’ register, it decided to vet every single organisation seeking charity registration, whether that organisation was a long-established charity previously enjoying charitable tax exemption from HMRC or a brand-new organisation forming for the first time and wishing to register as a charity. New Zealand is the only other country to adopt a purist vetting model when it first established its new register of charities in 2005 but in contrast to the Charity Commission, the New Zealand regulator devoted its available resources at the start almost exclusively to the timely completion of the register of some 25,000 charities by employing law graduates on short-term fixed contracts to work

exclusively on registration issues. Trained analysts in the New Zealand system completed 6 registration applications a day¹²⁴ (and the new register was built and fully populated within a period of 18 months).¹²⁵

In most other jurisdictions (including Ireland, Scotland and Australia), the creation of a charity register was achieved by the pre-population of the registers at the date of establishment with all charities then enjoying charitable tax exemption such that only newly established charities or charities not previously enjoying charitable tax exemption were obliged to come forward and apply for registration. Such registers obviously lacked the up-to-date quality and accuracy of the clean register approach favoured by NI and New Zealand and they required (and continue to require) rolling reviews to ‘weed’ out dormant or ineligible charities, but they did benefit from a relative completeness from day one which the Charity Commission has still to achieve in NI.

The more piecemeal approach adopted by the Charity Commission means that eight years on, the register of charities is not yet complete and as time passes, the Commission is forced to split its resources between ongoing registration, compliance and enforcement tasks. Many charities

¹²⁴Trevor Garrett, ‘The Evanescent Regulator’ in Myles McGregor Lowndes and Bob Wyatt (eds) *Regulating Charities: The Inside Story* (New York: Routledge, 2017), p. 166.

¹²⁵Sue Barker, ‘Reflections on Regulatory Accountability’ in Myles McGregor Lowndes and Bob Wyatt (eds) *Regulating Charities: The Inside Story* (New York: Routledge, 2017), p. 191

shared frustration of long delays in being called forward for registration, resulting in contact information changing as trustees moved on. Others spoke of the difficulties delayed registration caused for funding applications (many of which require a charity registration number) and until 2018, HMRC required charity registration as a prerequisite to considering a charity's application for charitable tax exemption, thereby further disadvantaging those

charities on the Combined List.¹²⁶ As regulatory momentum is lost, registration rates have fallen from a height of more than 2,500 registration decisions in 2015/16 to 367 decisions in 2020/21,¹²⁷ as the Commission has to balance registration duties with its monitoring of annual reports and other compliance tasks. **Table 5.2** below charts the decline in the rate of charity registrations over its eight-year existence to date.

Year	Numbers Registered	Numbers Refused	Comments
2013- 14	31	-	
2014-15	1306	3	
2015-16	2680	17	
2016-17	1484	18	Commencement of Accounting and Reporting regulations
2017-18	625	30	
2018-19	234	9	
2019-20	109	2	McBride Decision/Schedule 1 committee/COVID-19
2020-21	360	7	COVID-19/McBride Decision/ Schedule 1 committee

Table 5.2 Rate of Charity Registrations and Refusals: 2013-2021 (Source Charity Commission Annual Reports and First Commission Submission to Independent Review Panel)

¹²⁶ In 2018, the Commission agreed with HMRC that organisations which had submitted an Expression of Intent (EOI) and were waiting to be called forward, or had submitted an application for charity registration, could still apply to HMRC. The reason given for this accommodation by the Commission was that "Given the time it will take to build the register of charities in Northern Ireland, the Commission is keen to ensure that charities which are waiting to be registered are not disadvantaged as far as applications to HMRC for charitable tax status are concerned."

¹²⁷ Charity Commission NI Submission to Ministerial Review, p. 63 and Charity Commission NI Annual Report and Accounts 2020/21.

5.2. The Effect of the Decision in *McKee v The Charity Commission*

A further set back to the registration process occurred in May 2020, when the Court of Appeal for NI upheld a 2019 High Court decision of Madam Justice McBride to the effect that the 2008 Act did not provide the Commissioners with express powers to delegate decision-making tasks to staff.¹²⁸ One effect of this decision is that the register of charities as it existed in May 2019 is now void, as the decisions to register charities were not made at Commissioner level.

Since May 2019, registration decisions have been made by the Charity Commissioners applying the same legislative criteria previously applied by Commission staff in determining registration applications. It should be noted in this regard that it was the level at which such decisions were made (by staff rather than by Commissioners) to which the court objected, rather than to substance of any of the decisions. A Charities Bill to retrospectively validate decisions (including registration decisions) taken by Commission staff prior to May 2019 is currently before the Legislative Assembly.¹²⁹ The Panel recommends that this legislative solution be progressed as soon as possible to restore certainty in this important area of charity regulation.

Examination of the rate of registration implies that the introduction of the Charities (Accounts and Reports) Regulations (Northern Ireland) 2015 on January 1, 2016 impacted registration as staff were redeployed to monitor charity returns. The low of 109 registrations in 2019-20 may be explained by the High Court's delivery of its decision in *McKee v Charity Commission for Northern Ireland* in February 2019 (outlawing the taking of decisions by Commission staff) and the introduction of and bedding in period for the Commission's Schedule 1 Committee through which Charity Commissioners currently make Commission decisions. In 2020/21, low registration rates may be explained by the combination of the effects of the coronavirus pandemic, and the Court of Appeal's confirmation of the decision in *McKee* in February 2020. It is nevertheless interesting to note that notwithstanding the continuation of these three inhibiting factors in 2020-21, the number of registrations (360) already exceeds greatly the 2018-19 figure of 234 when none of these inhibiting factors were present.

The Panel believes that the prolonged period of waiting for call for registration is not conducive to good charity regulation in NI. The Commission's figures alone reveal that since 1 July 2019 almost 28% (61/218) of the concerns received by the

¹²⁸McKee and Hughes and AG for NI v Charity Commission and the Dept for Communities [2020] NICA 13 affirming the High Court decision in *McKee* [2019] NICH 6.

¹²⁹The Charities Bill completed Second Stage on June 29, 2021. See <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/charities-bill/>.

Commission related to organisations about which the Commission lacked full visibility and from a proportionality perspective could not prioritise a response based on the organisation's income levels.¹³⁰ Many of the common factors behind this information void, cited by the Commission, directly relate to the charity's continued presence on the combined list rather than on the register.¹³¹

The Panel recommends that a much greater priority be made to accelerating the registration process. It is conscious in making such a recommendation that this may mean the Commission has to temporarily divert resources away from compliance and enforcement tasks in order to increase the number of registrations completed. It may also leave room for the Department to consider a temporary increase in resources to facilitate short fixed term contract staff to focus solely on registration, along the lines previously adopted by the New Zealand Charities Commission.

At the same time, the Panel accepts that the primary responsibility for applying for registration and meeting the registration requirements lies with the charity trustees and to this end, the Panel recommends

that when a charity fails to come forward for registration when called, despite best efforts by the Commission to contact the charity, the charity should be removed from the combined list and where appropriate, HMRC should be informed. It is the responsibility of the charity trustees to reapply in such instances, as the 2008 Act requires.

5.3. The Registration Process

The Panel was interested to hear the views of those organisations who had gone through the registration process and to learn whether that process could be further improved. The majority of respondents (84%) confirmed that they had experience of the registration process as a result of either completing the registration of a charity or submitting an expression of intent to be registered, in various capacities of charity trustees, charity employees, in a helper group capacity or in the role of legal adviser to an applicant. When asked whether the current registration process was the best means for the Commission to create an accurate register of charities, responses show that less than half (45%) of respondents thought that the current process was the best means of creating an accurate register of charities. Two-fifths (40%) did not believe the current

¹³⁰The Charity Commission's approach to compliance is to progress concerns where the charity's level of income is above £50,000; the concerns raised include zero tolerance or high-risk issues (as defined in its risk assessment model); where previous self-regulatory or regulatory guidance was issued; or where the charity/trustees/issue are high profile.

¹³¹First Submission of the Commission to the Review Panel, p. 53. These included the fact that a) the charity had failed to apply for registration; b) the organisation had yet to apply (which the Commission explained referred to those charities on the combined list; that the organisation was not a charity or that the Commission was not the principal regulator (charity falls under s.167 or is registered with CCEW, OSCR etc).

process was the best means, and the remaining 15% had no view.

Importantly, almost three quarters (74%) of all respondents agreed that the registration process could be improved, with just 6% disagreeing. The most common criticisms were the process took too long, some commenting that it had taken years, and that it was overly complicated and onerous. The Panel received more than 100 comments suggesting ways to improve the registration experience for charities. These included speeding the process up, making the process less complicated, and introducing a de minimis threshold to give small charities the option of registering.

Several respondents mentioned the 'public benefit' test and advised that this needed to be improved as it was confusing. In the words of one respondent:

“Clarity around the meaning of the Combined List is needed and the registration application section on Public benefit is too complex and often repetitive for those charities whose public benefit straddles many charitable purposes - to have to report on the public benefit of each one (often where these overlap in terms of the practical workings of the charity are concerned) is cumbersome.” ID 120

Others suggested that one public benefit statement per charity rather than a separate one for each charitable purpose would lighten the regulatory burden for charities. Some respondents sought a contact centre within the Commission, creating short 'how to' videos, changing the language and terminology used as it was very legal/accountancy based, and having the option of completing registration by post.

There was, however, some recognition of the fact that charities themselves had certain responsibilities to maintain their own governing instruments and to empower themselves to better take charge of their own organisations: in the words of one:

“Charities could and should also be able to simplify and understand their own governance better so that proving a public benefit is much easier. Currently a lot of governing documents are based on old and complicated templates that are not relevant and make it very difficult to register as a charitable organisation. Powers are often mistaken as purposes, making it complicated to show public benefit. Many purposes in governing documents are also not relevant for what the group does, and there can often be clauses within governing documents that are not applicable at all.” ID 124

The onus would lie on the charity trustees in these instances to initiate the required changes.

Once called forward, charities are given one month to complete their registration forms. The Commission currently provides a suite of guidance to assist in the registration process, ranging from multiple resources on its website, YouTube tutorials, a ‘call forward’ workshop session and tool-kits to assist charities embarking on the registration process. The Commission has also engaged the services of helper groups to support applicant charities in completing registration successfully.

As part of its Transformation Project in 2018/19, the Commission reviewed and simplified its registration processes to take better account of the fact that many organisations are run by lay volunteers who may not be well-versed in the legal technicalities of charity law and to enable compliance with the spirit (rather than the letter) of the regulations to be sufficient in some instances.¹³² It cut out many steps in the process in light of its growing registration experience and reduced the number of ‘chase’ cycles undertaken by the Commission to engage a charity. It is also redeveloping its application forms to be ‘smarter,’ as a result of stakeholder feedback during the Transformation Project. According to the Commission, the development of smart forms will improve the user experience of its systems,

allowing charities a more intuitive experience “meaning they do not need to be an expert in charity law to complete these processes or, indeed, know exactly which process they require to address their issue.”¹³³

There remains the worrying statistic, however, that despite these positive steps the vast majority of respondents (74%) believe that the registration process still needs to be improved. In making sense of this disconnection between what the Commission does and how it is perceived by those it regulates, the Panel queries whether:

- a) The Commission could better communicate with charities to raise their awareness of the registration resources available to them;
- b) The Commission could improve its engagement with intended charity registrants to ensure that the available technically accurate resources are pitched at a more-user friendly level whereby they are not user-friendly for the intended audience; or
- c) charities trustees need to engage better with the regulatory requirements by spending more board time better understanding their roles and responsibilities in running a charity, which could be further assisted by strategic Commission and helper group road-shows and events.

¹³²Charity Commission, Outstanding information matrix, v2 (May 2019).

¹³³Charity Commission Second Submission to the Review Panel, at p. 37.

Ultimately, registering as a charity is a formal regulatory process which when successful, brings its own subsequent reporting and compliance obligations. Therefore it is important that certain minimum standards be maintained (and certain information be provided) when it comes to ascertaining, as the Commission must do under its statutory duties, whether a body is or is not a charitable institution and whether it should be registered. While the Panel remains committed to the idea that all charities should be required to register and that there should not be a minimum financial threshold below which registration is not required, it is equally of the view that the Commission must adopt a pragmatic and proportionate approach to the registration process. Smaller charities that do not have the support of paid staff or lack the benefit of legal advice may not present as sophisticated registration applications as their larger peers, but if they meet the statutory registration requirements and are constituted for charitable purposes for the public benefit, their registration should not be delayed.

Moreover, the Panel observes that in the event that the Minister decides to maintain the existing statutory requirement for all charities, regardless of size, to register, it will be even more important that the regulatory approach of the Commission clearly delineates the charity sphere from the broader non-profit space and that only

charities or those truly wishing to apply for charitable status are channelled towards the registration process.

6. Section 167 Institutions and the Registration Process

6.1. Terms of Reference

The Panel's Terms of Reference ask it to consider whether the particular requirements envisaged for s.167 institutions are fit for purpose and to formally explore the related issue of how statutory cooperation with charity regulators in neighbouring jurisdictions can be strengthened. In pursuit of these ends, the Panel met with representatives of the Irish CRA, OSCR and CCEW as well as representatives of the Charity Commission for NI. There is good working engagement between the Chief Executives and senior management teams of each of these regulators. The following section considers existing cooperation between regulators, the rationale for s.167 and the implications of its non-commencement for the registration of affected charities. Chapter 10 will further consider the regulatory consequences of registration for such institutions and advise on the fitness of the provision in light of same.

6.2. Existing cooperation with Regulators in other jurisdictions

Outside of s.167, which will be discussed below, memoranda of understanding

(MOU) governing cooperation exist between the Charity Commission and its counterparts in both OSCR and CCEW. The 2015 MOU between OSCR and the Charity Commission¹³⁴ commits both regulators to regular general liaison as well as specific liaison at individual case level. In the context of registration matters, both regulators agree to notify the other if, during the process of registration, it becomes evident that the applicant charity should also be required to register in the other jurisdiction. There is further agreement for cooperation between the regulators in the context of charity monitoring and investigation of charity abuse and misconduct. According to OSCR there are 2 charities established in NI that are concurrently registered on the Scottish register of charities.

An MOU governing the cooperation between CCEW and the Commission is also in place. Its purpose is to enable closer cooperation between the regulators at both a strategic and operational level by facilitating effective investigations and maximising information sharing about charities in the public interest.¹³⁵ It should be noted that the CCEW only registers charities that are established in England and Wales and are operating under the jurisdiction of the English High Court; the Charities Act 2011 does not have a

section 167 equivalent.

A draft MOU between the Commission and the Irish CRA was delayed by the necessity of the passage in Ireland of the Charities Act 2009 (Section 34) Regulations 2017,¹³⁶ identifying the Commission as a specific body with whom the CRA could enter an MOU. Despite the introduction of these regulations, Brexit and its associated implications has further delayed the advancement of an MOU. Ireland, which requires any charities (regardless of place of establishment) that are active in the state to register with the CRA, counts 21 NI charities on its Charities Register.

In addition to MOUs governing administrative cooperation, the various charity regulators (again at Chief Executive and SMT level) traditionally met every 18 months for the International Charity Regulators Forum and twice yearly for the UK and Ireland Charity Regulators Forum (established in 2006) until the pandemic disrupted such in-person meetings. The objective of these gatherings is to share information and best practice amongst peer regulators and where relevant (particularly in a UK/Irish context) to ensure a consistent

¹³⁴Memorandum of Understanding between the Scottish Charity Regulator and the Charity Commission for Northern Ireland (May, 2015).

¹³⁵Memorandum of Understanding: Charity Commission for England and Wales and Charity Commission for Northern Ireland (undated, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/680146/CC_MoU_with_CCNI_Feb_18_redacted_version.pdf).

¹³⁶S.I. No. 587/2017.

regulatory approach. These meetings are in addition to other informal meetings and phone calls between the various regulators on a bilateral basis as and when issues arise.

The Panel recommends that in the interest of furthering a consistent regulatory approach towards charity regulation across the island of Ireland that the Commission prioritise the agreement of an MOU with the Irish CRA.

Recommendation 33: The Commission should prioritise the agreement of an MoU with the Irish CRA in the interests of furthering a consistent regulatory approach.

The Panel notes existing MoUs with OSCR and CCEW and believes completing this task would provide the Commission with formalised contact across these islands in support of learning and development.

6.3. The rationale for s.167

Under the 2008 Act, a charity must be established in NI and be under the jurisdiction of the NI courts before it is eligible to apply for registration as a charity. This means that a charity established in another jurisdiction (whether that be in Scotland, Ireland, England and Wales or further afield) that is active in NI cannot apply to register

as a charity on the Charities Register. Section 167 of the 2008 Act, a section which is not yet in force, was designed to recognise these other charities and to enable the Charity Commission to register these organisations on a parallel register and to regulate their activities in NI.

Currently, over 500 charities established outside of NI but carrying out charitable activities in NI are on the Combined List, awaiting the commencement of s.167 and a call forward by the Commission for registration. These charities may simultaneously be regulated by the CCEW, OSCR or CRA (or indeed a charity regulator in another country). They may equally enjoy charitable tax exempt status from a revenue authority.¹³⁷ Inability to register in NI and the lack of certainty as to what form such future regulation will take is a source of frustration and concern to those organisations we met in our community webinars. The Commission has indicated previously that its primary focus on registration rests on the registration of NI established charities. Indeed, until the Department introduces regulations to give effect to s.167, the Commission has no control over progress of s.167 registrations. The Charity Commission also shared concerns over the workability of the s.167, as currently drafted, an issue that is further explored in Chapter 10.

¹³⁷We know that at least 50 of the remaining 200 deemed charities on the combined list are classified as s.167 institutions.

6.4. Analysis of the language of Section 167

Section 167 applies to “any institution which is not a charity under the law of Northern Ireland, but which operates for charitable purposes in or from Northern Ireland.” The word ‘institution’ is not defined in this context by the Act itself. An immediate issue arises in that as currently phrased, any non-charitable institution established outside NI could apply to the Charity Commission under s.167 for registration if it was operating for charitable purposes in NI. The section does not expressly require an applicant under s.167 to be registered with and subject to the full scrutiny of a ‘lead’ charity regulator in another jurisdiction so as to justify lighter touch regulation by the Charity Commission for NI.

It is possible that the choice of language in s.167 and lack of reference to registration with another regulator was deliberately chosen to provide exempt charities in England and Wales (who cannot register with CCEW) with a seamless route to gain charitable recognition in NI. Departmental records relating to the preparation and drafting of the 2008 Act are no longer comprehensive and prevent the policy considerations that arose in relation to s.167 being fully known. The current language, if its objective was to enable this one cohort of charities, however, causes greater difficulties for all other prospective s.167 charity applicants.

6.5. What we heard

Given the nature of the affected cohort – charities established outside NI -- the questions concerning s.167 institutions received less traction in the online survey than did other reference areas. Respondents were asked if their charity was active in NI, and if it was subject to additional regulation by any other charity regulators. Additional regulators identified by respondents were the Irish CRA (6 respondents), OSCR (7 respondents), and CCEW (10 respondents). Approximately a quarter (24%) of respondents felt that exposure to multiple charity regulation regimes did present a challenge in operating their charities. However, almost three-fifths (59%) of respondents had no view on this. Over a quarter (28%) of respondents felt that the commencement of s.167 is a matter that the Department should prioritise. However, just over three-fifths (61%) of respondents had no view on this matter.

In our community webinars, large charities expressed a strong desire to see s.167 registration progressed. They spoke of the barriers that they experienced operating in NI as a charity without the benefit of an NI charity registration number. One attendee highlighted that in charity shops if customers don’t see an NI charity number they believe the money isn’t being spent in NI which is not the case. We also heard of additional administrative burdens borne by s.167

institutions active in NI who experienced difficulty accessing the COVID-19 Charities fund without having an NI charity registration number.

With regard, then, to S167 the Panel makes the following recommendations:

Recommendation 34: The Department, in conjunction with the Commission, should review and amend the wording of s.167 prior to commencement to clarify the organisations that fall within its remit and the scope of activities that may trigger a requirement to register. The Panel will speak further to the required changes in Chapter 10.

Recommendation 35: The Department should consider making prior registration with a charity regulator in another jurisdiction a pre-condition to applying for registration under s. 167.

The compromise offered by s.167 in accepting a ‘foreign’ charity’s constitution without requiring further amendment to the charitable objects clause to align with the wording of the 2008 Act should be dependent upon the Commission’s relationships of trust and confidence in other charity regulators with whom it enjoys good working relationships. These regulators would remain the lead regulators for problems arising with these charities, thereby reducing the workload of the Commission in their regulation but still providing it with the necessary powers

to step in, either at the request of the lead regulator, or should there be a fear of loss or damage to NI beneficiaries or society more generally. The Panel notes that this approach would currently rule out the automatic registration of English and Welsh exempt charities operating in NI, but it would provide a more reasonable registration route for all other foreign charities.

Recommendation 36: In any regulations passed to give effect to s.167, the Department should name the regulators with whom the Commission enjoys mutual cooperation relationships, whereby the s.167 registration process might be simplified as a result of this respect for the lead regulator.

In instances of applications from charities regulated by charity regulators from another jurisdiction not mentioned in the regulations, the Charity Commission should be given leeway to carry out greater due diligence on a case-by-case basis before admitting institutions primarily regulated by these other regulators to the s.167 Register.

Recommendation 37: Upon the commencement of s.167, greater legislative clarity should be provided by the Department regarding the operation of the provision. To this end, further technical consideration is given to s.167 in Chapter 10 and further recommendations relating to s.167 will be made there.

7. Conclusion

An effective register forms the bedrock of a good charity regulation regime. Significantly accelerating the pace of registrations and reducing the registration backlog that has developed must become a key task for the Commission to enable it to fulfil its other statutory objectives effectively. But a well-maintained register is not an end in itself. It forms a necessary but not sufficient condition and must facilitate timely and effective reporting by registered charities, a subject to which we now turn in Chapter 6.

Chapter 6 – Annual Reporting

1. Introduction

The distinctive and widely-recognised contribution of charities to the public good leads, in principle, to a sector which deserves to be valued, nurtured, protected and encouraged by all parts of society: by beneficiaries of charitable activity, by those who work or volunteer in charities, and by those who seek to provide much-needed funds to generate public benefit. In practice, regulatory reporting is a mechanism to provide the necessary public assurances that a charity is well governed and accountable for the funds it holds and that good stewardship is practiced in its expenditure. To this end, the annual reporting requirement – in respect of both charitable activity and financial activity – is a common feature in all common law charity regimes.

This chapter deals with two main issues: it reviews the current reporting requirements for charities and it scrutinises the Charity Commission for Northern Ireland’s (the Commission’s) actual use of reported data for compliance and oversight purposes. With these two issues to the fore, the chapter considers firstly the views of small, medium and large charities on the proportionality of the reporting regime before taking account of the approaches adopted by neighbouring charity

regulators. Secondly, the chapter examines the Commission’s performance in monitoring and overseeing charities on the basis of annual returns made. Across both of these issues, the chapter takes care to distinguish between the experiences of charitable companies and unincorporated charities, where appropriate, as well as raising cross-cutting issues of concern on the fitness for purpose of the current regimes that affect all stakeholders.

2. Requirements for Charity Reporting

2.1. Why does the law require reporting?

The Charities Act (Northern Ireland) 2008 (the 2008 Act) requires the Commission to “promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.” One of the key ways that the Commission seeks to promote compliance is its requirement that all registered charities report annually on finances, resources and activities by completing an online annual monitoring return form with the Commission and attaching the following files to that submission:

1. A trustee's annual report;
2. A statement of accounts; and
3. A report from an auditor or independent examiner, as appropriate.

Reporting, however, is not an end in itself. The purpose of reporting is to encourage charities to keep proper books of account and to make themselves accountable through the dissemination of this information to interested parties about how the charity is using its charitable funds to achieve its charitable purpose. The rationale for disclosure of financial reports and charitable activity reports is to maintain and indeed increase public confidence and trust in registered charities. Since the inception of charity reporting in NI in 2016, £2.1 billion of charitable funds have been accounted for through the register of charities.¹³⁸

Submitting annual reports and accounts to the Commission in a timely fashion should encourage charity trustees to take responsibility for the running of their charity and to inform the public of the impact their charity has made. The act of annual reporting should promote transparency: any member of the public can access these published accounts through the charities register. Funders, in particular, noted their reliance on the register's published annual returns when making funding decisions about prospective charities.

Having access to a charity's financial returns should also assist the Commission in its task of scrutiny to ensure that charities are well-managed. Effective annual monitoring, using a risk-based assessment approach, should alert the Commission to matters requiring further investigation or attention. Similarly, a charity's failure to submit accounts on time, or at all, may signal to the Commission and stakeholders that all may not be well.

Effective, timely and proportionate reporting by charities to a regulator that actively evaluates those returns and intervenes when compliance issues arise forms the basis for public confidence and trust in charities. There is, however, a need to balance the desire for public trust safeguards with the imposition of disproportionate burdens on small charities. To this end, it is important to consider the available resources of these charities, the likelihood of misconduct and separately, the likely use made by the Commission of the information actually requested.

2.2. The current legal requirements for annual reporting

The Charities (Accounts and Reports) Regulations (Northern Ireland) 2015 (the 2015 regulations) set out different reporting requirements for organisations of different sizes, according to the level of income, and in the absence of a higher

¹³⁸Charity Commission NI, Second Submission to the Review Panel, May 2021.

standard imposed by the charity's own governing documents or required by a funder. According to the Commission, the vast majority of registered charities have an annual income of less than £100,000 (5,002 charities). There are 1,317 charities with an annual income of between £100,000 and £1m and a further 218 charities with income in excess of £1m per annum. More than half of all

registered charities to date have an annual income of £25,000 or less.¹³⁹ The Department for Communities (the Department) shared with the Panel a more detailed breakdown of registered charity income bands, based on verified data for charities that had passed through the Commission registration process at March 2020, which is displayed in **Table 6.1 below**.

Income Bands (£)	Number of Charities	Total Income £
0*	703	0
0 - 10,000	1,832	6,285,076
10,000 - 50,000	1,341	35,584,549
50,000 - 100,000	746	52,793,301
100,000 - 500,000	1,144	250,625,136
500,000 - 1m	182	130,609,206
1 - 2.5m	115	173,200,709
2.5 - 5m	45	155,348,336
5m+	46	1,503,843,482
All charities	6,154	2,308,289,795

Table 6.1 Categorisation of Registered Charities Based on Annual Income (Source: DfC, 2020)

* Of the 703 organisations with zero income, most had not yet submitted accounts information to CCNI (this is only required after a full financial year after passing through the registration process).

¹³⁹Source: Information from a download of the Charity Commission's register of charities at 28 January 2021.

Table 6.2 summarises the current reporting requirements for registered charities. It can be seen that generally, as income levels rise, so too do the reporting requirements imposed by law on a charity. The notable exception to this is in the

case of charitable companies, who bear a higher reporting requirement, regardless of size, due to company law requirements which sit alongside charity law requirements in this respect.

Charity Size	Accounting Requirements	Required Scrutiny
1. Charities with an annual income below £250,000	All unincorporated charities with annual income below £250,000 may submit receipts and payments accounts but must include a statement of assets and liabilities. If a charity is a company, regardless of its income , it must prepare accrual accounts (and by necessary extension, comply with the Charities’ Statement of Recommended Practice (SORP)).	All charity accounts in this bracket must be independently examined.
2. Charities with an annual income between £250,000 and £500,000	All charities in this bracket, regardless of their legal form, must prepare accrual accounts in line with SORP.	These accounts must be independently examined by a qualified independent examiner, as outlined in the Charities Act.
3. Charities with an annual income greater than £500,000	All charities with an annual income greater than £500,000 must prepare accrual accounts in line with SORP.	These accounts must be audited.

Table 6.2 Annual Reporting Requirements for Registered Charities in NI

Charities are required to submit their annual reports and accounts within ten months of the end of their financial year.¹⁴⁰ Up until the NI Court of Appeal decision in *McKee v Charity Commission*,¹⁴¹ the Commission had issued up to three reminders to a charity’s point of contact that annual returns were due. In 2018/19, it piloted a letter-based annual return date reminder to all charity trustees (and not just the charity’s point of contact). While this saw the rate of non-

submissions drop from 20% to 13%¹⁴² an automated email-based reminder to trustees may prove more cost effective when the annual reporting process returns in full.

Charities that fail to submit their accounts on time are normally red-flagged on the Charities Register as having been late and this flag remains in situ even if the required reports and accounts are subsequently submitted. The placing

¹⁴⁰2008 Act, s.68(3).

¹⁴¹[2020] NICA 13.

¹⁴²Second Submission to the Independent Review, Charity Commission for NI.

of the red-flag on the register is an automated feature that occurs automatically once the due date for the return has passed. The flag remains in place on the register even when the missing accounts have been filed.

To support charities in their annual filing obligations, the Charity Commission has provided 8 guidance documents, 2 toolkits and a template appointment letter for independent examiners on its “charity essentials” page on its website. The Commission also provides a useful annual monitoring return (AMR) video tutorial.

3. What is the Charity Sector Experience of Complying with Reporting?

Annual reporting was the most popular topic for discussion at our community webinars. It featured as the first or second issue of concern for attendees in 7 of our 9 community meetings. The level of satisfaction expressed with the charity reporting regime depended largely on the size of the charity in question with strong calls for a reduction in the administrative burden borne by small charities. Medium and larger charities viewed the reporting regime overall as more proportionate in its requirements of them although there were still many proposals on how the reporting regime could be further improved.

3.1. The Experience of Charities in the £250,000 and lower income bracket

What we heard: The Panel heard broad issues of dissatisfaction (relating to appropriateness of overall thresholds for reporting and the burdensome nature of reporting for smaller charities). Webinar attendees and respondents to the online questionnaire suggested that the process was currently too complex, especially for small charities and volunteers. In examining the feedback received, the Panel was cognisant of the differing expectations of unincorporated charities on the one hand, and charitable companies on the other hand. While respondents did not self-identify into these categories, those who commonly mentioned that accrual accounts should not be necessary for smaller charities (as this work would often need to be outsourced) fall into the charitable company category. As noted in **Table 6.2**, the requirement for accrual accounts in the lower income bracket is a function of company law, not charity law. Under charity law, unincorporated charities have the option of filing simpler receipts and payments (R&P) accounts.

Overall, there was general agreement among respondents of the need for greater proportionality of reporting requirements to be shown to those charities under £250,000. To this end, 79% of respondents to the Panel’s online questionnaire were in favour of the

development of an online financial template to help smaller charities submit simplified R&P accounts online.

Given the requirement for independent examination of charitable accounts for the vast majority of registered charity returns, charities expressed their difficulties in finding suitably qualified independent examiners who were willing to act at a reasonable price for charities. Several pointed to the need for the Commission to encourage greater training in this space:

“I would also encourage CCNI and the NI Executive to do more to promote training of people to be independent examiners and to support the development of community accountancy services so small charities are not forced to go to firms of accountants. My experience is that the average quality of accounts for small/medium charities in England and Scotland is vastly better in those areas where effective community accountancy services are active (normally the services are provided by charities specialising in such support).” ID 15

When it comes to the question of external scrutiny, 54% of respondents were in favour of the introduction of a de minimis financial threshold below which independently examined accounts would not be sought (a figure which rose to just over 2/3 if individual as opposed to

organisational responses were considered). Cited advantages included reduced costs and administration for smaller charities.

Those opposed to such a move pointed to the importance of maintaining accountability, transparency, and confidence in the sector, and the need to deter fraud and misuse of charitable funds. Respondents – both at webinars and through the questionnaire – differed as to what would be the appropriate level for any such de minimis threshold, with some identifying annual incomes of £5,000 or £25,000 and some identifying amounts of £100,000 and higher.

The Panel recognises that the current reporting framework imposes a heavy burden on smaller charities in NI, particularly in the case of charitable companies. This reporting burden has been alleviated to some degree in Scotland and England and Wales by the introduction of the charitable incorporated organisation (CIO), which enables smaller CIOs in those jurisdictions to prepare receipts and payments accounts, thus avoiding the need for accrual accounts and compliance with the Charity SORP. The issue of CIOs and their reporting requirements are discussed further below.

The Panel also recognises the administrative burden that requiring

independent examination of accounts poses for all small charities – whether incorporated or unincorporated. For those small charities with just a few hundred pounds in their bank account and perhaps no regular income of which to speak, the cost of an annual independent examination is disproportionate to the benefit it may bring in terms of public accountability. The Panel will return to both of these issues in terms of its recommendations once it has considered best practice in other jurisdictions.

3.2. The Experience of Medium and Larger Charities

What we heard: When it comes to medium sized and large charities, the majority of respondents (76%) felt that the reporting regime for charities in the £250,000 to £500,000 income bracket was proportionate as it currently stands while a similarly high proportion of respondents (68%) felt that the reporting regime for those charities with annual incomes in excess of £500,000 was also proportionate (although respondents less satisfied with the status quo did suggest that the doubling of the financial threshold for audited accounts to £1m would be beneficial).

Medium sized charities in the just below £250,000 income threshold and larger charities in the just below £500,000 threshold did draw attention to the lack of flexibility in the existing financial

thresholds for the different reporting processes and the difficulties that an exceptional year's fundraising could have for a charity if it caused it to change reporting threshold.

The Panel appreciates the well-founded concern raised by charities in this regard. As this can be a cross-cutting issue for all charities anytime a charity crosses a reporting threshold -- resulting in either a change in accounting process or level of external scrutiny -- the Panel will return to this matter in its broader recommendations below.

3.3. Issues affecting all charities

Annual Monitoring Return: The Commission's online annual monitoring return (AMR) process was the subject of adverse comment from many charities of all sizes. Charities pointed to the fact that the Commission's process requires charities to either disaggregate the audited/independently examined annual reports and returns previously approved by their boards into separate components for the online annual monitoring return form or to upload the same document three times under different names. Respondents also criticised the need to re-key financial data contained in the reports into the Commission's online form, with several suggesting that staff and volunteers struggled with this process when they were not qualified accountants and that it increased the margin for error.

For the Commission, however, the completion of the AMR enables it to extract data for basic compliance checks. The financial statements that charities upload with their AMR are often scanned PDF copies and are not machine readable, hence the Commission's need for charities to key in certain critical data from the accounts into the AMR to facilitate Commission scrutiny and basic compliance checking and the subsequent issuance of self-regulatory advice or regulatory guidance.

The Panel notes in this respect that in the case of smaller charities, the replacement of an annual account submission with a requirement to complete a simplified online financial template (as recommended below) would serve a dual purpose. This would simultaneously reduce the reporting burden on smaller charities and give the Commission better machine readable data in a true 'less is more' scenario. The further development of an Application Programme Interface ('API') for the AMR would benefit all charities in reducing filing errors and will also be discussed in more detail in **section 6.4** below.

4. Issues of Concern for Charities

4.1. Red Flagging of Late Accounts

The placing of the red-flag and its subsequent non-removal was an issue of contention for many charities. Affected charities saw it as an overly punitive measure. In the words of one respondent:

"The Commission has an over punitive response in relation to accounts and reports being filed late. If accounts are filed late, it will say so in red writing on the charity register for a year even if accounts filed one day late." ID 117

The 'red flag' regime for late accounts mirrors the approach adopted by the Charity Commission for England and Wales (CCEW), whose registration and reporting software supports the Commission. In England and Wales, overdue accounts are also red flagged and the red flag remains even after accounts are subsequently submitted, no matter what the length of the delay. On the issue of timely filing of returns, in the Panel's discussions with CCEW, it did not indicate any intention to move to a more lenient regime regarding application of red-flags to late accounts, as it viewed timely filing as a key criterion in its regulatory approach to delivering charity financial accountability, particularly when the regulator does not have the ability to check every set of accounts filed.

In examining this issue, the Panel appreciates both perspectives: the frustration of charities who may 'just' miss a filing date and suffer the ignominy of an enduring red flag as a result, placing them in the same company as other charity defaulters who may be far tardier in their annual return submission versus a regulator that cannot review every set of accounts in detail and must develop 'short-hand' regulatory methods (in the

form of emailing trustee filing reminders and red-flagging defaulters) to encourage greater charity compliance, even if that compliance merely relates to on-time filing. The Panel believes that the introduction of a traffic light system that allows greater differentiation between filing defaulters would be helpful and recommends:

Recommendation 38: The Commission should introduce a traffic light system that allows greater differentiation between filing defaulters

- green flag for on-time submission
- yellow flag for ‘slightly late’ (which at the Commission’s discretion could be one week or one month after the due date), and
- red flag for all other defaulters.

The Panel recognises that the Commission may need to work with the CCEW which provides its registration system to enable this bespoke alteration to occur since this would need to be an ‘automatic’ setting in the reporting portal triggered by the filing date and not dependent upon manual changes. The Panel also recognises that such a system change is likely to give rise to cost and further recommendations will follow in this chapter.

4.2. Lack of Commission feedback

Other charities, while appreciating the value that an annual reporting regime can bring as a welcome opportunity to showcase a charity’s contribution to society, were critical of the Commission’s lack of engagement following submission of their annual reports. The effect of this silence led some charities to assume that their submitted accounts fully met the Commission’s standards. Funders however referred to the poor quality of some of the submitted reports available on the Register, indicating a lack of scrutiny by the Commission upon receipt. The absence of quality control was highlighted by another respondent who commented:

“The quality of accounts and reports on the charity register indicates that charities are not complying with the accounting and reporting requirements. CCNI needs to scrutinise more accounts and reports but needs the resources to do this. Also, the Commission needs to communicate more effectively with accountants and independent examiners, some of whom produce accounts and IER using the wrong form of words.” ID 117

Other respondents echoed the need for better Commission engagement and feedback on reporting mechanisms:

“Much could be done simply by CCNI writing to charities highlighting issues that need attention. As noted above, feedback on accounts and reports would achieve a huge rise on levels of compliance at relatively low cost.” ID 15

Similarly, a charity told us:

“Submitted two self-regulatory concerns in the form of serious incident reports. In each report mitigation measures were identified and included within the reports, however the charity has had no feedback at all from the Commission, and therefore has had no assurance that the mitigation measures (and indeed the investigative measures taken in relation to the incidents) were appropriate or suitable for the commission.” ID 16

The Panel recognises that these views resonate with issues raised by charities in Chapter 4 on the perceived lack of proactive engagement by the Commission with those charities striving to be compliant. This theme – the importance of positive feedback – is also addressed in Chapter 7 on compliance. The Panel believes that praise is just as important an educator of charities as criticism and reporting feedback to charities provides a useful channel for both. The Panel therefore recommends:

Recommendation 39: The Commission should provide greater feedback to charities through the completion of an increased rate of basic compliance checks.

In respect of this recommendation, the Panel recognises that its implementation is contingent upon the Department’s acceptance of Panel recommendations

relating to reporting thresholds, discussed below. If the Panel’s recommendations regarding reporting thresholds were not to be adopted, then the Panel considers that the Commission would not have the capacity to give effect to this recommendation.

4.3. Lack of User-friendly portals

The lack of user friendliness of the reporting portal was also a source of frustration for the Charity Commission. As noted in Chapter 3 of this Report, the registration and reporting software used by the Charity Commission is not a standalone system run by the Commission. Rather, it piggybacks on the CCEW operating system and the Commission therefore lacks the autonomy to customise the system. This may explain the Commission’s previous inability to extend the period of time before late return submissions are red-flagged (if it were of a mind to do so) or to change in any way the triplicate uploading of documents to meet the separate requirements of the annual report, the annual returns and the independent examiner/auditor report. In our meeting with CCEW, the CCEW acknowledged known limitations with its current reporting system. In a future project, it hopes to review and streamline its reporting system to eliminate multiple uploading of the same document.

4.4. Crossing Financial Thresholds for Reporting Purposes

Under the current reporting regime as set out in the 2008 Act,¹⁴³ charities whose income level may fluctuate in an isolated year (perhaps due to a successful one-off fundraising campaign) may find that they are catapulted into a higher level of reporting requirements for that particular year in the next reporting cycle. This may result in the charity being required to prepare accrual accounts (and to apply SORP) if their annual income crosses the £250,000 threshold or being required to have their accounts audited instead of being subject to independent examination if their annual income crossed the £500,000 threshold.

Respondents to the Review sought greater stability in this area by requesting that more than one financial year be taken into account when considering whether a change to reporting levels was required, with particular calls for greater clarity in this area at webinars with both lawyers and accountants. This would prevent charities see-sawing between higher and lower reporting requirements on a yearly basis.

With regards to crossing the £500,000 audit threshold, the Panel notes that article 27 of the Charities (Accounts and Reports) Regulations (NI) 2015 (the 2015

Regulations) allows a charity which temporarily or exceptionally goes over the audit threshold to apply to the Commission for a dispensation from audit for that financial year and to be allowed an independent examination instead.

With regards to crossing the £250,000 threshold for preparing receipts and payments accounts such that accrual accounts are required, the Panel notes that no similar dispensation provision from such preparation exists for charities that experience an exceptional year of fundraising under the 2015 regulations. Indeed, no UK jurisdiction currently offers such a dispensation.

The Panel believes that the ability for the Commission to offer an exemption when a charity exceeds a financial threshold – whether this is an audit threshold (as currently provided for in the 2015 regulations) or a threshold relating to the type of account preparation – is meritorious when granted on the basis of clearly articulated reasons. It provides flexibility for the Commission to respond to exceptional circumstances affecting a charity's gross income levels. It is also less complex to apply or understand than alternative solutions based on the need for two consecutive years of gross income in excess of a threshold before an accounting change is triggered.

¹⁴³Charities Act (NI) 2008, ss.64(3) and 65.

The reasoned exemption route also ensures good Commission oversight – since dispensation must be proactively sought -- by avoiding a situation of too much flexibility for those charities that may not wish to be accountable for several years without proper accounting. In light of this the Panel recommends:

Recommendation 40: The Department review the 2015 regulations and in addition to the existing power upon application to grant dispensation from audit, also give the Commission the power upon application to grant a dispensation from the requirement of preparing accrual accounts in favour of receipts and payments accounts when a charity experiences an exceptional year of income.

The Panel believes the implementation of this recommendation would have a significant outcome for charities in that a charity experiencing an exceptional year of income (as a result of an unprecedented legacy, for example) which pushes it over its normal income threshold of less than £250,000 per annum could apply to the Commission for dispensation from the requirement to prepare accrual accounts in compliance with the Charity SORP.

5. An Assessment of the Reporting Regime

5.1. How fit for purpose is the current reporting regime: income versus asset thresholds?

The current reporting regime is primarily set out in the 2015 Regulations. The Panel has considered the purpose of reporting and has examined whether different degrees of reporting would enable both the Commission and the charities it regulates to fulfil their statutory duties and in the case of the latter, achieve their charitable purposes. A good reporting system should:

- allow charities to submit the required information in a timely, user-friendly, accurate and proportionate manner;
- provide essential and digestible data to facilitate targeted regulatory intervention by the Commission, where necessary;
- provide an easily available, reliable and often-used repository of charity data for other key stakeholders (whether government, funders, or the public) in their decision making processes;
- assist charities to tell their own stories of the impact they have made in the past year and to benchmark their own success against that of their relevant peers.

At present, under the Charities Act (Northern Ireland) 2008 (the 2008 Act), reporting criteria are based solely on annual gross income levels¹⁴⁴ and take no account of asset holdings.

a) Definition of Gross Income

In its first submission to the Review, the Charity Commission pointed to the limited statutory definition of ‘gross income’ in the 2008 Act. Section 180 of the 2008 Act, which mirrors the Charities Act 2011,¹⁴⁵ defines gross income as “gross recorded income from all sources including special trusts.” According to the Commission:

“This definition does not helpfully explain to charities what makes up income for threshold purposes, particularly for smaller charities preparing receipts and payments accounts where cash received may be capital in nature and not true income.”¹⁴⁶

The Panel notes that the Scottish definition is more comprehensible, providing that “‘gross income’ means the total recorded income of the charity in all unrestricted and restricted funds but not including resources received as capital funds.”¹⁴⁷ The Panel will make a recommendation regarding gross income definition below.

b) Consideration of Asset Levels for Threshold Reporting purposes

If changes were made to reporting levels to lessen the accountability burden on smaller charities below the £25,000 threshold, the need to consider asset levels may once more become relevant in determining whether a charity should have to provide simplified annual accounts or be exempt from independent examination. Some small charities may have little disposable income but hold substantial assets (or apparently substantial, if unrealisable, assets).¹⁴⁸

The Minister may want to ensure that such charities (with large asset holdings but limited income flow) were still actively pursuing their charitable purposes and not falling into the inactive or dormant category where charitable resources were not being effectively harnessed for public benefit. Taking assets (such as premises and investments) into account when determining the application of lighter reporting requirements on smaller charities in terms of setting financial reporting thresholds should be considered in any reform of the Charities Act.

The Panel notes that of those respondents who sought a registration exemption threshold, overall 49% believed that such

¹⁴⁴See, e.g., Charities Act (NI) 2008, s.64(3), s.65(1).

¹⁴⁵Charities Act 2011, s.353(1).

¹⁴⁶Charity Commission NI, First Submission to the Review Panel, May 2021, p.42.

¹⁴⁷Charities Accounts (Scotland) Regulations 2006, Article 1.

¹⁴⁸In its recent appearance before the Communities Committee, the Commission cited the example of a registered charity which, as per its September 2019 accounts, had income of only £17,861, but held net assets of £1,328,565 at the year end.

threshold should be calculated on the basis of a combination of income and assets. The Panel believes that a similar approach is warranted when it comes to adjusting the reporting requirements based on a charity's size and recommends that in lightening the reporting burden for smaller charities that due account should be taken in defining a small charity with reference to both the income and asset levels of the organisation. The Panel will make a recommendation about asset thresholds below.

c) Information requirements for receipts and payments accounts

Section 64 of the 2008 Act sets out that receipts and payments accounts must contain:

- a receipts and payments account and
- a statement of assets and liabilities.

In its first submission to the Review, the Commission advised that the absence of any content requirements for the statement of assets and liabilities in the 2008 Act in the context of R&P accounts meant that:

“the quality and content vary significantly from charity to charity and very little can be determined, even as an estimate, as to the value of charitable assets attributable to the small charity portion of the sector.”¹⁴⁹

The Commission pointed to the approach adopted in Scotland where Schedule 3 of the Charities Accounts (Scotland) Regulations 2006 set out clear and specific content requirements, including the obligation to provide values for charity assets and liabilities (varying between cost, market valuation or estimated). Scottish law also requires preparers of receipts and payments accounts to include explanatory notes to the accounts in respect of restricted funds, details of grants paid, and payments or transactions with trustee or related parties. The Panel will make recommendations about receipts and payments account content below.

5.2. Implications of Statutory Regulations and the Legal Form of Charities on Reporting Obligations

Many of the frustrations and concerns raised in relation to the current reporting regime stem from two main sources: a) the terms of the statutory regulation (i.e., the 2015 Regulations); and b) the legal form adopted by the charity. In both instances, the Commission is powerless to mitigate those difficulties without legislative intervention by the Department.

a) The Charities (Accounts and Reports) Regulations (NI) 2015:

The Commission has no power to change the accounting regulations which require all charities, regardless of size, to submit annual returns and to provide, at the very least, independent examiner's reports. If

¹⁴⁹Charity Commission NI, First Submission to the Review, p.43.

de minimis thresholds were to be introduced for accounting purposes (e.g., setting a financial threshold below which submission of receipts and payments accounts would not be required or removing the requirement for an independent examiner's report for small charities), this would require the Minister to amend the statutory regulations or to seek legislative change to the Charities Act (depending on the nature of the change sought).

b) The legal form adopted by a charity:

In relation to the legal form adopted by a charity, it is quite common on the establishment of a new charity to incorporate it as a company so as to offer charity trustees greater protection from personal liability should something go wrong at the charity. This benefit brings associated responsibilities under company law which requires all companies (even relatively small charitable companies) to prepare accrual accounts in compliance with the Statement of Recommended Practice for Charities (SORP). Charitable companies are thus subject to dual regulation by both Companies House and the Charity Commission. Because of their corporate form, small charitable companies cannot avail of the option open to smaller unincorporated charities under charity law to file simpler receipts and payments accounts that may be more in line with their actual income levels.

The commencement of Part 11 of the 2008 Act, relating to charitable incorporated organisations (CIOs), would help to resolve some of the difficulties experienced by this cohort of smaller charities. Smaller charities that either formed as -- or subsequently converted to -- a CIO could file receipts and payments accounts, thereby avoiding the need to prepare accrual accounts or to follow SORP. Formation as, or conversion to, a CIO would thus substantially reduce these charities' reporting compliance burdens.

Introduction of the CIO would still impose certain reporting requirements on the charity. In England and Wales, for instance, all CIOs are required to file an annual return, a trustee annual report and a statement of accounts. If the CIO has income over £25,000 an independent examiner's report is also required and a full audit is required if income exceeds the £1m mark or has gross assets greater than £3.2m and income in excess of £250,000. An advantage of this new legal form would be that CIOs would not have to file simultaneously with Companies House, as they would be regulated solely by the Commission. The Panel believes that the introduction of the CIO as a legal form would be a valuable legal structure for smaller charities (and their charity trustees) in particular and its availability would help to lessen the reporting burdens on smaller charitable companies that chose to convert to a CIO. A fuller

discussion of CIOs and the implications of their introduction in NI may be found in Chapter 10.

5.3. How does the current reporting regime compare with reporting under other charity regimes?

As currently implemented, the NI reporting regime resembles that of Scotland in that all charities, regardless of size are required to submit annual returns which have been the subject of, at least, independent examination. Interestingly, these requirements have not caused such concern in Scotland but the availability of Scottish CIOs (SCIOs), which account for 20% of registered charities there,

alleviates a compliance burden on smaller Scottish charities that is currently borne by small charitable companies in NI.

In England and Wales, as **Table 6.3** indicates, a graduated approach to annual reporting is also adopted with minimal information required for registered charities with an annual income under £10,000. Those with income between £10,000 and £25,000 file an annual return without the need for other supporting documents. It is only when a registered charity crosses the £25,000 income threshold that additional requirements by way of a trustee annual report and further external scrutiny is required.

	Audit	Trustee Annual Report	Independent Examination	Annual return	Simple reporting of income and expenditure
Income under £10,000					X
Income between £10,000-25,000				X	
Income over £25,000		X	X	X	
Income over £1m or Gross assets over £3.26m and income over £250,000	X	X		X	

Table 6.3 CCEW Charity Reporting Thresholds (source: CCEW).¹⁵⁰

In Ireland, accounting regulations for registered charities have yet to be introduced. Following a 2016 public consultation on proposed regulations,

the Irish Charities Regulatory Authority (CRA) proposed the introduction of a graduated scheme of reporting (see **Table 6.4** below), which, if introduced, would see

¹⁵⁰See <https://www.gov.uk/guidance/prepare-a-charity-annual-return#ar-questions>.

smaller charities meeting certain threshold criteria relieved entirely of the need to file an annual statement of account. These charities would instead complete an online financial template, setting out basic financial information,

when filing their annual report with the regulator. The benefit of this approach would be that these charities would remain visible to the Regulator but would not be not overburdened in terms of annual reporting.

CRA Proposal	Charity SORP Mandatory	Accruals/ Simplified Accounts	Annual Audit Required	Independent Examination	No requirement to submit Annual Statement of Accounts
Meets 2 of the following criteria: 1. Gross income not exceeding €25k; 2. Balance Sheet total not exceeding €25k 3. No employees	-	-	-	-	✓
Gross Income or Total Expenditure between €25k and €250k	-	✓	-	✓	-
Gross Income or Total Expenditure exceeds €250k	✓	-	✓	-	-

Table 6.4 Irish CRA Proposed Reporting Requirements (source CRA).

5.4. Analysis

So far, this chapter has outlined the existing NI regulatory framework; it has compared that framework to the reporting frameworks in England and Wales, Scotland and Ireland and it has highlighted the difficulties experienced by both charities in general and smaller

charities in particular in complying with the NI regime. The blunter financial thresholds provided in NI’s 2015 Accounting Regulations coupled with the absence of a CIO option for charities make the NI regime more demanding on smaller charities here than in other jurisdictions.

As this chapter has previously stated, in relation to small charities, there is a need to balance the need for sufficient safeguards to protect public trust and confidence in them with the imposition of disproportionate burdens when viewed in light of both their available resources and the likelihood of misconduct. As with all regulatory change, there will be a trade-off. Two issues arise for consideration: should there be a financial threshold below which the Commission seeks only minimal financial information from a charity every year; and, secondly should there be a financial threshold below which independent examination is not required by law?

I. Introduction of a Financial Threshold below which only minimal charity financial information is provided

The Panel believes that a balance must be struck between making charities accountable for the charitable funds they hold and imposing a disproportionate regulatory burden on smaller charities to provide detailed financial reports which the Regulator neither has the capacity to exploit nor that the Risk Assessment Framework deems to be of sufficient risk to warrant that level of scrutiny. To this end, in line with the approaches taken in England and Wales and proposed in Ireland, the Panel recommends that a differentiation be made at the £25,000 financial threshold mark such that lesser reporting burdens are placed on these charities.

The Panel notes that in England and Wales, the threshold is based purely on gross income whereas in Ireland the proposed threshold is based on a combined consideration of assets and income. If the Minister accepts the Panel's recommendation to introduce a financial threshold for minimal reporting purposes, it will be a policy decision for the Minister as to the basis for this threshold and the Panel would encourage the Minister to consult key stakeholders on the setting of the proposed threshold.

II. The Necessity for Independent Examination Reports in every case

Turning to the second issue, the necessity for an independent examiner's report in the case of every small charity with just a few hundred pounds in its account is debateable and the costs associated with obtaining these reports may on occasion outweigh the benefits in the grand scale of risk assessment. The Panel recommends that there should be no statutory requirement to provide an independent examiner's report below the £25,000 mark, as is currently the case in England and Wales and is presently proposed in Ireland.

Dispensing with the requirement for an independent examiner's report in the case of charities in the £25,000 income bracket or less may introduce some risk that mismanagement will not be spotted immediately. But if in doing so, the Commission was able to complete a

higher level of basic compliance checks on all charities and to carry out a larger randomised sample audit, more lessons might be learned. Furthermore, if the choice of audit samples took account of the regulatory ladder of supports, which are further discussed in Chapter 7, it could be that those compliant charities who evidence compliance with Commission requirements (including timely submissions) would be rewarded by featuring less often in the Commission's spotlight scrutiny (by way of rotation of samples for audit) in return for such compliance. It should be noted that the introduction of de minimis reporting standards would not preclude charity trustees from choosing to apply higher standards to their own accounts either for their own or their funders' assurance.

In light of the Panel's detailed consideration of the current reporting regime, the experience of charities making returns under this regime and the approaches taken by charity regulators in neighbouring jurisdictions the Panel believes that a proportionate approach should be taken to reporting and will make recommendations to this effect below. If implemented, the recommendations would deliver the following positive outcomes:

- Allow smaller registered charities to focus their work less on reporting requirements and more in delivery thereby placing less strain on resources

while importantly maintaining proper governance by charity trustees.

- A risk approach requiring less need for independent examination of accounts in those charities where the risk presented is small.
- A combined test taking into account both balance sheet assets and annual income, if adopted, will achieve an appropriate balance between safeguarding the public interest and imposing a proportionate burden on smaller charities.
- The move to a simplified template report with removal of independent examination requirement has the potential to lighten the reporting burden of 50% of registered charities if based solely on annual income of £25,000 or less. Depending on the Minister's definition of 'small' charities, if based on a combined test (looking at both balance sheet assets and annual income), there will still be a positive effect for charities even though the Panel cannot currently estimate how many registered charities would meet the CRA test above.
- Unincorporated charities with income between £25,000-£250,000 and all CIOs in that bracket (when introduced) would be required to prepare receipts and payments accounts and a statement of assets and liability, which should continue to be independently examined. This would align the

approach to these charities more generally with the approach currently adopted in England and Wales. The inclusion of content requirements for receipts and payments accounts would bring greater consistency in their preparation, assist independent examiners in their examination of such accounts and align the approach to such accounts with the approach currently adopted in Scotland.

- The introduction of the CIO would reduce the reporting burden on charities that establish as, or convert to a CIO, by allowing all CIOs to file only with the Commission and not with Companies House and by further allowing smaller CIOs to file receipts and payments accounts instead of accrual accounts, and thereby avoiding the need for SORP compliance in these instances.

Recommendation 41: The Commission should implement a proportionate approach to reporting.

To achieve this the Review Panel recommends:

Recommendation 42: The Minister bring forward amendments to the Charities Act 2008 and The Charities (Accounts and Reports) Regulations (NI) 2015 to enable the Commission to adopt a more proportionate, tiered approach to reporting for small charities to reduce their reporting

burden. This should include:

- The removal of the requirements to file an annual statement of account and for independent examination,
- Charities in this bracket be required to complete an annual monitoring return and to complete an online financial template setting out basic financial information.

The Panel notes that the introduction of a financial threshold for minimal reporting is a policy decision for the Minister and encourages the Minister to consult key stakeholders on the setting of the proposed threshold, particularly as to whether the threshold should be defined in terms solely of gross annual income **or** whether a combined income and assets threshold is required. In terms of setting a possible income threshold (aside from the separate policy question of whether assets should also be considered) the Panel recommends to the Minister that:

Recommendation 43: The income threshold should relate to a gross annual income of £25,000 or less.

To assist the Commission to apply proportionate reporting standards the Panel recommends that:

Recommendation 44: The Department amend s.64 of the 2008 Act and the Charities (Accounts and Reports)

Regulations (NI) 2015 to include content requirements as to the format of receipts and payments accounts and the statement of assets and liabilities.

Note: This recommendation should not apply to those charities with annual income less than £25k as set out in recommendation 43 above.

Recommendation 45: The Department amend the definition of ‘gross income’ in s.180 of the 2008 Act to provide greater clarity to charities as to its meaning.

In respect of this recommendation the Panel commends the definition in The Charities Accounts (Scotland) Regulations 2006 for consideration.

Recommendation 46: The Department should prioritise the commencement of Part 11 of the Charities Act, and the associated regulations to introduce CIOs as a legal form option for charities.

The Panel recognises that these recommendations will not reduce the reporting burden of small charitable companies that continue to take the form of a company limited by guarantee since these charities would continue to be subject to company law and would still be required to prepare accrual accounts and to comply with the Charity SORP, although it would be at the discretion of the Department, for the purposes of charity law, to remove

the dual reporting requirement of independent examination for those companies who meet whatever definition of ‘small’ is ultimately decided upon by the Department.

6. Filed Returns: Challenges, Concerns and Proposed Solutions

6.1. The Commission’s performance checks on filed returns

Registered charities, for the most part, demonstrate a strong willingness to meet their reporting obligations in a timely fashion and in a way which is valuable both to themselves and to other charities and the public. In the period from 1 April 2018 – 31 March 2020, on average, four out of five charities filed annual reporting information with the Commission on time.¹⁵¹ While this ticks the timeliness box, the accuracy of charity filings and the Commission’s rate of scrutiny of filed accounts raise some concerns; concerns that in both instances are often related to capacity and resourcing issues. As one charity respondent recognised:

“The resource capacity of the Commission means they have to rely heavily on the entity providing the data and using the professional report from an auditor and independent examiner to comply with the due diligence. Their capacity to check is very limited.” ID 69

¹⁵¹First submission of the Charity Commission NI to the Independent Review of Charity Regulation in NI, at p. 48.

In its annual report 2019/20, the Commission reported a basic compliance check of 19% of annual monitoring returns received (exceeding its target of 17%). The fact that this leaves 81% of submissions un-scrutinised/unchallenged by the Commission may explain funder feedback on the poor-quality annual returns posted on the register and the perception by charities that the Commission does not proactively engage with them on their submitted accounts.

In its first submission to the Review Panel, the Commission provided figures spanning a broader 2-year period.¹⁵² That analysis of a sample of 1,600 received reports shows that compared with charities in the £20k+ gross income category, charities with a gross income of less than £20,000 are almost twice as likely to fail account

checks to some degree. In categorising the quality of submitted returns, the Charity Commission rates them respectively as:

- **Pass;**
- **Fail – regulatory issue:** requires re-submission (e.g., incorrect year or primary financial statement or report missing);
- **Fail – self regulatory issue:** to be resolved by next filing date (e.g., public benefit reporting not included in the trustees’ annual report);
- **Fail – no action:** (other minor issues re contents of the trustees’ annual report) – noted on the Commission’s systems to inform guidance and/or thematic reports.

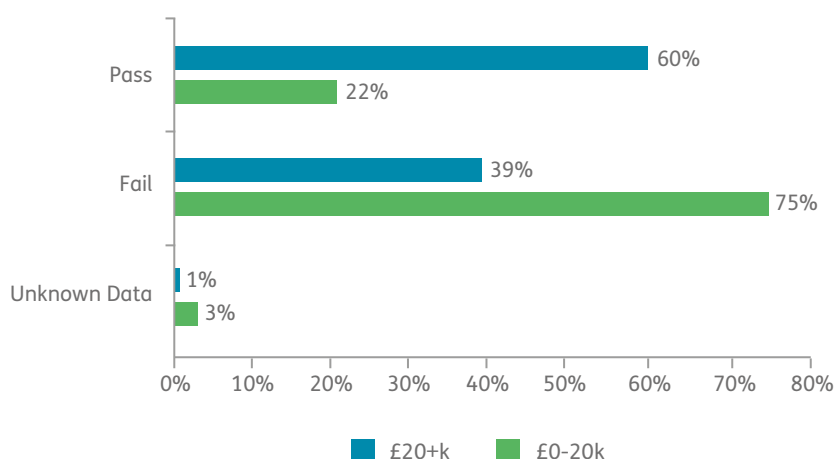


Figure 6.1. Basic compliance check outcomes 1 April 2018 -31 March 2020 simplified to above and below £20k income (source: Charity Commission)

¹⁵²Ibid., p. 51.

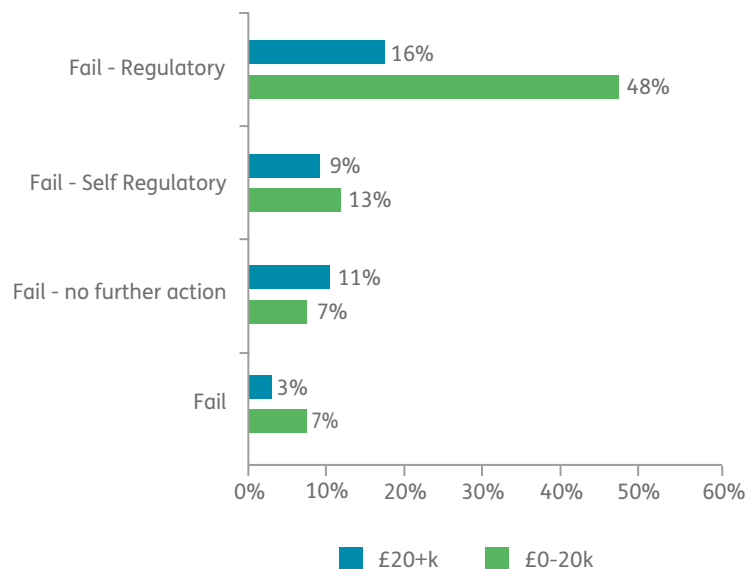


Figure 6.2 Basic compliance check by type of fail 1 April 2018- 31 March 2020
 (Source: Charity Commission) ¹⁵³

6.2. Resubmitting annual accounts

Just under half of the sampled charities with a gross income under £20k were required to resubmit their annual accounts, while 13% were alerted to issues for improvement for the next regulatory cycle. Given that 47% of all registered charities have an annual income of under £20,000, if the prevalence of these inaccuracies is to be found more generally in filed reports outside the Commission’s testing sample, this would mean that a quarter of all registered charities would fail the basic compliance checks which are fundamental to good reporting. The webinar feedback from funders on the

poor standard of “accepted” accounts on the Charities Register would seem to provide anecdotal evidence that the problem is a wider one. It should be noted that in identified regulatory fail cases the Commission works with these charities on an individual basis to enable them to understand their obligations and resubmit compliant accounts and reports, a resource intensive approach for the Commission.

6.3. Software difficulties

While charities complained about the reporting software’s lack of user-friendliness at the submission end, the Charity Commission similarly experiences difficulties at the receiving end.

¹⁵³The reference to ‘fail’ simpliciter covers those basic compliance checks which were carried out prior to the end of 2018. At that stage all charities which failed checks received e-mail correspondence asking them to address the matter and those charities were captured as “fail” only. At the end of 2018 the Commission revised its procedure on basic compliance checks. Since then, any failed checks have been addressed through guidance where appropriate and captured as ‘fail- regulatory’, ‘fail – self-regulatory’ and ‘fail-no further action’.

Information uploaded in read-only PDF format cannot be extracted by the Commission for reporting and analysis purposes. These issues, as highlighted earlier, are related to the fact that this software system is not a standalone system owned by the Commission nor are resources likely to allow such capital investment in the near future.

6.4. Finding a solution

The Panel recognises the apparent tension between the sector's call for a reduction in the reporting burden on charities and their trustees and the currently high failure rate of smaller charities of the Commission's basic compliance checks. One might even question the rationale for asking less rather than more of these charities if the Commission's function is to oversee charities and thereby ensure public trust and confidence in their stewardship of the funds entrusted to them. Notwithstanding the failure rates cited above, the Panel believes that it may be the perceived complexity of what is currently asked of charities that confounds some charity trustees, resulting in the fails.

The Panel believes that there may be room to enable charities to submit and for the Commission to receive **less but better quality data** at the lower end of the receipts and payments returns through the development of an open source financial template that charities could populate with the required information

and alert charities or their accountants to inaccurate figures or omissions and that would enable the Commission to extract tagged information at the regulatory end for better analysis and oversight at the basic compliance end of matters. As noted earlier in this chapter, the move to a simplified template report with removal of the independent examination requirement has the potential to lighten the reporting burden of 50% of registered charities if based solely on gross annual income of £25,000 or less. Introduction of the CIO legal form would further increase the availability of the receipts and payments account filing option in the £25,000 - £250,000 income category for charities that adopt or convert to this legal form. The Review Panel believes that this proposed tiered approach to smaller charities would still provide the Commission with basic (and important) insights into the financial status of smaller charities but it would free the Commission, in line with its risk based approach, to concentrate its limited resources on the scrutiny of those charities with greater turnover.

For all other charities, the Panel believes that the development by the Commission of an API (Application Programming Interface) to enable such charities (or their third-party accountants) more easily to file their annual monitoring return (AMR) and ultimately their financial statements in the correct format would be beneficial. The primary gain would be the

reduction of figure transcription errors that respondents told us occur when charities are tasked with both completing the AMR and uploading trustee approved accounts to the Charity Commission system. Use of an API has the associated advantage that many charities and their software providers are already familiar with using APIs, e.g., the HMRC Charity donation reclaim XML based API¹⁵⁴ and XBRL has already been adopted by HRMC¹⁵⁵ and by the Irish Revenue Commissioners.¹⁵⁶ So aligning with this would not increase costs to charities as their existing financial audit providers should already have this capability. Many accounting package providers also support the XML XBRL API requirements outlined by the European Security and Markets Authority regulatory technical standards for electronic format IFRS accounts reports, in effect since 2020.¹⁵⁷

As the charities register becomes more complete and greater visibility is provided of the scope of the charity sector and its value in terms of annual reporting and accounting, there will be an opportunity to ensure that all other relevant stakeholders make use of the rich data held by the charity regulator. In those instances where the Commission is the

primary regulator, the information filed with the Commission should inform other interested funders (whether public or private), related regulators and government departments more generally.

By alleviating some of the existing reporting burdens placed on smaller charities to better reflect the level of risk, in line with best practice elsewhere, the Commission should be better placed to carry out its own sample audits of filed returns and to share learnings with the sector more broadly. To give some sense of a benchmark in this regard, in 2018/19, the Commission scrutinised 19% of all charity returns for basic compliance checks. By way of comparison, in that same time period, CCEW reviewed the accounts of a sample of 702 charities (a review rate of 0.004% of all registered charities) and provided guidance to 192 of those charities to help the trustees address areas for improvement that it identified.¹⁵⁸ In Scotland, on the other hand, the Office of the Scottish Regulator (OSCR) reported a review rate of 4% of all charity annual return submissions, following pre-publication checks of 100% of charities in 2018/19.¹⁵⁹ The Panel draws together a graphic of the stratified nature of these alleviation measures in **Table 6.5** below.

¹⁵⁴<https://www.gov.uk/government/publications/charities-generic-technical-specifications>.

¹⁵⁵<https://www.gov.uk/government/publications/xbrl-guide-for-uk-businesses/xbrl-guide-for-uk-businesses>.

¹⁵⁶<https://www.revenue.ie/en/companies-and-charities/submitting-financial-statements/index.aspx>.

¹⁵⁷See <https://www.esma.europa.eu/policy-activities/corporate-disclosure/european-single-electronic-format>.

¹⁵⁸Charity Commission for England and Wales, Annual Report 2018-19, p. 22.

¹⁵⁹OSCR Management Information – March 2019, clause 16

Thresholds	Accruals/ Simplified Accounts	Trustee Annual Report	Annual Audit Required	Independent Examination	Simplified Financial Template
Below £25k	-	-	-	-	X
£25k-£250k	X R&P accounts (unincorporated and CIOs) Development of API for AMR	X	-	X	-
£250k-£500k	X Introduction of Commission dispensation from filing ac- crual accounts in exceptional year of income	X	-	X	-
Above £500k ¹⁶⁰	X	X	X	-	-

Table 6.5 Summary of Panel’s alleviating measures to reduce the reporting burden on charities

6.5. Panel Recommendations on Commission Oversight of Charitable Accounts and Reports

In light of Panel recommendations 41-46 which, if accepted will result in charities submitting and the Commission receiving less but better-quality financial data on an annual basis, allowing for more proportionate charity oversight and reducing the regulatory burden on charities, the Review Panel recommends that:

Recommendation 47: The Commission develop an API (Application Programming Interface) to enable charities (or their third-party providers), particularly those in the £25,000 - £250,000 category, more easily to file their annual monitoring return (AMR) and ultimately their financial statements in the correct format.

¹⁶⁰The Panel notes again the existence of the Commission’s power under art 27 of the Charities (Accounts and Reports) Regulations (Northern Ireland) 2015 to dispense with the audit requirement in exceptional circumstances in this category.

Recommendation 48: The Commission actively apply its Risk Assessment Framework to concentrate on protecting charitable assets at risk of mismanagement or misconduct where most risk exists to public trust and confidence.

Recommendation 49: The Commission should review how it communicates its existing written guidance and best practice on financial accounting and reporting to charity trustees to raise the level of charity trustee awareness of their responsibilities in this sphere and their general competence to deliver on those responsibilities.

In this respect, the Panel is keen to encourage the Commission to move beyond simply publishing technical guidance on its website and to strive for better engagement by the Commission in the education of trustees around their reporting responsibilities.

The implementation of **these recommendations should, the Panel believes, result in:**

- A reduction in filing errors experienced by the Commission due to paring back the filing data requested of smaller charities;
- Better access to financial data for the Commission in a format that is more usable for compliance purposes;

- More proportionate use of resources for smaller charities with the potential for a higher level of basic compliance checks by the Commission and better feedback to charities as a result.
- Increased public accountability of charities in line with statutory objectives and functions.

7. Group Accounts

The Review received two different submission issues in the context of group accounts. Group accounts are the accounts prepared by the reporting 'parent' charity which controls or exercises dominant influence over one or more charitable or non-charitable subsidiaries. Group accounts are prepared in accordance with s. 72 and Schedule 6 of the 2008 Act and the 2015 accounting regulations. Company law and UK accounting standards also inform their preparation and these group accounts present the results of the whole group on a consolidated basis with the trustees' annual report and accounts submitted by the 'parent' charity including the financial results of the whole group.

7.1. Reference to 'asset threshold'

In its first submission to the Review, the Commission raised as 'essential' the need to amend what it views as an incorrect reference to an asset threshold for the audit of group accounts in the 2008 Act. According to the Commission:

“Section 6(1)(b) of Schedule 6 of the 2008 Act erroneously refers to an asset threshold for the audit of group accounts. However, s.16 of the Accounts and Reports Regulations 2015 introduced an income threshold only for audit threshold purposes.”

The Panel notes the discrepancy highlighted by the Commission and recommends that the Department revisit the provision in question. This is subject to consideration by the Minister on the issue of income and assets thresholds referenced at sections 5.1 and 5.5 above.

Recommendation 50: The Department review Section 6(1)(b) of Schedule 6 of the 2008 Act with a view to amendment if it considers that the reference to asset threshold was in error.

7.2. Auditing Group Accounts for audit threshold purposes

Respondents who commented on the issue of group accounts either via the online questionnaire or at the Review’s webinars raised a separate concern about the group account provisions.

Respondents told us:

“The threshold for the preparation and audit of group accounts needs to be raised as £500,000 (after consolidation adjustments) the current audit threshold,

is too low which causes unnecessary expense to the charity. For example, a charity with an income of £400,000 and its trading subsidiary with an income of £120,000 is currently required to have an audit of each entity as their combined income is over £500,000. The audit threshold for group accounts should be increased to £1m for this reason.” ID 117

Accountants also noted the lower income threshold as an issue. We heard that group accounts cause issues because of the £500k limit, as they are too onerous and cost more for consolidated accounts due to the low limit that exists for audit.

The Scottish approach to group accounts is similar to NI. In Scotland, any parent charity where the gross income of the group (the parent charity and its subsidiaries) is £500,000 or more after consolidation adjustments, must prepare group accounts. The Scottish accounting regulations, however, determine whether audit or independent examination is required based on the regulation which the charity with the highest gross income is required to follow.¹⁶¹ However, where a charitable company is required by section 399 of the Companies Act 2006 to prepare group accounts, those group accounts are prepared under the Companies Act 2006, as well as under Scottish charity law and the accounting regulations.

¹⁶¹ See The Charities Accounts (Scotland) Regulations 2006, Art 7(4) which provides that “Where connected charities prepare accounts collated into a single document, the accounts shall be audited in accordance with regulation 10 or independently examined in accordance with regulation 11, depending on which regulation the charity with the highest gross income is required to follow.”

In England and Wales, parent charities are required to prepare group accounts if the aggregate gross income is in excess of £1,000,000. The aggregate gross income is taken after elimination of consolidation adjustments such as intra-group sales. Under the Charities Act 2011, there is no pro-rating the threshold for periods that are not a year in length. Respondents suggested that a higher threshold in line with England and Wales would be useful because of additional costs for charities. The Panel believes that the Scottish approach to the audit requirement for connected charities is an interesting approach and recommends that the Department, in consultation with the Commission, consider its adoption.

To this end the Panel recommends that:

Recommendation 51: The Department review and amend the current audit threshold for group accounts.

In this respect, the Panel believes that the Scottish approach to the audit requirement for connected charities is an interesting approach and recommends that the Department, in consultation with the Commission, consider its adoption.

8. Conclusion

This chapter has focused on the reporting requirements of charities with particular attention to the issues relating to financial reporting. Two other notable types of reporting that charities and their advisers engage in are:

- the making of Serious Incident Reports to the Commission and;
- the requirement under the Charities Act for auditors and independent examiners to report matters of material significance to the Commission when they arise.

Both of these types of reporting are addressed further in Chapter 7, which deals with compliance matters.

Chapter 7 – Compliance and Investigation

1. Introduction

Compliance lies at the heart of most forms of regulation. The task of an effective regulator is to create an environment in which there are high levels of regulatory compliance by most regulated entities, freeing up the regulator to concentrate scarce resources on pursuing the most harmful misconduct or mismanagement by a smaller cohort. As Sparrow has commented:

“in most regulatory contexts, the person or party the regulator encounters directly is not paying for the service, often does not want it and will not be pleased by it.”¹⁶²

Failure to enforce the law swiftly and effectively against deliberate or persistent offenders undermines the incentives for compliance in the rest of the community and may bring a regulatory regime into disrepute.

The spectrum of prevention however is a longer continuum which moves from preventative enforcement at one end through to proactive problem solving or regulatory intervention midway (to avert the need for active enforcement), through

to education and guidance at the other end of the spectrum (to avoid problems arising in the first place). Across all of these stages of compliance runs a certain level of what might be called ‘customer service’ - timeliness, technical competence, courtesy and respect and being willing to consider other points of view and preferences – attributes which inform a regulator’s relationship with both the regulated sector but also the broader public on whose behalf regulation is carried out. In the words of Sparrow:

“balancing and integrating customer service with mission accomplishment is one of the central challenges of the regulatory art.”¹⁶³

The capacity and desire of charities to engage or comply with the Commission will vary greatly depending on their size, their funding and staffing, and their area of charitable activity. Charity trustees are subject to a myriad of legal obligations in exercising control and management of their charities. These obligations may arise from their governing documents in the first instance. They may result from statutory requirements under charity law

¹⁶²Malcolm Sparrow, *The regulatory craft: controlling risks, solving problems, and managing compliance* (New York: Brookings Institute, 2000), p. 62.

¹⁶³*Ibid.*, p. 64.

or company law (where relevant), or tax law. They may be related to the sector in which the charity operates – e.g., additional governance or reporting requirements, e.g., for health or education or housing charities. The fact remains, however, that once a charity meets the charity test set out in the Charities Act (Northern Ireland) 2008, it is the statutory duty of charity trustees to apply for registration of any unregistered charities with which they are associated.¹⁶⁴

1.2. Terms of Reference

The Review Terms of Reference ask the Panel to report on options for optimal charity regulation with particular regard to whether the Commission’s engagement with stakeholders is in accordance with best practice in the area of dealing with concerns raised about a charity.

This chapter therefore examines the Commission’s approach to compliance matters. It begins by considering who is subject to Commission regulation and the common circumstances in which this scrutiny or investigation arises. It then examines the Commission’s approach to compliance and how it exercises the powers at its disposal and whether further

improvements to Commission practice could be made. The chapter then turns to consider the Commission’s use of its investigation powers to date before making recommendations for best practice going forward.

2. Who is subject to Commission regulation and how does this arise?

2.1. Commission Regulatory Powers

The Commission has a statutory objective to oversee charity trustees’ compliance.¹⁶⁵ Its regulatory powers extend to those charities which have been properly registered. Its powers also cover (as discussed in Chapter 5) those “deemed charities” on the Combined List which are awaiting call forward for registration. Beyond this, if an unregistered charity was operating as a charity and was either not on the Combined List awaiting a call forward or had failed to come forward when called for registration, the Commission has statutory power to direct charity trustees to make good this default;¹⁶⁶ an order which is capable of High Court enforcement.¹⁶⁷ It is also an offence for a person to solicit money or other property for the benefit of an institution while representing that it is

¹⁶⁴Charities Act (NI) 2008, s.17.

¹⁶⁵Charities Act (NI) 2008, s.7(3).

¹⁶⁶Charities Act (NI) 2008, s.173.

¹⁶⁷Charities Act (NI) 2008, s.174.

a registered charity if indeed the institution is not registered on the register of charities.¹⁶⁸

More generally, the Commission may become aware of charity non-compliance in several different ways. These include through:

- a) The Commission's routine and proactive monitoring of registered charities (e.g., review of annual returns);
- b) other processes such as the charity registration process or consent applications by registered charities; and
- c) externally generated concerns from third parties (e.g., whistle-blowers, other charities, the public, funders, statutory bodies or other regulators).

Like any regulator, sometimes its intervention will be welcomed; at other times, it may be strongly resisted and disputed. Interventions by the Commission may arise from a number of routes addressed in the following sections.

2.2. Annual Routine and Proactive Monitoring of Charity Returns

When it comes to compliance, the vast majority of registered charities strive to meet their statutory obligations. In the period from 1 April 2018 – 31 March 2020, on average four out of five charities filed annual reporting information with the

Commission on time.¹⁶⁹ On time filing was marginally better for charities with income in excess of £20,000 (at 89%) but even with the very smallest charities, 77% of those with annual income less than £5,000 filed on time.¹⁷⁰ The scale of this engagement would indicate that most of the sector understands the obligations that flow from the privilege of being a registered charity and are eager to comply. As previously noted in Chapter 6, however, charities in the below £20,000 income bracket are twice as likely to fail basic compliance checks on their reporting.

As the register grows with the addition of newly registered charities, so too will the influx of annual reports and accounts though it must be borne in mind that for each of these newly registered charities, it will be their first time filing annual reports and there will be a necessary learning curve for those organisations which may sometimes be lost in the overall compliance figures.

In its Business Plan for 2019/20, the Commission set a key performance indicator ('KPI') to complete a basic compliance check of approximately 17% of annual return submissions received. How does this review rate compare with other charity regulators? The Irish Charities Regulatory Authority (CRA) is silent on the extent of its sample audit

¹⁶⁸Charities Act (NI) 2008, s.156.

¹⁶⁹First submission of the Charity Commission NI to the Independent Review of Charity Regulation in NI, at p. 48.

¹⁷⁰Ibid.

process and publishes only statistics relating to the number of charities who submit their annual returns on time.¹⁷¹ The Charity Commission for England and Wales (CCEW) is similarly silent on the percentage level of its charity scrutiny. In its annual report for 2019/20, it adopted a risk based assessment in tightening its approach to double defaulters and filing compliance among larger charities generally.¹⁷²

In Scotland, the Office of the Scottish Regulator (OSCR) reviewed 4% of charity annual return submissions following pre-publication checks in 2018/19 (a fall from 7% in 2017/18)¹⁷³ – the implication here being that 100% of submitted returns underwent at least basic compliance checks. The Commission has previously submitted that adoption of OSCR’s 100% basic compliance check approach would require additional resources from the Department.¹⁷⁴

2.3. Registration Processes

In its second submission to the Review, the Commission acknowledged that on its registration application form, it collected more information than was strictly necessary to determine charity status. Its argument for so doing was that, unlike other jurisdictions, it was not just registering new charities but also charities that may have been operating for many years.¹⁷⁵ The Commission stated that it asks for more information than it strictly needs to make a registration determination to enable a first ‘regulatory look’ at each charity, knowing that it may be up to two years before a charity is required to submit its first annual monitoring return.¹⁷⁶ For the Commission, registration is the first point of contact with these charities and it described the additional information sought as being “discreet and aimed at ensuring a proportionate level of regulation, oversight and public accountability of charities during this hiatus. The additional

¹⁷¹CRA, available from: www.charitiesregulator.ie/media/1631/annual-reporting-compliance-review-2017.pdf. This is possibly due to the delayed introduction of charity accounting and reporting regulations in Ireland, resulting in no formal position being taken by the Regulator in respect of the quality of the returns actually submitted by all charities to date.

¹⁷²CCEW Annual Report and Accounts 2019-20, pp 18-19, noting that it had engaged with 1,639 high income charities in 2019 to bring them up to date with their filing requirements resulting in receipt in 2020 of “a record volume of Annual Return and Account submissions from charities, ensuring the majority of the sector’s income is being accounted for in financial documents filed.”

¹⁷³OSCR Management Information – March 2019 at <https://www.oscr.org.uk/media/3530/2019-03-07-march-management-information.pdf>.

¹⁷⁴Capacity Review of The Charity Commission for Northern Ireland (CCNI), February 2016 (DRAFT REPORT V.3).

¹⁷⁵In both Scotland and Ireland, such ‘deemed charities’ were automatically placed on the charities register when it came into existence. In Scotland, OSCR conducts rolling reviews to review charitable status of such charities, outside of the annual reports and returns scrutiny. In Ireland, the CRA is empowered to request any documents of a deemed charity that it could request of a new charity seeking registration (Charities Act 2009, s.40). The CRA may, if it is of opinion that a deemed charity is not a charitable organisation, apply to the High Court for a declaration to this effect, which if granted would result in it being removed from the register.

¹⁷⁶The AMR system is not currently functioning for organisations registered by Commission staff, due to amendments made to processes following the CoA judgment.

information is used to identify present or potential issues or risks which the newly-registered charity may need to address.”¹⁷⁷

It could be argued that asking for only information required for registration purposes at this point of time would accelerate the registration process and help to clear the backlog on the Combined List. It would also simplify the registration process for charities. The Panel notes that if the Charities Bill 2021 is passed, it will introduce a requirement to comply with the accounting and reporting requirements for financial years beginning on or after 1 April 2022. Presently, two-thirds of registered charities have continued to voluntarily file their annual returns with the Commission. Passage of the Bill would see charities filing accounts with a 2023 financial year end with the Commission over the course of 2024 (typically in March 2024 and October 2024). Once reporting equilibrium is restored, the average time lag in filing annual monitoring returns should be no longer than one financial year after the date of registration with the Commission and no longer than 10 months after the end of the financial year in all other cases. With a view to completing registrations and assisting charities to comply with registration requirements the Panel recommends that the Commission review

the level of information requested from charities at the point of registration.

Recommendation 52: The Commission should review the information requested of charities during the registration process with the aim of speeding up registrations and ensuring only required information is sought from charities.

2.4. Externally generated concerns

Externally generated concerns are an important source of compliance information for the Commission. Members of the public, funders, other regulators, volunteers or charity staff and charity trustees themselves may bring matters of concern to the Commission. Auditors and independent examiners are required by the 2008 Act to bring matters of material significance to the Commission’s attention.¹⁷⁸ Additionally, if a serious incident occurs within a charity, charity trustees are required to report the matter to the Commission. A serious incident is described as “an adverse event, whether actual or alleged, which results in, or risks, a significant:

- loss of charity money or assets;
- damage to charity property; or
- harm to the work of the charity, its beneficiaries or reputation.”¹⁷⁹

¹⁷⁷Second submission of the Charity Commission NI to the Independent Review of Charity Regulation in NI, p. 15.

¹⁷⁸Charities Act (NI) 2008, s.67.

¹⁷⁹Charity Commission NI, Serious incident reporting - a guide for charity trustees (EG059).

Of the statutory inquiries undertaken to date, approximately 60% have originated from externally generated concerns brought to the Commission's attention; 25% have been as a result of own initiative actions by the Commission while a further 15% have come from internally generated concerns from within the charity itself.

The Commission provides guidance on the type of externally generated concerns that it can and cannot deal with.¹⁸⁰

Examples of the types of concerns that the Commission can address include:

- significant financial loss to a charity.
- any suspected fraud or theft.
- serious harm to beneficiaries and, in particular, vulnerable beneficiaries.
- threats to national security, particularly terrorism.
- criminality within or involving a charity.
- sham charities set up for an illegal or improper purpose.
- charities not meeting their public benefit requirement.
- where a charity's independence is seriously called into question.
- serious non-compliance in a charity which could damage public trust and confidence in the charity and / or in the sector.

There are also important concerns that fall outside the Commission's remit. According to its guidance, such concerns would include, for example:

- Where there is disagreement over the decisions made by the charity trustees and those decisions have been properly made within the law and the provisions of the charity's governing document.
- Where there is an internal disagreement over a charity's policy or strategy and there are properly appointed charity trustees whose responsibility it is to deal with these issues.
- Incidents of poor service from a charity where there is no general risk to its services, its clients or its resources.
- Where the issue does not relate to charity law, for example, employment issues or where there is a disagreement about the terms or delivery of a contract.
- Where the issue relates to the charity's fundraising methods and should be referred to the Fundraising Regulator.

Communicating the precise remit of the Commission in the compliance space is important. Informing the public, very clearly, as to the types of concerns that the Commission can and cannot address is part of this communication process. The implications of this are borne out in the comments of one respondent to the Review who noted:

¹⁸⁰Charity Commission NI, How to Raise a Concern about a Charity (March 2021, EG045).

“Conflict between trustees can result in escalation of complaints to the CCNI, not necessarily justified by a significant or genuine regulatory concern taking up professional time to address and causing fellow trustees to become demotivated to continue. This tends to be a lose-lose situation. If such cases could be channelled towards a mediator for analysis and assistance, this might result in a quicker resolution and be more effective for CCNI staff in terms of time management. ID 48”.

The Panel believes that the Commission must engage in clear communication both with a charity which is the subject of a concern and also with those parties who raise concerns. In the former case, it is essential for affected charities to understand what is happening when the Commission takes measures to respond to a third party concern, particularly regarding the nature of the alleged breach and what steps the charity is required to take to remedy it. In the case of those raising third party concerns, it is equally important that the Commission should be clear in its communications with such parties (and not just in its written guidance) as to concerns it can, or cannot, address.

To this end, the Commission should review its communication procedures to ensure clarity regarding the parameters within which it operates with regards to concerns

raised. The Panel appreciates that the Commission has published guidance on its approach to addressing concerns, how they are escalated and how they may be resolved. The Panel believes that there is room to further strengthen the Commission’s practical application of this guidance so that charities who may find themselves in compliance difficulties are clear as to what is required of them to remedy breaches, and third parties complainants and the public more generally are better informed and understand when and why the Commission might take action.

Recommendation 53: The Commission should review and improve its communications about compliance to ensure:

- That there is clarity about the types of concerns that the Commission can pursue and those that it cannot and in cases where concerns have been raised, the Commission provides direct feedback with assurance they have been followed through, and
- That there is clarity in communications with charities about the nature of a compliance issue, definition of the nature of the problem and clearly set out steps that could be taken to resolve the situation.

In respect of this recommendation the Panel is conscious of the anxiety that can be caused to trustees and others when concerns are being responded to by the Commission. Having clear information should assist them.

3. The Commission’s Approach to Compliance

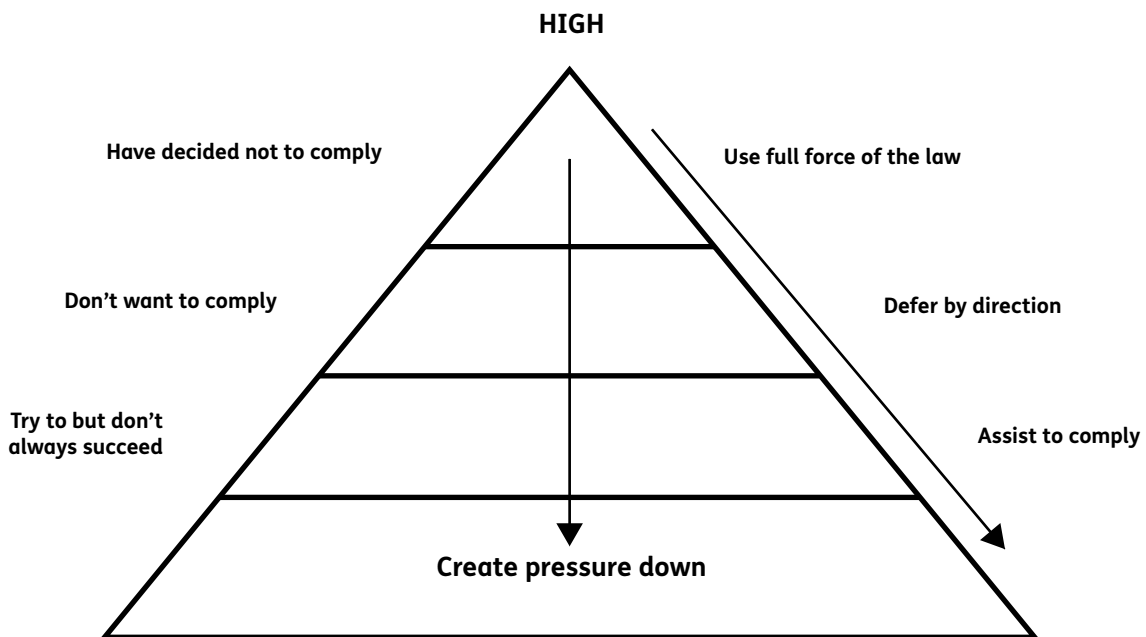
3.1. The Regulatory Pyramid

According to the Commission, it adopts a risk-based and proportionate approach

to regulating charities. It subscribes to the regulatory pyramid, an international regulatory model developed in the early 1990s.¹⁸¹ In the Commission’s pyramid (Fig 7.1), the Commission assists charities to comply as long as a charity is cooperating. When a charity resists compliance, the Commission then takes a more robust approach and will employ a variety of mechanisms to deter a charity from that path.

Figure 7.1 Charity Commission Regulatory Pyramid from its website

Our multi-tiered approach is reflected in the ‘regulatory pyramid’ below. This is an international regulatory model and is recommended UK regulatory practice.



¹⁸¹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford Socio-Legal Studies, 1992).

This model is based on the premise that the achievement of regulatory objectives is more likely when agencies display both a hierarchy of sanctions and a hierarchy of regulatory strategies of varying degrees of interventionism.¹⁸² Regulatory pyramids are best understood as part of an integrated regulatory framework that recognises and rewards compliance in tandem with the application of proportionate and scaled escalation of sanctions when non-compliance is encountered.¹⁸³

3.2. Assessing the Pyramid Approach

To fully appreciate and assess the Commission's regulatory pyramid it helps to situate that pyramid between the related ladder of supports and the spiral of sanctions (see **Figure 7.2** below), which should incentivise good and reprimand non-compliant behaviour, respectively. The determining factor in whether the Commission uses the tools available to it on the ladder of supports or the powers available in the spiral of sanctions (see **Figure 7.2**) to bring about compliance should be the willingness of a charity and its trustees to cooperate with the Commission to resolve the issue(s) in question. The absence of effective charity trustee engagement with the Commission would thus lead to the Commission using its enforcement powers against the charity.

The diagram below places the Commission's regulatory pyramid within this broader framework of compliance options. This juxtaposition of regulatory tools and powers allows us to more clearly set out the journey from when a concern is raised to the possible opening of a statutory inquiry and helps situate the non-compliant charity at a point on that journey. This should assist charities to be more aware of what may lie ahead of them, doing away with any 'surprises' for them and, at the same time, give clarity to the Commission about what stage of the process has been reached and allow for a charity to return to compliance until that is no longer possible. The Panel believes that a good compliance regime strives to balance supporting compliant charities to continue to do the right thing with the application of a graduated but clear compliance framework to less compliant minded charities. Good compliance regimes are journeys rather than destinations in that they evolve constantly and must be the subject of ongoing review and adaptation by the Commission in light of experience.

To this end, the Panel recommends that in rethinking its approach to compliance, the Commission applies its Risk Assessment Framework (previously discussed in Chapter 3) as set out in the recommendation:

¹⁸²Ibid., pp 6-7.

¹⁸³See, e.g., Healy, J., *Improving Health Care Safety and Quality* (Routledge: London, 2011), p. 221.

Recommendation 54: The Commission should use its Risk Assessment Framework to move towards a truly risk-based assessment system in which proportionate regulation is manifested through a reduction in Commission scrutiny of compliant charities, particularly smaller charities, that continue to meet the basic required registration and annual reporting benchmarks.

In respect of this recommendation the Panel believes that by adopting this approach the Commission will free up its limited resources to focus on charities where the Risk Assessment Framework indicates greater risk exists.

The Panel now turns to consider what application of this approach might look like for the Commission.

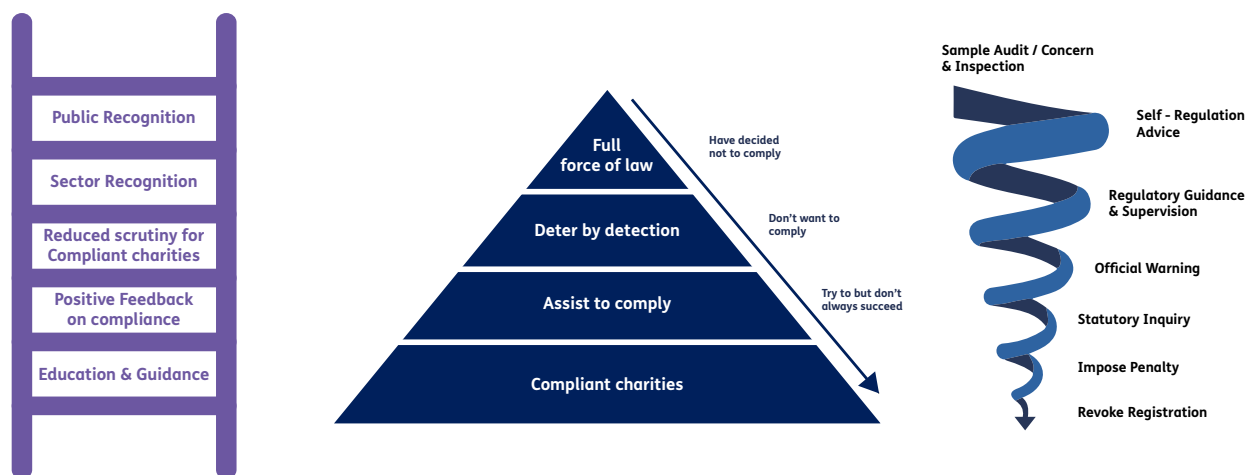


Figure 7.2 Ladder of Regulatory Supports and Downward Spiral of Regulatory Sanctions

3.3 Applying the Ladder Model for proportionate responses to non-compliance

The proportionate regulation of the majority of compliant charities who strive to meet their regulatory obligations will require greater use of the features of the ladder of supports. This would include supports currently utilised by the Commission – e.g., the provision of

education and guidance (which the Commission currently does through its YouTube videos, ‘how to’ guides and thematic reports on lessons learned). It would include Commission feedback on compliance to charities to both incentivise annual reporting (something sought by several respondents but only made available to the 19% sample audited by the Commission in 2019/20)¹⁸⁴ and to better facilitate the administration of

¹⁸⁴Charity Commission NI, Annual Report and Accounts 2019-20, p.15.

charities (one of the Commission's statutory functions under the 2008 Act).

As mentioned earlier, in a truly risk-based assessment system, proportionate regulation should manifest itself in reduced Commission scrutiny of compliant charities, particularly smaller charities (where risk is lower), that continue to meet the basic required registration and annual reporting benchmarks. Ultimately, in an era of joined up thinking, one might see sector public recognition of compliant charities through something like an annual Good Governance Awards process run by the sector but supported by the Regulator (see the Republic of Ireland's Good Governance Awards¹⁸⁵ which is now in its 6th year). The Panel believes that its previous recommendations in Chapter 6 on reducing the reporting burden on smaller charities will also benefit the Commission in the compliance space by freeing up its resources to engage in a higher level of basic compliance checks on registered charities and to differentiate between compliant charities, charities that need guidance and education, and charities that require further regulatory engagement to meet the statutory requirements expected of them.

In this latter space, when one turns to the spiral of regulatory sanctions, one sees again many of the tools currently

available to the Commission to promote compliance – from the ability to request charity documents or records¹⁸⁶ to the offering of self-regulatory advice or the imposition of regulatory guidance. In the Terms of Reference for the Panel's work we were asked to consider if there were any tools, short of statutory inquiry, which the Commission could employ. We discuss this further here and in Chapter 8 in which we will make a recommendation.

Official Warning

A new statutory tool that could be added would be the ability to issue an 'official warning' to a charity, a power that would fall short of a statutory investigation of a charity but could enable the Commission to escalate its formal disapproval of a charity's behaviour in a situation where the charity trustees or the charity were engaging in mismanagement or misconduct. Such a tool assists in compliance, providing stages on the way to the full force of the Commission's regulatory powers. Each of these steps on the way should provide charities with the opportunity to turn back to compliance.

Three-fifths of respondents (61%) to the Panel's online questionnaire felt that the Commission should have the power to issue such a warning when it considers that a breach of duty has occurred without the need to first open a statutory inquiry. The Panel begins its consideration

¹⁸⁵See <https://goodgovernanceawards.ie/>.

¹⁸⁶Charities Act (NI) 2008, s.23.

of this statutory tool below by outlining the features of the English official warning mechanism from a compliance perspective. The Panel will return to this issue again in Chapter 8 when considering the official warning as a form of enforcement tool.

The warning power was introduced in England and Wales in 2016¹⁸⁷ and it enables the CCEW to tackle breaches in a risk-appropriate manner. Issuance occurs when the harm, or risk of harm, to a charity, its assets (including reputation) or beneficiaries is sufficient to require the CCEW to take action. In these instances, regulatory advice and guidance alone may not have been sufficient to deal with the misconduct or mismanagement and the CCEW determines it would not be proportionate in the circumstances to use other temporary or permanent protective powers (whether under the auspices of a statutory inquiry or otherwise). The CCEW must make clear to the charity the grounds for the warning and any action the CCEW intends to take, or considers the charity or its trustees should take, to rectify the misconduct or mismanagement.¹⁸⁸ Charities can use the decision review process to make representations to CCEW about the content of the proposed warning it receives within the notice period. The decision to issue an official warning, once made, however, is not one of the

decisions that a charity can refer to the First Tier Tribunal.

The CCEW decides on a case-to-case basis whether it is appropriate to publish the warning. According to its guidance, CCEW will normally publish a warning when it is likely to:

- help secure compliance by the trustees with their duties;
- protect public trust and confidence in the charity or charities more widely;
- be the most effective way of highlighting a regulatory issue to the wider sector;
- promote accountability and transparency;
- protect potential donors or funders in circumstances where CCEW considers this necessary; or
- be in the public interest for any other reason.

Reasons for not publishing a warning, on the other hand, would be where doing so would:

- be detrimental to a particular individual or group of individuals, for example a risk to someone's personal safety;
- contravene or prejudice requirements for confidentiality or commercial sensitivity, or risk national security;

¹⁸⁷ See The Charities (Protection and Social Investment) Act 2016, s.1.

¹⁸⁸ CCEW, Guidance – Official Warnings to Charities and Trustees: Q and A (2016) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/576625/Official_warnings_to_charities_and_trustees_Q_and_A.pdf

- in itself cause disproportionate prejudice to the charity and/or its beneficiaries;
- contravene the Commission’s duty to use its resources in the most efficient, effective and economic way; or
- not be in the public interest for any other reason.

The official warning mechanism can be used both as a mechanism prior to/in lieu of a statutory investigation (and so acts as a form of compliance mechanism) and it can also be issued at the conclusion of a statutory inquiry if issuing a warning is more appropriate and proportionate an outcome than use of other powers (and therefore performs an enforcement role). For the purposes of this chapter, introduction of an official warning power could therefore form a statutory approach short of the use of a Statutory Inquiry which could be used as part of the regulatory framework to assist with achieving resolution of concerns in relation to charities, as requested by the ToR.

As with all compliance tools, **how** you use a tool at your disposal is almost as important as **what** tools you have available and **when** you use them. There was an interesting mix of views on how and when the Commission might use a warning power, if granted to it. Some who queried the capacity of the Commission to fairly exercise any such new power tied

this back to their view of the culture of the Commission, with comments to the effect,

“The issuing of formal warnings before the opening of a statutory inquiry is a case in point. If the Charity Commission were of a mind that such action was needed, then it should be of a sufficiently high enough priority to escalate the statutory inquiry. I can think of no other formal structure legal or otherwise whereby a formal warning could be implemented without due investigatory process.” ID 7

Others did not see the introduction of a warning power as an enhancement, noting,

“Much better for CCNI just to write to a charity if it has issues of concern: in some cases this may lead to a statutory inquiry if the charity fails to respond, but in most cases it will allow issues to be addressed without more formal steps being required.” ID 15

Other respondents again were more open to it:

“Formal warning - yes, depending on the seriousness of the breach. ID 34” and

“In respect to the issuing of a formal warning, while there is merit in allowing the Commission to issue a warning if it believes a clear breach has occurred we would be concerned that sufficient due diligence is carried out first. If it is clear the breach is actual then issuing a warning notice or corrective action

request may be more suitable subject to the issue at hand. Failure to comply leading to a formal warning with a specific timescale for recovery. Thereby creating a scalable formal warning system.” ID 69

The Panel believes that there is potential for a warning power, to serve both as a compliance tool that falls short of opening a statutory inquiry and equally provides a sanction post-statutory inquiry, that may be a more appropriate response than provided by some of the Commission’s existing powers. To this end, the Panel recommends that the Department consult on the appropriateness of introducing a warning power under NI law with the Commission (whose own views should be further informed by its new Stakeholder Forum), and the charity sector more broadly, taking account of CCEW’s experiences to date in exercising this new power. In the context of compliance, a warning power should be understood by the Commission as the final opportunity for a charity to become compliant. Opportunity for compliance should be the focus until such times as it is evident that a charity will not comply. In communicating about the new power, if it is agreed, the Commission should, therefore, take care to ensure that they remain in an enabling and collaborative mode until the last possible moment. The Panel will return to official warnings in Chapter 8 in the context of enforcement. For present purposes, the Panel makes the following recommendation:

Recommendation 55: The Commission should view a warning power, should it be agreed, as the final opportunity for a charity to choose to comply and therefore should approach the warning as an enabling tool.

4. How does the Commission’s approach to compliance work in practice?

Having a proportionate and targeted risk-based compliance procedure is important for every regulator. There will never be sufficient resources to adopt a zero tolerance approach across every aspect of charity compliance. The compliance and investigatory tools available to the Commission are, for the most part, similar to those enjoyed by neighbouring charity regulators. The manner in which these tools are deployed is important to good charity regulation and ties back into the Commission’s Risk Assessment Framework discussed in Chapter 3.

4.1. The Review Panel’s Process

In examining the Commission’s approach to compliance, the Panel met with both members of the Commission’s Senior Management Team and the Charity Commissioners themselves. The Panel reviewed the Commission’s Board papers, detailing its evolving approach to compliance and enforcement matters and the Commission’s procedure manuals in

light of its experience enforcing charity law. In addition to community webinars aimed at charities and the general public, the Panel also convened two meetings to hear specifically from professional advisers to charities on their experience of compliance matters, facilitated by the Charity Lawyers Association and the Ulster Society for Chartered Accountants in Ireland, respectively. These meetings were in addition to written submissions received in response to the Review's online questionnaire, which asked stakeholders about their experiences of the Commission's compliance procedures.

4.2. What we heard from respondents

Less than half of all respondents (44%) to the online questionnaire had direct experience of engagement with the Commission on compliance matters. This experience came both from working through a compliance matter on behalf of a charity (often as an employee or volunteer with that charity) or through reporting another charity to the Commission. Of those respondents, 41% had a positive experience of engagement; 32% an average and 27% a negative experience.

In terms of positive experience, the following themes emerged from submissions:

- **Quick, efficient, robust and diligent investigations.**

Respondents shared that this was how they had experienced the compliance process. In the words of one respondent, "The staff have good understanding of issues and investigate thoroughly before decisions are taken. Staff are supportive of charities in finding solutions, but are competent in dealing with large and complex legal matters." ID 48

- **Wrong advice quickly corrected.**

Another respondent advised that when they had been provided with incorrect advice, this was quickly rectified by staff.

- **Speaking to a staff member is helpful.**

There was a broad consensus among webinar attendees that when you managed to speak directly to a Commission staff member they were helpful in resolving issues although some pointed to capacity issues on the compliance side with one respondent recounting that in "one instance was very positive, fast response to issue raised; the other instance the issue was not actioned quickly and left me feeling a bit exposed." ID 44

- Of those respondents who commented on their compliance engagement experience: 69% found the compliance procedures easy to follow while 68%

found that engagement with the Commission on a compliance issue had a positive outcome for their charity.

Of those who offered criticism it related more to how the Commission exercised its powers than the actual use of the powers in question. Some common themes again emerged:

- **Correspondence Tone**

We heard of an overly formal use of language in Commission correspondence and a tone that was experienced by some as being upsetting or intimidating, particularly for charity volunteers. This sentiment was echoed at community webinars and is further discussed in Chapter 4.

- **Correspondence Signatures**

We also heard of the Commission's practice of not signing letters issued to charities and the more general use of generic email signatures, making it difficult for charities to contact a case worker if questions arose. The Commission confirmed that a policy of anonymisation of written correspondence is in place and cited staff security concerns as the reason. The Panel notes that the Commission's approach in this regard differs from the practices adopted by CCEW, OSCR and the CRA. The Panel will make recommendations in this regard.

- **Concerns not acted upon.**

Community webinar attendees (most notably, but not exclusively, accountants) highlighted that concerns raised by them with the Commission were not acted upon. In the online questionnaire, 15% of respondents had either raised a concern about a charity directly with the Commission or assisted a charity to do so. Several noted that the Commission did not communicate back to complainants as to whether matters had been addressed or not. This breakdown in communication undermines public confidence in charity compliance and ultimately in the charity sector.

- **Obligations to Report**

Matters become particularly acute where there is an obligation to report – as arises in the case of serious incident reports (SIRs) or matters of material significance (MOMS) in the context of financial report. In the context of SIRs we heard:

“Submitted two self-regulatory concerns in the form of serious incident reports. In each report mitigation measures were identified and included within the reports, however the charity has had no feedback at all from the Commission, and therefore has had no assurance that the mitigation measures (and indeed the investigative measures taken in relation to the incidents) were appropriate or suitable for the Commission.” ID 16

In the context of matters of material significance, one webinar attendee told us:

“I have reported matters of material concern on two occasions and have not received any feedback or enquiries from CCNI regarding these’ . . . ‘Concern in each charity was in respect of major fraud. I would have expected some interaction with CCNI.”

- **Provision of information about compliance issues.**

Organisations that provided a negative rating commented that the Commission was not forthcoming in providing charities with any information on what the compliance issue was, and that there had been no engagement with the charity to determine if there was any substance to the allegation. In the words of one respondent:

“Commission official sent an email/letter in relation to unfounded allegations raised by unknown individual(s) without contacting us to find out if there was any substance to the allegations (even though we were a Commission ‘Helper Group’). Simply registering this as a complaint and referring it to the organisation as a “self-regulatory case” is not good enough.” ID 45

- **No communication from Commission after receipt of concerns.**

On the other side of the line, those raising concerns with the Commission

experienced no subsequent communication from the Commission other than an initial acknowledgement of receipt of their concern. This left respondents frustrated and not knowing whether their concern had been addressed or, on other occasions, unable to further assist the Commission in the matters raised through lack of Commission engagement with respondents telling the Panel of:

“Slow response, only acknowledgement of receipt of Concern, no clear process or stages to be followed through.” ID 93 and

“The charity was prepared to work with the CCNI in terms of any questions/ investigations, yet there was no approach from the CCNI.” ID 16

- **Lack of clarity on the nature of the problem or possible steps to resolve.**

We also heard that the Commission in its engagement with charities was not always clear on the nature of the actual problem and did not articulate clearly what the charity could do to resolve the issue. Others mentioned the Commission’s lack of engagement with their charity in resolving identified problems. Some respondents felt that the Commission was overly punitive in its attitude to late filing of accounts while others felt that insufficient time had been given to charity trustees to address problems, particularly in light of the volunteer nature of charity boards. The fact that many charity trustees do not have a legal background

was also mentioned pointing to the ensuing need for the Commission to explain compliance issues in clear and simple language. In the words of one respondent:

“Very small charities can struggle to find experienced trustees with sufficient legal or financial understanding to respond appropriately to some aspects of returns. There is acknowledged public benefit delivered through small scale charitable enterprise, but the professional skill and knowledge is not always available at the organic community level. The smallest charities would benefit from further simplification of regulation and compliance.” ID 48

Another respondent commented that the Commission was all “stick and no carrot” with regards to compliance and had ignored parts of the Charities Act which stipulate it’s regulatory function should be “proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.” ID 113

4.3. Areas in which Commission Compliance Procedures could be improved

Almost two-thirds of respondents (64%) agreed that there were elements of the Commission’s compliance procedure that could be improved. The most frequent issue raised by organisations was the Commission’s approach to the late filing of accounts (a matter on which the Panel will make recommendations in Chapter 6).

A common plea of both small organisations and individuals was for a simplification of the language used in the Commission’s advice and guidance. Some small organisations referenced the struggle to find someone with the legal or financial knowledge to offer an adequate response. Individuals focused on the need for the Commission to consider that many trustees are not from a legal background and that compliance communication should be clear and easy to understand, and that if there was a compliance issue, that the Charity Commission should engage with the charity involved in the first instance.

The Panel has already addressed the need for clear Commission communication in **Recommendation 53 above**. The Panel further recommends that the Commission reviews its policies and practices regarding anonymised correspondence. Specifically, the Panel recommends that:

Recommendation 56: The Commission reviews communications specifically with reference to anonymising letters, emails etc. to ensure:

- a) that correspondence is issued in the name of a relevant case worker or line manager where there is no security issue. The Panel further recommends that this policy should be reviewed annually and practice amended accordingly; and

b) that where security issues are of concern, that correspondence indicates a named or clear point of contact at senior management level for those in receipt of communications.

5. Investigation Powers and Usage by the Commission

5.1. Powers, Concerns and Responses

The 2008 Act gives the Charity Commission broad powers to examine and inquire into any registered charity. These powers range from requesting information from “any person” where it “is relevant to the discharge of the Commission’s functions” (s.23) right through to the institution of a s.22 statutory inquiry into a charity or a particular class of charities. In these instances, the Commission may, on its own initiative, identify an issue requiring further investigation or a third party or indeed a charity itself may raise a concern with the Commission. The Commission considers three matters before proceeding:

1. Does the concern fall within the remit of the Charity Commission? If it does not, then the Charity Commission may close the concern or refer the complainant to another body.

2. Is there evidence available to proceed to an investigation? If there is no evidence found to support the concern, then the Charity Commission will close the concern.
3. What is the level of risk to the charity concerned and to public trust and confidence in the sector?¹⁸⁹

A number of outcomes are possible from this initial assessment work:

1. no action necessary;
2. the concern is referred to another regulator;
3. a self-regulatory case is opened when the concern is considered to best be addressed within a charity. Trustees are alerted and it is for them to deal with the matter. The Commission may monitor how the concern is dealt with and identify actions to be taken by the trustees to resolve the concern. These cases are considered to pose a relatively low risk of damage to the individual charity’s reputation or its ability to deliver its charitable objects or to public trust and confidence in charities more generally;

¹⁸⁹See Charity Commission NI, Dealing with concerns about charities: Guidance on how the Charity Commission for Northern Ireland deals with concerns about charities (July 2019, EG044).

4. a regulatory compliance case is opened when clear issues of concern are willingly addressed by the trustees in cooperation with the Commission and the risk is not so high as to merit a statutory inquiry. The Charity Commission may issue regulatory guidance and agree an action plan with the trustees to address concerns. In this situation, the Commission will monitor the action taken by the charity and will only close the case when the concern has been satisfactorily resolved;
5. a statutory inquiry is opened only when concerns identify serious risks to the charity, its assets or beneficiaries and is legislated for in section 22 of the 2008 Act.¹⁹⁰

These different options are intended to provide the Commission with a range of proportionate measures to oversee charity compliance by charity trustees and to allow the Commission to strike a balance between supporting charities to do the right thing and deterring misconduct. The Panel refers the Commission back to its discussion of what an integrated compliance framework would look like in section 3.3, which is intended to assist the Commission in its thinking in getting this important balance right.

The Commission has issued guidance notes on its approach to monitoring compliance¹⁹¹ along with further website information on its approach to assessing concerns about charities; when it investigates charities; its approach to working with other agencies, regulators and departments and information about those instances in which it can help resolve internal conflicts in a charity.¹⁹² To date, the Commission has opened 17 statutory investigations, although a number of the decisions flowing from these statutory inquiries have been challenged before the Charity Tribunal for Northern Ireland and some have been quashed upon judicial review (see further Chapter 8). Regulatory guidance is a more common occurrence – in 2019/20 alone, the Commission issued regulatory guidance to 1,788 charities (15 related to enquiries and 1,773 related to monitoring and compliance issues).¹⁹³

5.2. The Review Panel's Process

As part of its Review, the Panel has examined Commission Board papers, Commission manuals of procedure and Commission discussion papers which set out the approach and rationale adopted by the regulator towards compliance and investigation matters over the period from 2014 to 2021. The papers reviewed indicate that much time and effort has been spent developing operational

¹⁹⁰Ibid.

¹⁹¹Charity Commission NI, Monitoring and compliance guidance - getting it right (EG042).

¹⁹²See more generally, <https://www.charitycommissionni.org.uk/concerns-and-decisions/monitoring-and-compliance-guidance/>

¹⁹³Charity Commission NI Annual Report and Accounts 2019-20.

procedures. Over time, and as the Commission has developed and had an opportunity to both exercise its powers and learn from those experiences, it has reflected upon those learnings in its subsequent iterative revisions of its approach to risk-based assessment, its development of risk matrixes, its expansion of its Enquiries Manual (from a 42-page Investigations Manual listed as v1.4 in December 2014 to a 154-page Enquiries Manual, listed as v4.3 in May 2018 and subsequently revised again in 2020 (v7.4) to capture further changes to the Commission's information gathering procedures. The current Enquiries Manual is v8 and it is the first manual to include explicit references to proportionality, which previously were implicit but not expressly stated.¹⁹⁴

5.3. The Commission's Transformation Project and its implications for compliance procedures

In 2018, the Commission began a 'Transformation Project,' aimed at streamlining decision-making processes and developing a Risk Assessment Framework project to help the Commission to focus its resources on regulatory interventions where risks are highest.¹⁹⁵ This ongoing project, which is now in Phase II, has seen the Commission engage with the Strategic Investment Board in the development of its own Risk Assessment

Framework which focuses on the risk to the Commission of a regulatory failure arising from adverse events occurring in charities under its remit and which the Commission could reasonably have prevented from occurring by proactive regulatory interventions.¹⁹⁶ The practical effect of this project to date has been to identify a higher risk appetite on the part of the Board (in Phase 1, completed in late 2018), resulting in a willingness to change registration procedures, reducing the number of steps involved and thereby increasing efficiency.

Phase 2 (which is ongoing) is seeking to identify opportunities to streamline current work procedures and delivery arrangements to allow prioritisation of resources to cases where risks are highest and provide a rationale for not taking action where the Commission does not have resources.

The Commission is to be commended for initiating and committing to an ongoing transformation project. Such action on the part of the Commission aligns with its statutory duties to act in an efficient and resource conscious manner. The important question for the Panel is the effect of project outcomes on how the Commission carries out its oversight and compliance functions. As the Transformation Project moves into Phase 2, it is too early to judge its overall effectiveness, in the absence of a

¹⁹⁴See Preliminary opinion on assurances sought by DfC from the Chief Commissioner (November 2020).

¹⁹⁵Charity Commission NI, Annual Report and Accounts 2018-19.

¹⁹⁶Charity Commission NI, Board Paper 587-18 Transformation Project (March 20, 2018).

formal post project review; a view shared by the Chief Commissioner in the Panel's correspondence with her. Nevertheless, the Panel attaches importance to the Commission's ongoing commitment to improvement, but also importantly, the need to effectively articulate to the sector how the regulatory approach it adopts and the regulatory actions it chooses to take are both important for the sector and help to instil public confidence in charities.

6. The Commission's Approach to Concerns

In the recent Public Trust and Confidence in Charities Report 2021,¹⁹⁷ the most important factor to the public when deciding whether to trust charities or not was that donations and funds raised by charities are used properly (with 32% choosing this factor).¹⁹⁸ Half of the public surveyed had heard of the Commission with more than half (55%) having a high level of trust and confidence in the Commission which perception, in turn, influenced their trust and confidence in charities. In the words of a respondent to that survey:

“They can check up and make sure everything is above board and things are being done the way they should be.”¹⁹⁹

6.1. Overview of Concerns Received and Investigation Duration

The Commission receives on average 100 concerns a year about charities, which are aside from serious incidents reports (which must be made by charities themselves to the Commission when certain identified events happen) and reports of matters of material significance (which must be made by auditors or independent examiners to the Commission in the course of their scrutiny of charity accounts). The vast majority of these concerns, where they warrant action, are dealt with by the Commission through either self-regulation advice or regulatory guidance and only a very small number of concerns proceed to the initiation of a statutory inquiry under the 2008 Act. Many of these concerns are closed to the Commission's satisfaction within the same year as being opened. It is also noteworthy that throughout its tenure to date, the Commission has made good efforts to share learnings from its compliance actions by publishing thematic reports recounting the lessons learned from its various monitoring and investigations.²⁰⁰

¹⁹⁷Prepared by Cognisense on behalf of the Charity Commission for Northern Ireland.

¹⁹⁸Ibid. The next factor most likely to have been chosen was that charities 'have a positive impact on the causes they represent' (18%), followed by 'how transparent charities are about the way they spend donations/funds' (16%) and that 'charities do what they say they will do' (16%).

¹⁹⁹Ibid, [7.3], Male, 45-64, C2.

²⁰⁰See the 19 reports published by the Commission between 2012 and 2021 at <https://www.charitycommissionni.org.uk/charity-essentials/thematic-reports-and-case-studies/>.

The Panel notes, however, that charities already feeling overwhelmed with regulatory compliance duties are unlikely to be reading these thematic reports and taking on board the broader lessons shared. Webinar attendees indicated that for charities administrative burden is not limited to report filing but also encompasses the time it takes for charity trustees and other volunteers to locate and understand long Commission guidance documents, which are not always aimed at the layperson volunteer. This is not to say that thematic reports lack value and many stakeholders (e.g., lawyers, accountants, academics) will carefully read these documents. The important question for the Commission is about the effectiveness of their communication with charities, which can be assessed by considering if the pitch is at the right level and information is easily accessible, whether through on-line videos, roadshows or proactive Commission engagement (see Chapter 3 of this report).

Since 2018, the Commission has included a statement in its annual report to the effect that:

“... due to the high volume of enquiries-related queries and concerns received, the Commission does not currently have the resources to progress investigations into more minor concerns, instead focusing scarce enquiries resources on

the issues of highest risk to a charity’s beneficiaries and assets.”²⁰¹

This has several knock-on effects for stakeholders. Longer term and live investigations can have more serious ramifications for charities where, for example, public disclosures result in the suspension of grants, which consequentially can result in services being withdrawn and/or redundancies. In the words of one respondent:

“For funders if there are concerns, even if not fully investigated as yet, it can be risky not to take any live investigation into account when reviewing whether the organisation should have funding or not, however, not offering funding on the basis of potential issues has caused problems in the past if the investigation is found to be unwarranted.” ID 124

Funders mentioned the difficulties that the long duration of Commission investigations can have for funding decisions. In one case, we heard that a beneficiary was still being investigated by the Commission after three years while in another instance six years after raising an issue with the Commission, the case was still ongoing. Stakeholders mentioned that lengthy investigations can sometimes leave a perception of disconnect and/or an imbalance of power between those stakeholders and the Commission, particularly when

²⁰¹Charity Commission NI Annual Reports 2018-19, 2019-20.

information is being requested by the Commission and the timeframe given to collate and present that information is short. It can appear that the Commission works slowly yet when information is requested by them, it must be provided within an exceptionally short timeframe. Finally, unless there is good communication from the Commission as to what constitutes “a minor concern” in respect of which it will not be progressing an investigation, those raising concerns are left frustrated while those thinking about raising a concern may be hesitant as to whether it is sufficiently significant to warrant the Commission’s time. The Panel’s **Recommendation 53** above on the importance of clear communication refers.

6.2. Review of Commission escalation of concerns to Statutory inquiry

In its review of the Commission’s approach to investigations in 2016, the draft Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008 (hereafter referred to as ‘the Scott Report’) noted that the Commission is more likely to intervene in cases where it suspects misconduct (defined by Commission guidance as including “any act/failure to act in the administration of the charity which the person committing it knew (or ought to have known) was criminal, unlawful or improper”) or mismanagement (defined

by the Commission as including “any act or failure to act in the administration of a charity that may result in significant charitable resources being misused, the charity’s reputation being undermined or the charity’s beneficiaries being put at risk”).

The incomplete draft of the Report seen by the Panel found that while the Commission’s rationale for instituting statutory inquiries was reasoned, it faulted the Commission’s procedure in terms of written recording of such decisions, noting the generally poor quality of the papers provided to the Section 22 Committees at that time (a fact acknowledged by the Commissioners to the draft Scott Review); and the absence of a good s.22 executive summary carefully presenting the evidence. The Scott Report also found evidence of poorly maintained files with duplicate and poorly ordered information regarding s.22 inquiries and insufficient evidence of challenge and recording of reasoning underpinning decisions to undertake a s.22 inquiry.²⁰²

Since 2016, the Commission has reviewed and amended its procedures relating to the opening of statutory inquiries. The Panel examined v.8 of the enquiries manual which requires a Senior Member of Management Team to present a case to Commissioners for the opening of an inquiry. Commissioners are provided with

²⁰²Scott, Draft Report, December 2016, [6.4.7].

a supporting note to the appropriate risk assessment and other materials/evidence identified by the Head of Compliance and Enquiries or Senior Manager to inform their decision making. Commissioner decisions to institute an inquiry are recorded on the file note whereas as in the case of a Commissioner decision not to institute an inquiry, both that decision and the reasons therefore are recorded. Good decision making and good record keeping are key to good compliance practices. The Panel notes that as the Commission has gained experience in the compliance and enforcement areas, it has over time reflected upon and revised its practices particularly in the areas of decision audit trails and the first-time exercise of statutory powers. The Panel will make recommendations about the quality of Commission papers in Chapter 9.

To date, of the 17 statutory inquiries the Commission has opened, 8 statutory inquiry reports have been published, including 1 interim report. The average length of a completed investigation was 17 months, although some took as little as 5 months while in other cases, inquiries are still continuing up to 9 years after their initiation. In terms of impact, 50% of the charities under inquiry subsequently closed while 50% continue to operate. This ongoing stress on charities under inquiry is neither timely nor effective and should be addressed.

In the aftermath of compliance exercises, the Commission commonly releases information on how it has dealt with concerns about charities. As mentioned above, the Commission relies on regular thematic reports, drawing on confidential case studies to contextualise the Commission's regulatory functions and to provide lessons learned from its investigatory work to charities. These thematic reports, now numbering 19, are published on its website. The Panel is mindful of both the important emphasis on learning within the Commission and the knowledge that many charities, particularly where they are run by volunteers, may not have time to read thematic reports. At the same time it is critical that they be supplied with the type of information that will assist them in their own compliance. The Panel will make a recommendation on this below.

Recommendation 57: That the Commission review and improve written records of the decision-making process in relation to statutory inquiries, record keeping and file management to ensure best practice standards apply and that manuals are updated on an ongoing basis as experience grows.

Recommendation 58: The Commission should review long running inquiries with a view to reaching the necessary decisions to close them out in a timely and effective fashion.

Recommendation 59: That the Commission explores new, more streamlined ways of sharing learning from compliance cases, outside of the traditional thematic report format, for example through social media and other virtual learning platforms to widen outreach for its compliance learnings.

In this respect, the Panel draws attention to the IT aspect of the Transformation Project which is still being developed and the opportunity that may exist to build-in learning that can be reproduced with ease and without significant resources being applied.

6.3. Conclusion

In summary, we can see that like any regulator, the Commission has learnt as it's been given powers and developed processes and to some degree it has reflected on those learnings and revised its procedures – the fact that in the space

of 6 years, the Enquiries Manual has gone through 8 or more iterations and tripled in size speaks to this point. There is also evidence of the Commission first setting out its approach to waiver applications in 2014²⁰³ and then reviewing lessons learned from the 2017 Charity Tribunal decision affirming a Commission decision not to grant a requested waiver of removal to a charity trustee.²⁰⁴ There is further evidence of the Commission adapting its procedures around how it articulates and records its approach to proportionality as a result of internal audit recommendations in 2018.²⁰⁵ At the same time, recent Commission practices to anonymise communications in writing and to use generic email signatures²⁰⁶ have been at odds with the standard practices of neighbouring charity regulators and have not been welcomed by the sector. Nevertheless, the reasons for this decision are understandable and this is a timely opportunity to review the practice as the Commission moves towards developing a clear enabling and collaborative motif to its work.

²⁰³Charity Commission NI Board Paper 210-14 Investigations Procedures

²⁰⁴Redacted Board Paper 482-17 – Lessons learned Waiver decision report (March 2017)

²⁰⁵Board Paper 607-18 Proposed New Enquiries Manual (May 2018).

²⁰⁶Appendix to Board paper 825 0 v7.4 Enquiries Manual – Info Gathering Section (June 2020)

Chapter 8 – Enforcement and Appeals

1. Introduction

Regulation has been described as “carefully measured doses of misery by design, usually intended to get those regulated to comply.”²⁰⁷ In essence, this understanding of regulation reflects what can be experienced when those being regulated do not wish to comply, have become distracted from their governance responsibilities or are finding compliance challenging. In this sense, regulation can draw charities away from programme activity to address their governance responsibilities and this is not always welcomed. However, during our webinar and other consultations we were impressed that regulation is understood to be important and there was considerable positive desire to get compliance right.

Chapter 7 introduced the spectrum of compliance ranging from education and guidance at one end to assist charities to improve their own compliance, through to Commission investigation of non-compliance and ultimately using the power of the regulator to ensure compliance. Chapter 7 noted that most concerns that the Charity Commission for

NI (the Commission) identifies in charities are dealt with as regulatory cases. These cases are not formal investigations, but are aimed at ensuring charity trustees address any failures and weaknesses in their charity’s governance. Statutory inquiries may be opened in accordance with the Commission’s Risk Assessment Framework where there is a high risk to public trust and confidence in a charity, where there is evidence of misconduct or mismanagement of a charities’ assets, and/or where there is risk of harm or abuse to reputation, service or beneficiaries. The opening of an inquiry allows the Commission a fuller range of enforcement powers.

This chapter focuses on the enforcement powers of the Commission, how it exercises those powers, and how they compare to those possessed by other neighbouring regulators. It also considers the appeal avenues currently open to parties affected by decisions reached by the Commission. The key question for the Panel is whether the Commission in exercising its powers has struck the right balance between encouraging charities to do the right thing and deterring misconduct.

²⁰⁷Malcolm Sparrow, *Modern Regulatory Practice and what it means to be a risk based regulator* (Lecture to the Victorian Building Authority, March 26, 2019).

2. A Comparative Review of the enforcement powers available to the Charity Commission

2.1. Overview of Powers

The Charity Commission possesses statutory powers to protect charities and their assets. These may be broken down into three categories:

- a) those general powers available to the Commission on a day-to-day basis;
- b) additional investigation and enforcement powers which are only available to the Commission on the opening of a statutory inquiry; and finally,

- c) enabling protective powers available to the Commission for exercise when a request is received from a charity or charity trustee seeking this assistance.

2.2. General Powers of Commission

The general statutory powers of the Commission are intended to protect charities and their assets. They empower the Commission to call for documents or records to assist in its oversight of charities and where necessary, to institute statutory inquiries into charities. They give the Commission certain powers over disqualified charity trustees and an ability to appoint or remove trustees in certain defined circumstances. These routine operational powers are set out in **Table 8.1** below.

Power	Statutory Provision - Charities Act (NI) 2008
1. Require a charity to change its name in certain specified circumstances.	s.20
2. Institute inquiries into the administration of a charity.	s.22
3. Call for documents and search records.	s.23
4. Make a scheme for the administration of a charity.	s.33(2)(ii)
5. Remove a charity trustee.	s.33(4)
6. Appoint new trustees.	s.33(5)
7. Give directions about dormant bank accounts.	s.48
8. Determine the membership of a charity.	s.50
9. Ensure the safekeeping of charity documents.	s.51
10. Exercise the same powers as the Attorney General with respect to taking legal proceedings, except for petitioning for the winding up of a charity.	s.53
11. Order a disqualified person to repay sums received from a charity while acting as charity trustee or trustee for the charity.	s.87(4)
12. Disqualify trustees who are receiving remuneration by virtue of s.88.	s.90

Table 8.1 General Protective Powers available to the Commission

The Panel received limited respondent feedback on the Commission's exercise of the general powers outlined in **Table 8.1** above. One respondent believed that the Commission had a poor understanding of its powers under s.22 and s.23 and that their use was rarely effective and rarely necessary. Another respondent believed that the manner in which the Commission used its powers under s.23(1) to obtain a charity's bank statements from financial institutions breached Article 8 of the European Convention on Human Rights (the right to family and private life) and was disproportionate. The Review Panel considered the Commission's documented procedures for exercising its powers under s.23 and found that these procedures expressly recognised the Commission's obligations under the Human Rights Act 1998 and the steps set down in v8 of the Commission's Enquiries Manual demonstrated that caseworkers were required to act in a proportionate manner when calling for documents under s.23.

2.3. Additional Powers available to the Commission upon opening a statutory inquiry

When the Commission uses its powers under s.22 to initiate a statutory inquiry, a number of additional enforcement powers become available, including powers to suspend or remove trustees and powers to restrict charity transactions or freeze charity property. In aid of its statutory inquiry powers, the Commission, on production of a warrant from a lay magistrate, is also given the power to enter premises and seize documents or information that is relevant to its inquiry. While covering only that information that could normally be sought under the Commission's general power to call for documents or records (s.23), this enhanced power to 'turn up and take' documents is a more muscular power available to the Commission when a charity has ceased to cooperate with or comply with Commission orders. It represents an escalation of Commission powers in light of the opening of a statutory inquiry and is thus rightly subject to court supervision. The full list of these powers may be found in **Table 8.2** below.

Power	Statutory Provision - Charities Act (NI) 2008
1. Suspend or remove any trustee, charity trustee, officer, agent or employee of a charity.	s.33(1)(i) and s.33(2)(i)
2. Make a scheme for the administration of a charity.	s.33(2)(ii)
3. Appoint new trustees.	s.33(1)(ii)
4. Order individuals not to part with charity property without its approval (“freezing orders”).	s.33(1)(iv)
5. Restrict transactions that can be entered into on behalf of a charity.	s.33(1)(vi)
6. Appoint an interim manager for a charity.	s.33(1)(vii)
7. Suspend or remove trustees, officers, agents or employees from membership of a charity.	s.34
8. Give specific directions for protection of a charity.	s.36
9. Direct the application of charity property.	s.37
10. Enter premises and seize documents.	s.52

Table 8.2 Additional Commission Protective Powers upon the opening of a Statutory Inquiry

The Charities Act (NI) 2008 (the 2008 Act) affords the Commission a wide discretion when it comes to opening a statutory inquiry. Importantly, the decision must be made by the Charity Commissioners. In terms of possible challenge, a decision to institute a statutory inquiry is subject to review only – i.e., was the decision lawful?²⁰⁸ This is a more limited basis than is open to someone wishing to challenge a decision made as part of an ongoing statutory inquiry. These latter decisions made under a statutory inquiry are subject to an appeal by way of re-hearing by the Charity Tribunal – i.e., was the decision correct?

The Commission’s exercise of its s.22 powers to initiate a statutory inquiry and its associated enforcement powers, detailed in **Table 8.2** above, are among the Commission’s most sensitive and complex areas of work. Since 2013, the Commission has initiated 17 statutory inquiries and issued just over 100 orders in pursuance of its enforcement powers. Exercise of these powers has given rise to a number of appeals to the Charity Tribunal and to the courts and garnered high profile media attention. Some parties affected by some of these inquiries have been very critical of the Commission’s engagement with them and its exercise of these powers. As a result

²⁰⁸Charities Act (NI) 2008, Schedule 3, Para. 3.

of these events, over the past five years, several reports by civil servants and by independent counsel have reviewed the Commission's enforcement practices and procedures and have made a series of recommendations to both the Department and the Commission for further improvement of the Commission's regulatory oversight. These are discussed in Section 3.

2.4. Enabling Protective Powers of the Commission

The Commission also possesses a final set of enabling protective powers that

might not technically be described as enforcement powers in that exercise of these powers normally flows from a request by charity trustees for assistance in administering a charity. These statutory powers include the ability to frame cy-près schemes, to give advice or guidance to a charity or to vest or transfer charitable property. The Commission can also relieve trustees, auditors and independent examiners from liability for breach of trust or duty. The fuller list of these powers is set out in **Table 8.3**, below.

Power	Statutory Provision - Charities Act (NI) 2008
1. Authorise cy-près application of gifts belonging to unknown or disclaiming donors.	ss.26-29
2. Make a scheme in relation to a charity governed by charter or under statute, subject to Order in Council.	s.30
3. Establish a scheme for the administration of a charity (including the alteration of purposes cy-près).	s.31(1)(a) (and ss.26-29)
4. Appoint or remove trustees; remove officers or employees.	s.31(1)(b)
5. Vest or transfer property, or require or permit any person to call for or make any transfer of property or any payment.	s.31(1)(c)
6. Alter provisions in Acts of Parliament establishing or regulating a charity, subject to Parliamentary approval.	s.32
7. Authorise dealings with charity property or other actions in the interests of the charity.	s.46
8. Authorise ex-gratia payments.	s.47
9. Give advice and guidance to a charity trustee or trustee for a charity.	s.49
10. Authorise regulated amendments to memoranda and articles of charitable companies.	s.96 (as amended)
11. Grant a waiver to a person disqualified from acting as a charity trustee.	s.86(4)-(6)
12. Relieve trustees, auditors, or independent examiners from liability for breach of trust or duty.	s.91

Table 8.3 Commission powers normally exercisable upon the request of a Charity

The Review Panel received fewer submissions relating to the Commission's exercise of these powers in terms of their actual scope. A number of respondents, however, raised concerns over the status of decisions taken by the Commission in furtherance of the powers listed in **Table 8.3**, in light of the 2020 NICA decision in *McKee v Charity Commission*, finding that the Charities Act did not provide a power of delegation by the Commissioners to staff. Several respondents noted the long delays associated with the processing of cy-près and other consent applications while others queried whether successful cy-près schemes and other decisions enabling vesting of charity property or charity mergers were now valid if previously made by Commission staff. The Panel recognises the need for charities to have legal certainty of the standing of Commission decisions. It is aware of the Charities Bill 2021 which is before the Assembly and strongly encourages the completion of the necessary legislative steps to retrospectively validate previously undisputed decisions taken by Commission staff.

3. Reviews of Commission's Enforcement Practices

3.1. Draft Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008, 2016 ("The Scott Review")

In 2016, the Minister for Communities asked officials to provide assurances regarding the strategic approach of the Commission in regulating local charities. To this end, the Department tasked a senior civil servant to carry out a strategic review of the Commission, resulting in a draft review report which was never completed or published due to the collapse of the Northern Ireland Assembly in January 2017. In the course of its work, the Panel had sight of a copy of this unpublished December 2016 draft which assessed the strengths and weaknesses of the Commission when it came to dealing with alleged charity mismanagement and misconduct.²⁰⁹

The Scott Review found, as at 2016, that the Commission's rationale for instituting s.22 Statutory Inquiries and making s.33

²⁰⁹Department for Communities, Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008 (draft report, 22 December 2016, unpublished).

orders in the course of those inquiries was reasoned. It did, however, point to the poor order of casework files and on occasion, an inadequate audit trail in recording decisions taken and it recommended as a matter of urgent priority that the Commission improve its s.22 paperwork with a further requirement on the s.22 Committee chair to fully record in writing appropriate challenge and reasoning underpinning decisions to undertake a s.22 statutory inquiry.

The Scott Review also recommended a greater involvement of the Commissioners in the approval of s.33 orders to provide additional public confidence that significant sanctions were applied only after detailed scrutiny. This recommendation, with which the Review Panel agrees, has been overtaken by the successful legal challenges to the 2008 Act's powers of delegation in *McKee v Charity Commission* in 2019;²¹⁰ a matter to which effect will be given in the forthcoming Charities Bill 2021 and which will be discussed further when we consider the matter of delegation in Chapter 10.

It should be noted that while the Commission was advised of the general direction of the Scott Review and its draft findings, the Report was never finalised or approved by the Minister, so those findings had no Departmental standing.

Consequently, a copy of the report wasn't shared with the Commission for it to act on its recommendations. In its meeting with the Chief Commissioner, the Panel inquired as to the quality of papers now presented to Commissioners in the case of s.22 inquiries and the improvements made to this briefing process since 2016. The Panel learnt from subsequent engagement with Commissioners that while the s.22 papers provided to the Commissioners post the Scott Review were adequate for the purposes of making informed decisions, Commissioners have nonetheless noted a marked improvement in the quality, structure and content of paperwork provided in recent years. Previously, Commissioners' decision-making occurred in the course of full Board meetings when less time was available to them to fully interrogate issues. An additional advantage of the Schedule 1 Committee process is that these meetings are held on separate days to other Commission Board meetings, making the process more manageable for the Commissioners involved. We heard from Commissioners that the standard of paperwork is high in relation to charity registrations while at the same time there was clear acknowledgement that further improvement is possible, particularly with reference to powers Commissioners do not often exercise but which need to be reflected in the paperwork.

²¹⁰[2019] NICH 6 (McBride J), upheld on appeal [2020] NICA 13.

The Panel believes that not alone must those who exercise powers be in full possession of the necessary facts to inform their decision-making but they must also make their decisions in a deliberative manner which properly records the procedures followed and provides reasons for the decisions reached. The Panel recommends that the Commission review its operating procedures to ensure that staff are fully briefed on the nature and format of material that Commissioners need to exercise their powers properly. The Panel recognises that this is an iterative process that evolves over time and through experience.

The Panel also endorses the current separation of Schedule 1 decision-making from other Board strategic and governance responsibilities. Such separation provides a focused and deliberative space for Commissioners to consciously exercise their powers. The Panel recommends that this separate Schedule 1 process continue with regards to Commissioners' exercise of reserved powers post the passage of the Charities Bill 2021 and its proposed scheme of delegation.

Recommendation 60: The Commission review its operating procedures to ensure that staff are fully briefed on the nature and format of material that Commissioners need to exercise the full scope of their powers effectively.

In respect of this recommendation the Panel emphasises that for the Commissioners to exercise their responsibilities they should be fully informed and able to engage in deliberative decision-making in a manner that properly records the procedures followed and the reasons for the decisions reached.

Recommendation 61: The Schedule 1 process continue with regards to Commissioners' exercise of reserved powers post the passage of the Charities Bill 2021 and its proposed scheme of delegation.

In respect of this recommendation, the Panel is conscious that when a Scheme of Delegation has been put in place some powers will be reserved to Commissioners. To facilitate the deliberative space needed to fully interrogate cases that come before the Commissioners for decision it is important that the Schedule 1 Committee process remains in place for the exercise of these reserved powers.

3.2. Handling of Complaints and Concerns: The Executive Office Review 2020 and Departmental Governance Review of Correspondence (2020)

In 2019, a former Whitehall senior civil servant, Jonathan Baume, was commissioned by the then Head of the Civil Service David Sterling to consider

correspondence he had received in relation to a specific statutory inquiry. The review, which was completed in August 2020, is owned by The Executive Office (TEO) and looked at how the Department for Communities (the Department) had handled specific complaints from a member of the public in relation to the Commission. The TEO Review does not speak to the Commission's enforcement powers directly. At the same time that the TEO Review was being progressed, the Department's Head of Governance commenced a wider review of correspondence over the period from 2014, which included correspondence from the same member of the public. This review resulted in assurances being sought from the Chief Commissioner, including in regard to the Commission's approach to decision making on the institution of Statutory Inquiries.

The Panel notes that ownership of the TEO Review lies with The Executive Office. The Commission did not contribute to the TEO Review, nor was it given an opportunity to respond to it as the review related to the handling of complaints by the Department. The Executive Office provided a copy of the review to the Department in August 2020. The Department did not share this with the Commission or with the Panel. The Commission subsequently formally requested and was granted a copy of

the Review by The Executive Office. A similar request on behalf of the Panel to The Executive Office was denied. The Panel was informed that the TEO Review related to a specific complaint about the handling of specific correspondence. The Review thus fell outside the Panel's Terms of Reference which specifically excluded the Panel from revisiting past decisions in individual cases.

The Department's request for Commission assurances led to the Chief Commissioner seeking a legal opinion from independent counsel based on a review of papers in 2020. Following receipt of this opinion, the Commission determined that further work was necessary and asked the same independent counsel to engage in a more extensive review of the Commission's exercise of its enforcement powers in relation to the Commission's regulation of two charities. The purpose of these reports was two-fold: firstly, to establish whether there were lessons the Commission could learn from its handling of these cases which had not yet been learned; and secondly to enable the Commission to provide assurances to the Department on the proportionate use of its statutory enforcement powers in particular cases. The Terms of Reference (TOR) for this second review provided a facility for persons who were most affected by these inquiries to provide information to and, if desired, have an

opportunity to meet with, independent counsel in order to outline their concerns.²¹¹

The 2020 opinion of independent counsel, and the Executive Summary of Independent Counsel's 2021 review have been shared with the Panel and have informed the Panel's views on the Commission's exercise of its powers. The Panel will comment further on this below, however, it is important to note that the Panel has not had an opportunity to examine Independent Counsel's 2021 full report, as it was still being finalised when the Panel submitted its report to the Minister.

3.3. Preliminary Legal Opinion of Independent Counsel on Assurances sought by the Department from the Chief Commissioner 2020

In November 2020, Independent Counsel found that based on the evidence provided – including a review of the Commission's Enquiries Manual (v2 and v8) -- that the Commission could provide the sought assurance to the Department that the Commission has in place a sufficient range of responses short of the use of statutory powers and that the issues of proportionality, risk and value for money are required to be addressed when making decisions, including when to institute a statutory inquiry.

The Review Panel has scrutinised v8 of the Enquiries Manual and its procedures that precede statutory enforcement from the initial reception of a concern, to the Commission's initial risk assessment of concerns, to the requirements relating to serious incident reporting, information gathering and review and analysis. As noted by the 2020 Preliminary Opinion, proportionality is written into these procedures such that even where cases meet the proportionality criteria for enforcement, the Commission may not pursue them by way of subsequent intervention where adequate remedial action has been taken by the charity.

Independent Counsel also found that the decision making process to institute a statutory inquiry adequately addresses the issues of proportionality, risk and value for money with well-identified risk levels with room for discretionary judgement by the Commissioners, informed by a number of factors that include the size and resources of the charity in question, whether the concern relates to a zero tolerance/high risk issue, whether the charity has prior offences and its responsiveness to engagement, amongst other matters. The requirement for senior management scrutiny and a decision by Commissioners to open a statutory inquiry provided further structural mechanisms to ensure that

²¹¹Review by Independent Counsel Terms of reference, 8 February 2021.

statutory inquiry is the correct route to pursue by subjecting the assessment to that scrutiny.

In terms of the proper exercise of its powers in practice, particularly with regard to employing alternative responses short of a statutory inquiry, Independent Counsel found the Commission's decision to proceed to an inquiry to be proportionate in the circumstances under review but noted that more detail by the Commission in its written risk assessment on its consideration of alternative responses would have been helpful (echoing to some extent the earlier findings of the draft Scott Review). To this end, Counsel noted in his preliminary opinion:

“... it was clear that action had to be taken but it could be argued that more liaison with the [charity] over the provision of documents may have addressed the shortcomings (a response short of the use of statutory powers) and avoided the need for matters to progress so swiftly to a statutory investigation or possibly avoid the need altogether.”

The Panel notes that Appendix D of v8 of the Commission's Enquiries Manual now requires the Commission to expressly address the question of alternative actions considered and presumably to provide a record of whether (and what) alternatives were considered and why the preferred recommendation is being made.

On foot of this 2020 opinion, the Commission asked Independent Counsel to complete a more comprehensive review that would provide for those most affected by the inquiries in question to provide information to, and meet with, Independent Counsel. The purpose of this second review was to enable the Commission to make the assurances sought by the Department. It is to this more comprehensive review that we now turn our attention.

3.4. Final Charity Commission Report - Review of Processes and Complaints by Independent Counsel 2021

The Review Panel was provided with the Executive Summary to this review in July 2021. The Chief Commissioner has confirmed to the Panel that the full report is nearing completion and will be considered by the Commission to support the provision of assurances that have been requested by the Department. The Chief Commissioner expressed an intention to publish Independent Counsel's report in due course with redactions where required. On foot of this report, the Commission's senior management team will bring an Action Plan to the Board to implement Independent Counsel's recommendations, which will be both published and monitored. The Commissioners have informed the Panel that they are committed to being as open and transparent as possible and will publish relevant extracts from the report alongside

the Action Plan which will be developed in response to it. It is unlikely that they will publish the report in its entirety owing to necessary redactions which would have to be made to it in light of legal constraints such as data protection legislation.

Turning to the Executive Summary which was shared with the Panel, Independent Counsel found no serious shortcomings in the Commission's processes overall.²¹²

Counsel did reference the balance of emphasis the Commission placed on whether the actual test for intervention was met in relation to proportionality and necessity, which effectively is a balance of risk. Counsel expressed the view that there was a greater balance of emphasis on meeting the test and that records needed to demonstrate how proportionality were considered and decisions reached. Counsel did not go so far, however, as to find that the Commission failed to consider issues of proportionality and necessity.

While noting the improved Commission processes that are now in place, Counsel's review of the Commission's previous practices, particularly with regard to its decision-making and investigation procedures did not reveal serious deficiencies as a result of the manuals employed. Counsel carefully acknowledged the great hurt affected parties felt due to the manner in which the Commission had handled their cases.

Many of the recommendations made by Counsel speak to how the Commission engages with the charities it regulates and the impact on affected parties of how cases are handled. The particular recommendations noted below align with the recommendations made by this Review Panel in the context of engagement processes in Chapter 4. Independent Counsel recommended, *inter alia*, that:

- a) The Commission should seek to ensure that when actions are taken which disrupt a charity's functioning, that supportive measures are available to minimise any disruptive effects and maximise the chance of a successful outcome for the charity and its beneficiaries.
- b) The Commission should consider what more could be done to improve its awareness of issues arising in individual charities so as to allow earlier intervention.
- c) Consideration to be given to improving the Commission's processes to ensure that the cost to a charity is factored into the decision-making before taking steps which will incur significant costs, such as the appointment of an interim manager.
- d) The Commission should consider how to ensure that communications with individuals and charities seeking information/documentation or when

²¹²Independent Counsel left aside the issue of delegation as being an issue "that lies outside this review." (Executive Summary, 3.4. Final Charity Commission Report Review of Processes and Complaints by Independent Counsel 2021, at [2.10]).

dealing with complaints are sufficiently detailed and provide adequate rationale for any requests or outcomes.

- e) The Commission should review its current scheme for registering and dealing with conflicts of interest to ensure that it is sufficiently robust.

The Review Panel believes that the underlying role of the Commission is to act as the protector of charities in the public interest. To this end, the Commission facilitates charitable activity for the public benefit through good regulation of those persons or entities who control charities. In its oversight of charity trustees and charity employees and in the exercise of its enforcement powers, the Commission's objective should always be to enable the charitable enterprise at the centre of its compliance regime to flourish or, if survival is no longer viable, to wind down in an orderly manner.

The Panel is mindful that the Minister's TOR specifically stated that the Panel should not review past decisions and therefore we will be making no recommendations on these cases. While, as noted at section 3.2 above, the Panel has not had an opportunity

to examine Independent Counsel's full report, as it is still being finalised, based on its own examination of the Commission's place within the broader regulatory framework, the Panel endorses the above recommendations of Independent Counsel shared in the Executive Summary of that report. The Panel welcomes the Commission's intention to publish its Action Plan arising from Independent Counsel's final report, following the plan's approval by the Board. It is important that the Board keeps this under review and we make a recommendation to facilitate this. The Panel also notes that at the time of writing, the Commission has yet to provide the promised assurances to the Department.

Recommendation 62: The Commission should report on the implementation of its Action Plan arising out of Independent Counsel's final report in its published Annual Report. The Panel also recommends that the Department seeks ongoing assurance from the Commission on progress on the implementation of the Action Plan as part of its quarterly accountability meetings with the Commission.

4. How has the Commission exercised its powers?

4.1. What we heard from respondents

In relative terms, the vast majority of charities never experience the full force of the Commission's powers in this regard and most cases where issues arise are resolved either with self-regulation advice or regulatory guidance. It was thus unsurprising to the Review Panel that the majority of respondents (62%) expressed no view on whether the Commission, in exercising its powers, had struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct. When 'no view' responses were excluded, almost three-fifths (59%) agreed that the Commission had struck the right balance and just over two-fifths (41%) disagreed. As between organisations and individuals, 74% of responses from organisations agreed that the right balance was struck compared with 35% of individuals.

The Review heard that that the Commission is:

“hugely supportive to charities, and knowledgeable about the issues charities face...they investigate thoroughly and where an issue has been identified, take steps to resolve.” ID 34

Other comments included that they acted swiftly and decisively when necessary, they strike the right balance in protecting charity assets and reputation, and are clear and robust in their procedures. While

some respondents said the Commission took a proportionate and hands-off approach, and had got the balance right, there were others who felt the Commission failed to provide enough guidance and was unnecessarily aggressive, and had a reputation for being heavy handed. One respondent went as far as to state it has:

“caused small groups to close out of fear.” ID 130

4.2. What we heard from the Commission

In its first written submission to the Review, the Commission set out a number of powers the introduction of which it saw as either essential or extremely beneficial to the Commission's operation. In terms of essential enforcement powers, the Commission sought the power to suspend or remove charity trustees etc. from membership by realigning the wording of s.34 of the 2008 Act with that of s.83 of the Charities Act 2011 to clarify the power of the Commission to remove or suspend a charity trustee or other person not just from office or employment but also from membership of a given charity.

In terms of extremely beneficial enforcement powers, the Commission drew on the additional powers granted to the Charity Commission for England and Wales (CCEW) under the Charities (Protection and Social Investment) Act 2016 and highlighted the additional enforcement powers set out in **Table 8.4** below as particularly apposite for NI.

English Charities (Protection and Social Investment) Act 2016	Commission’s rationale for seeking powers
Amendments to investigations	A failure to comply with an order of the Commission would automatically be considered to constitute misconduct or mismanagement and could be used as grounds for using other powers and could be referred to in the statement of reasons for taking further regulatory action.
Power to suspend	An extension of the suspension period (to be capped at 2 years), recognising that a statutory inquiry involving suspension may be undertaken in conjunction with other investigations by statutory bodies, such as the police, and in some cases the Commission must await the outcome of a criminal prosecution before it can proceed with its regulatory action.
Amendments to range of conduct to be considered when exercising powers	Once misconduct or mismanagement has been established, this power would enable the Commission to consider whether there is other relevant evidence of misconduct or mismanagement in other charities or conduct outside of charities linked to a related individual which could undermine public trust and confidence in charities before determining how to act.
Introduction of a power to remove charity trustees following an inquiry	This power would enable the Commission to continue the removal process (and consequent automatic disqualification) where a person ceases to hold office. This would enable the Commission to deal with cases where the person they have been seeking to remove resign their position in order to avoid removal and consequent disqualification.
Amendment to power to direct property to be applied to another charity	This power would be useful as it would enable the Commission to prevent wrongdoing and harm from occurring in charities in the first place, or to prevent further abuse from occurring, protecting charities, their assets and beneficiaries.
Power to disqualify from being a trustee	The Commission would be empowered to disqualify by order a person from being a charity trustee and in a senior management position in a charity. Before the Commission can make a disqualification order it must be satisfied that one or more of the prescribed conditions are met, that the person is unfit to be a charity trustee (either in relation to charities generally or a particular class of charity to be specified in the disqualification order), and that making the order is desirable in the public interest to protect public trust and confidence in charities.
Records of disqualification and removal	There is currently no requirement for the Commission to maintain a register of disqualified or removed charity trustees. The maintenance of a register would be valuable in terms of transparency, and in providing a resource for charities against which to check prospective trustees.
Participation in corporate decisions while disqualified	Where a person is disqualified from acting as a charity trustee and is an officer of a corporate body that is a charity trustee, this provision would prohibit that person from participating in decisions relating to the charity’s administration. This would not constitute the removal of the individual as a director of a corporate body. Rather, they would be prevented from having improper influence or responsibility in the direction of a charity.

Table 8.4 Charity Commission NI Requests and Rationales for Additional Powers

4.3. How do the Commission's powers and their exercise compare with those of neighbouring regulators?

The Commission's existing powers bear a very strong resemblance to those enjoyed by the CCEW. This is not surprising, given the extent to which the 2008 Act was modelled on the English Charities Act 2006. The powers of CCEW have further increased with the passage of the Charities (Protection and Social Investment) Act 2016 and, will again, if the current Charities Bill 2021 is passed by Westminster.

The Commission's powers are, however, relatively more extensive than those enjoyed by the Scottish or Irish regulators (OSCR and the CRA). In Ireland, when it comes to the protection of charitable assets, the CRA must seek court approval for any application to suspend or remove charity trustees or employees. It also requires court assistance to prohibit or restrict charity transactions; to vest charity property in the CRA or other appropriate body; or to prohibit the sale, disposal or removal or application of charity property.²¹³

Similarly, in Scotland, while OSCR can suspend charity trustees, it cannot remove them at its own initiative. It must apply to the Court of Session. It is also the Court of Session, rather than OSCR, that has the power to prohibit a charity or its trustees

from any activity; or to prohibit a body from calling itself a charity. Court consent is also required to order a bank or another person not to part with charity property or to restrict the transactions that a charity can enter into.²¹⁴ Finally, unlike the Commission which can appoint an Interim Manager of its own motion, OSCR must apply to the Court of Session and seek the court appointment of a Judicial Factor (similar to an Interim Manager).

The judicial scrutiny to which the Irish and Scottish regulators are subjected when exercising their enforcement powers does provide an extra layer of protection for complainants and requires the regulators to be able to argue the case for the actions sought. It does, however, slow down the pace of enforcement and can increase the cost, necessitating court applications on each occasion. Nevertheless, given that Commission decisions are challengeable before the Charity Tribunal after the fact, the cost of acting first and offering justification after may not be that much cheaper in the longer term than seeking court consent in the first instance. At the very least, the Panel believes that given the reputational effect that removal of a trustee has on both the individual and the charity concerned, decisions to remove trustees should be made at least at Commissioner level. It should also be considered whether suspension of a charity trustee

²¹³See Irish Charities Act 2009, s.74.

²¹⁴See Charities Trustee and Investment (Scotland) Act 2005, s.34.

or charity member should be a pre-cursor to subsequent removal. If the power to suspend charity trustees is reserved to Commissioners, then depending upon the type of regulator that the Minister wishes to empower, subsequent applications to remove a trustee could then be made either by the Commissioners or by way of separate application to the High Court.

4.4. What we learnt from other regulators in terms of best practice

The Review Panel met with charity regulators in neighbouring jurisdictions to consider their respective approaches to charity law enforcement and to learn from best practice elsewhere. A common theme in all of these engagements was the advisability of resolving matters at the earliest possible stage and at the lowest level of intervention. This does not ignore the overall duty of the regulator to protect charities and the public interest and thus to use the full force of the law, where necessary.

The Review Panel noted that both OSCR and CCEW do not tend to name charity trustees in statutory inquiry reports. CCEW takes three elements into account: a) Defamation, b) Article 8 ECHR rights; and c) Data Protection. It also considers the need for public interest against the decision to not name trustees. In most cases it will anonymise the individual and

yet still manage to convey the key regulatory message. OSCR also refrains from identifying charity trustees in its reports even in the context of their removal from a charity unless they have been convicted by the courts and their names are in the public domain.²¹⁵

The Review Panel recommends that the Commission adopt a similar approach in future statutory inquiry reports towards the identification of charity trustees.

5. Additional Powers for the Regulator

5.1. What we heard

As part of our online questionnaire, we asked respondents whether the Commission needed new or additional powers in order to properly regulate charities. There was strong support generally across the board for increasing the powers of the regulator in specific areas, as is indicated by **Figure 8.1** below. An important theme running through responses however, which ties back to Chapter 4 on Engagement, is that while there was support in principle for granting these powers, respondents sought reassurance that the Commission would exercise them in a reasonable manner, remembering its primary role of facilitating charities for the betterment of society. One respondent commented:

²¹⁵OSCR, Updated report under section 33 of the Charities and Trustee Investment (Scotland) Act 2005 on SC009814 Dr Robert Malcolm Trust; see also OSCR, The Alfred Stewart Trust, Scottish Charity Number SC041929: Interim report on the inquiry conducted by the Scottish Charity Regulator in both of which removed and suspended trustees were not named but disqualified trustees were.

“I would support the Commission having additional powers if there is a change in ethos to support organisations as well as deterring misconduct. In my opinion, the balance between these two must be greatly improved before any additional powers would be granted to the Commission. From my experiences,

I do not have trust in the Charity Commission to do the right thing, for the right reasons.” ID 92

It is therefore important that this is read alongside commentary throughout this report about how the Commission carries out its work.

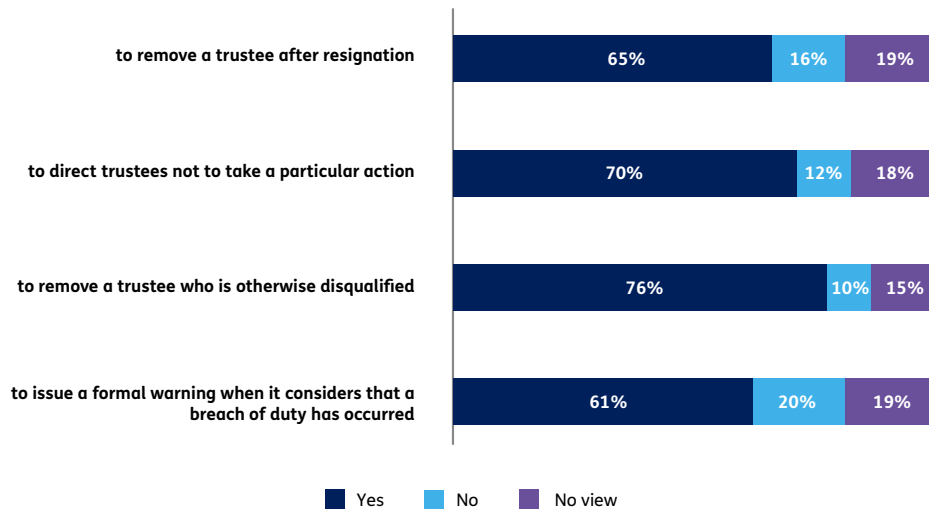


Figure 8.1 Overall responses on a range of powers required by the Charity Commission

5.2. Power to remove Trustees

The proposed powers include giving the Commission the power to remove a trustee (and thereby disqualify him or her), even if the trustee resigns before being removed. In the words of one respondent:

“Accountability isn’t temporary so removal and disqualification should not be avoidable by way of resignation.” ID 71

There was also strong majority support for a Commission power to direct trustees not to take a particular action (70%) and to remove a trustee who is otherwise disqualified (76%). While some respondents endorsed in principle the need for these powers, they also sounded a warning note about the Commission’s use of them: in the words of one organisation the Commission:

“needs to have a range of powers at its disposal to enable it to protect charities and the general public who support them from serious adverse incidents,”

but it was also noted that on occasion the Commission had shown itself to be:

“incapable of exercising these powers without a high level of oversight.” ID 7

The formal warning power, as previously discussed in Chapter 7, is currently a power enjoyed by the CCEW and a power that the Commission sought as desirable in its first written submission to the Review Panel. According to the Commission:

“The official warning is intended to be a more reasonable and proportionate way of dealing with breaches of statutory provisions of [the 2008 Act], breaches of fiduciary duty or other mismanagement where the risks and impact on charitable assets and services are relatively low. Sometimes this may be used as a more proportionate alternative to the use of remedial powers such as suspensions, or removal of trustees or restitution action against trustees. . . In other cases, a warning might be used alongside or with reference to other powers to increase the incentive to comply.”

A majority of respondents (61%) supported its introduction while 20% opposed it. There was an interesting division of opinion on the appropriateness

of granting the Commission this power. Some respondents agreed with the Commission having a broader range of proportionate powers:

“all of these powers could be useful tools to protect the charity sector and add steps into the processes to enable direct and effective but less draconian action.” ID 129

others were less enthused:

“I’m not sure about the issuing of a formal warning without the opening of a statutory inquiry. I think that this could lead to challenges to the Commission and the possibility that wrong decisions could be made without the backup of an inquiry.” ID 36

5.3. The Panel’s View

The Review Panel believes that there is scope to develop enforcement tools that fall short of, or supplement, the statutory inquiry so that the Commission can regulate in an effective but proportionate manner. To this end, there is room to, and support for, enhancing the Commission’s existing powers by expanding the scope of the power to remove trustees to include removal of trustees who have resigned from office. The Panel believes that this removal power should be reserved to the Commissioners. The Panel recommends granting the Commission power to issue directions to trustees not to undertake certain actions. The Panel believes that this power should be

delegated to Commission staff under the proposed Scheme of Delegation. On the introduction of an official warning power, the Panel refers back to its discussion of this power in Chapter 7 and its potential to serve as both a compliance tool and an enforcement tool. The Panel recommends that the Department examines its suitability for introduction in NI, consulting with CCEW on its experience of the benefits and shortcomings of this regulatory tool and with the Commission (whose own views should be informed by those of its Stakeholder Forum). Further consideration should be given as to the circumstances in which, if introduced, the power to issue official warnings would be reserved to the Commissioners or exercisable by Commission staff.

Recommendation 63: To assist the Commission to regulate in an effective and proportionate manner the Review Panel recommends:

- In line with best practice elsewhere, the Commission should revise its approach of automatically naming charity trustees in its statutory inquiry reports.
- Expanding the scope of the power to remove trustees to include those trustees who have resigned from office. This power should be reserved to Commissioners.

- A power granted to the Commission to issue directions to trustees not to undertake certain actions. This power should be delegated to staff.

Recommendation 64: The Department consult appropriately on the possible introduction of an official warning power and whether it should be treated as a reserve power of the Commissioners or exercisable by Commission staff.

6. Internal Avenues of Appeal

6.1. What happens when there is Dissatisfaction

Parties affected by decisions taken by the Commission may wish, on occasion, to challenge or to complain about those decisions to the Commission itself. The nature of the complaint may fall into one of two categories – a) it may be about the service provided by the Commission or b) it may relate to the substance of the decision taken. In both instances, effective regulation should provide a clearly defined, transparent and well communicated route of redress for affected parties to appeal or to have that decision reviewed.

6.2. Complaints about Commission services

The Commission provides an internal decision review process where an affected party wishes to complain about the quality of the service it has experienced from the Commission. It provides

published guidance on how to access this review process and the various stages of resolution.²¹⁶ In 2019/20, by way of example, the Commission received 16 complaints about its service provision. Four complaints were not upheld; one complaint was partially upheld. One complaint was ineligible as it was out of time. One complaint was resolved as a result of action taken by the Commission, as requested by the complainant. Two complaints were withdrawn by the complainants. Consideration of the remaining seven complaints was ongoing at year end.

Those dissatisfied with the outcome of the Commission's investigation of their complaint can, given that the Commission is a public body, lodge a complaint with the NI Public Services Ombudsman (NIPSO). Given that complaints must normally go through a number of stages before they can be escalated to NIPSO it is expected that every opportunity should be taken to resolve matters before escalation. NIPSO will not investigate complaints where a complainant could take their case to a tribunal or could have gone to court or have already begun legal action. NIPSO must publish reports of investigations undertaken on its own initiative and has discretion to publish reports of investigations stemming from the complaint of an aggrieved party.

It is understood the Ombudsman, in some cases, does not publish reports if they are linked to ongoing legal proceedings.

In relation to investigations of the Charity Commission, the NIPSO website cites one investigation on foot of the complaint of an aggrieved party.²¹⁷ The July 2020 summary found that a complainant had been treated unfairly over the publication of a Commission report. NIPSO stated:

“An Ombudsman investigation has found that a complainant should have been given the chance to comment on the factual accuracy of a report by the Charity Commission prior to its publication. However, the complaint that the report was biased and written in ‘bad faith’ was not upheld.”

No further details as to the date of this report, the parties involved or the circumstances surrounding the report are available from NIPSO.

In its second submission to the Review, the Commission indicated that to date it has received six recommendations from NIPSO, all of which it has implemented. In 2020, arising from the TEO Review, the Commission referred itself to NIPSO over the handling of a case complaint. NIPSO, however, declined to take up the request.

²¹⁶Charity Commission NI, Making a complaint about our services: Guidance on raising a complaint about service standards in the Commission.

²¹⁷<https://nipso.org.uk/nipso/our-findings/complainant-treated-unfairly-over-publication-of-charity-commission-report/>.

6.3. Seeking a Review of a substantive Commission Decision

It is common for regulators to provide a non-statutory internal decision review process that is ancillary to more formal statutory routes of decision appeal. In the past, the Commission operated an internal decision review procedure for decisions taken by Commission staff but following the NICA ruling in *McKee v Charity Commission* the Commission has temporarily suspended this review mechanism. While v8 of the Enquiries Manual does make reference to “decision review” procedures, no further details relating to these processes are set out there.

Previous guidance outlining the Commission’s prior practice was published in June 2018.²¹⁸ Internal review was generally possible for decisions made under Schedule 3 of the 2008 Act (as a parallel avenue to an appeal to the Charity Tribunal), unless that decision had been made by the Commissioners, in which case a review or appeal to the Charity Tribunal was the only recourse. The Commission imposed a 42-day time period for initiating the internal review and this time-period ran concurrently with the time period for challenging a decision before the Charity Tribunal, often forcing affected parties to commence both challenges simultaneously.

The review procedure involved consideration of the complaint by a member of Commission staff who was not previously involved with the original decision and could involve liaison with affected parties during the course of the review. In terms of possible outcomes, the Commission could decide to confirm the original decision, or to change or overturn in full or in part the original decision. The Commission aimed to reach a conclusion of such reviews within a period of three months but this depended on the complexity of the individual case. In its 2019/20 Annual Report, the Commission reported that it had completed two decision reviews relating to registration refusals. One registration decision was overturned and one casework decision was upheld. Parties unhappy with the decision reached in a Commission review had the option of applying to the Charity Tribunal.

In looking to best practice elsewhere, the Review Panel was struck by the flexibility shown by the Scottish Regulator, OSCR, when it comes to its internal decision review procedures. OSCR’s review process provides:

“OSCR will organise its reviews to follow recognised principles of good decision-making. In particular, we will make sure that (unless there are exceptional and unavoidable circumstances) the people who made the original decision will not

²¹⁸ Charity Commission NI, *Challenging a decision of the Commission: Guidance for anyone considering challenging a decision made by the Charity Commission for Northern Ireland* (June, 2018).

undertake the review of that decision. Depending on circumstances, this may mean making sure the review is undertaken by:

- a more senior member of staff
- a staff member from a different team
- a Review Panel made up of staff and/or members of OSCR's Board
- OSCR's Board as a whole.”²¹⁹

The implications of this approach is twofold: firstly, it allows OSCR staff to review decisions of other OSCR staff in the first instance, thereby spreading the review process across a broad range of knowledgeable individuals and not requiring Board involvement in every review. Secondly, where Board decisions are under review OSCR does not see the taking of a decision by members of its Board as preventing internal review by other Board members (or the Board as a whole) of these decisions. By contrast, the Commission's current suspension of its internal review procedures is based on the fact that all decisions are currently at Commissioner level, which the Commission perceives as ruling out internal review by other Commissioners or the Board as a whole. The current absence of an internal review mechanism exposes applicants to the cost of having to challenge decisions or orders before the Charity Tribunal. The Review Panel recommends that the Commission take on board the flexibility

provided by OSCR's approach in reviewing its internal review process.

Recommendation 65: The Commission should, when reviewing its internal review process, mirror the flexibility provided by OSCR's approach to who reviews what decisions within the Commission.

The Panel is aware that OSCR's approach enables peer and superior review of decisions right up to Board level, providing greater opportunities for dispute resolution without the additional time and cost associated with a tribunal appeal. The Panel will return to the powers of Commissioners in Chapter 10.

6.4. What we heard:

The vast majority (93%) of respondents had no experience of the Commission's internal review process to challenge a decision. In terms of feedback received on the internal review process, one respondent noted:

“All decisions, orders and directions of the Commission should be subject to review, if not by the tribunal, then by the Commission. NI does not have an Upper Tier appeal process, that's why we should be able to have every decision reviewed, otherwise charities have only Judicial Review as a defence. That is not fair, nor is it consistent with the rest of the UK, a broadly similar jurisdiction.” ID 113

²¹⁹OSCR Review Procedures (February 2018) available at <https://www.oscr.org.uk/media/1531/review-procedures.pdf>

Other respondents felt that:

“the opportunity to engage with a case worker to have the situation explained or further reviewed would be beneficial. Face to face engagement is always beneficial.” ID 120

When asked how the internal review process could be improved, respondents offered a number of suggestions. We heard that internal review should not be peer reviewed but should be completed by a more senior case-worker (e.g., case manager) to the deciding case-worker. Others sought greater clarity around communication and the level of information required for responses in the internal review process. A common call for improvement related to the time period for requesting a decision review with respondents seeking a longer period than 42 days. Other respondents pointed to the difficulties caused by the concurrent running of time for filing both internal reviews and Charity Tribunal appeals:

“The need to ensure that options are kept open for a challenge to the Charity Tribunal means that an application to the Tribunal has to be made at the same time to be within the 42 day concurrent time limit which often incurs wasted work and costs.” ID 120

And:

“the time limit for both routes currently runs concurrently meaning that if a charity availed of decision review and the decision was upheld, the time limit for lodging an appeal may be passed. We know there is the option of submitting an appeal 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 think this needs to be changed also.” ID 117

In both of its submissions to the Review, the Commission recognised the difficulties and duplication of work caused by the absence of a power from the Charity Tribunal Rules 2010 for the Tribunal to stay proceedings pending, e.g., an internal review by the Commission and it supported an amendment to the Tribunal Rules to allow for such a stay to be sought. By way of comparison, it is possible in England and Wales and in Scotland for the First Tier Tribunal to grant a stay (or sist) of the proceedings whilst the CCEW (or OSCR) carries out a Decision Review.²²⁰

The Panel makes the following recommendations in relation to a stay being sought when a Commission decision review is underway and the time period for requesting a decision review:

²²⁰See Chapter 4 of this Report at section 3.3(f); See also, e.g., *Kin Leaver v Charity Commission for England & Wales* (CA/2021/0002), Directions, March 16, 2021.

Recommendation 66: The Department for Communities should collaborate with the Department of Justice with a view to amending Charity Tribunal Rules (NI) 2010 to allow a stay to be sought when a Commission decision review is underway.

In respect of this recommendation, the Panel is concerned that there should be speedy access to justice.

Recommendation 67: The Commission should extend the time limit for initiating a Commission decision review to a period longer than three months.

In respect of this recommendation the Panel believes the current time limit for bringing cases is considered to be too short (42 days). It gives trustees limited time to make decisions and fails to reflect the reality that many trustee meeting cycles operate on a monthly or quarterly basis. It would allow for many charities' quarterly trustee meeting cycles, allow decisions on taking action to be made after due reflection and allow charities without the benefit of staff a longer period to prepare their case, thereby facilitating access to justice.

7. Higher Court Appeals Mechanisms

7.1. Appeals to the Charity Tribunal

The Charity Tribunal is the main forum for resolving complaints against the Commission. It was established by the 2008 Act to handle challenges to the Commission's decisions and came into being on April 1, 2010. During its 11 years of operation it has heard under 80 cases.²²¹ A right of appeal against its decisions lies to Court on a point of law only, except where the appeal against the Tribunal decision determines a question referred to it by the Commission or the Attorney General, in which case the court shall consider afresh the question referred to the Tribunal, and may take into account evidence which was not available to the Tribunal.²²²

The intended objective of the Tribunal was to provide a more user-friendly, low-cost alternative to the jurisdiction of the High Court (which still maintains its own jurisdiction over charitable matters, in parallel to the Tribunal). The Review Panel asked the sector whether the reality of their Tribunal experiences lived up to this objective or whether there were other statutory or non-statutory approaches which could be implemented to provide

²²¹Of the 81 cases listed in the Charity Commission's Tribunal Tracker, the Tribunal made a determination in 36 cases, the appellant/ applicant withdrew in 30 cases and the Commission withdrew in 10 cases (many of the withdrawals happened at a late stage at a hearing before the Tribunal). There are also 5 Tribunal cases which are ongoing, 1 of which has been heard but the Tribunal has not yet issued a decision and 3 of which have been listed for hearing.

²²² Charities Act (NI) 2008, s.14.

the opportunity for independent review of a regulatory decision short of an appeal to the NI Charity Tribunal. Most respondents (76%) had no view; a small proportion (15%) felt there were other approaches, whilst 9% did not. In the words of one respondent:

“Tribunal action is an important last stage in what should be a process giving a number of options to off ramp before reputational, governance and other negative impacts overtake the issues under consideration.” ID 37

Respondents with experience in this area focused on the challenging and interrelated issues of cost, time and jurisdiction. On cost, one organisation told us:

“One charity that we helped with their appeal on being turned down as a charity ended up having to spend over £7,000 on legal fees to go to the Charity Tribunal. The Commission did a sudden u-turn on its decision and the charity was registered. The additional information that was submitted to the Commission during the internal appeal process should have been sufficient and the charity should never have had to incur these legal fees.” ID 117

The concurrent running of time for filing internal reviews and Charity Tribunal applications also featured heavily with respondents as an area in need of improvement. In the words of one respondent:

“The need to ensure that options are kept open for a challenge to the Charity Tribunal means that an application to the Tribunal has to be made at the same time to be within the 42 day concurrent time limit which often incurs wasted work and costs.” ID 120

This perspective is shared by the Commission and the Panel has made recommendations regarding amendment of the Charity Tribunal Rules 2010 above in section 6.4 to address this issue.

In terms of jurisdiction, the Tribunal’s jurisdiction is defined in a table set out in Schedule 3 of the 2008 Act. The Schedule 3 table is focused on a specific range of formal legal ‘decisions’ made by the Commission. One respondent noted:

“Schedule 3 simply limits the power of the tribunal to make orders, it does not limit its ability to make findings. All decisions, orders and directions of the Commission should be subject to review, if not by the tribunal, then by the Commission.” ID 113

Enlarging the Tribunal’s jurisdiction to allow an appeal against any action or decision of the Commission might sound attractive but the disadvantages of such a move would seem to outweigh any likely benefits. One could imagine that there would be increased number of appeals (which could overwhelm the Commission); and that such an appeal mechanism could risk undermining the Commission’s

authority to make decisions and deploy its resources independently and effectively. We recommend accordingly:

Recommendation 68: There be no change to the Tribunal’s jurisdiction as defined in Schedule 3 of the Charities Act (NI) 2008.

It is interesting to note that the recent UK Government response to the Law Commission’s charity law reform recommendations rejected a similar recommendation to amend Schedule 6 of the Charities Act 2011 (which sets out a similar basis for appeals to the Charity Tribunal there).²²³ It did, however accept a Law Commission’s recommendation aimed at providing reassurance to, and reducing legal costs for, trustees by giving the Charity Tribunal power to make an authorised costs order, enabling trustees to obtain confirmation that costs of Tribunal proceedings can properly be paid from their charity’s funds without the expense of going to court to get that confirmation. The UK Government did note that such an order might also discourage trustees from pursuing action in the Tribunal.²²⁴

The UK Government also accepted a second recommendation allowing the time for Charity Commission decisions to be challenged before they took effect, in

the event that the decision was controversial and not time-sensitive.²²⁵ In advancing this recommendation, the Law Commission had carefully parsed its scope, noting that it did not think the Tribunal should have the power to suspend the effect of a CCEW decision pending challenge or to award an interim injunction, nor did it consider that all CCEW decisions should take effect only after a certain time. The Law Commission concluded that “rather than being addressed by law reform we think that steps could be taken by the Charity Commission to ensure that controversial decisions are not acted upon until potential complainants have had an opportunity to make a challenge.”²²⁶

To some degree, this recommendation echoes the sentiments expressed by those respondents to this Review seeking alternatives to direct Tribunal action – with one respondent querying:

“Is it possible to have either a face to face meeting to discuss concerns with the charity before it goes to tribunal stage. All correspondence was through email. An open and honest conversation can highlight areas of concern or areas needing further information.” ID 92

Similar sentiments were echoed by other respondents to the Review with some calling for the possibility of mediation as

²²³Government response to the Law Commission report ‘Technical Issues in Charity Law’ (22 March 2021), p. 21.

²²⁴Ibid, p. 29.

²²⁵Ibid, p. 30

²²⁶Law Commission, No. 375 Technical Issues in Charity Law, at 15.57.

a route to avoid the need to proceed to Tribunal Hearings with all that such hearings bring.

The Panel endorses the idea that the Commission should fully engage with all parties in the compliance process with a view to resolving matters at the lowest level of the regulatory pyramid possible. The ability to meet with parties in person can, in certain circumstances, bring focus to an issue and help to clarify any misunderstandings that may exist between the regulator and the charity. If through such meetings, a charity can better understand the steps it must take to bring itself back into compliance with charity law, then this is in everyone's interest. It also allows the Commission to step back from enforcement action if a charity is willing to cooperate with the Commission to resolve the issue at hand.

The Panel notes however that in exercising its regulatory powers the Commission must be free to escalate an enforcement matter where, in line with its Risk Assessment Framework, it believes this to be necessary. This decision is not a matter for negotiation between parties and can be challenged subsequently either by way of internal review or application to the Charity Tribunal.

7.2. High Court Charity Cases or Cases impacting charity regulation

In its second submission to the Review, the Commission highlighted the need for better communication links between the High Court and the Commission when the former is hearing charity law related matters. In the words of the Commission:

“the Commission would be significantly more robust if the Courts had better links with it. There are examples of cases being heard by the Courts which impact on the status of an organisation as a charity but where the Commission has not been advised of the proceedings or the judgment. Similarly, trustees who are disqualified through court actions which may impact on the trustees' ability to act for a charity are not communicated to the Commission.”²²⁷

The Panel notes that under s.54(2) of the 2008 Act, no charity proceedings relating to a charity shall be entertained or proceeded with in any court unless the taking of the proceedings is authorised by order of the Commission. “Charity proceedings” are defined by s.54(8) as relating to “proceedings in any court in Northern Ireland brought under the court's jurisdiction with respect to charities, or brought under the court's

²²⁷Charity Commission NI, Second Submission to the Review (May 2021), p. 12.

jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.” To ensure good stakeholder communications the Panel recommends:

Recommendation 69: The Commission improve communication with the Courts Service of NI, the Law Society of NI and the Bar Council of NI to bring the existence of s.54(2) of the 2008 Act to the wider attention of these various stakeholders to enable its effective application.

Chapter 9 – Sponsor Department Ownership of Policy and Regulation

1. Introduction

When it comes to delivering policies and public services, the government has a number of options open to it. As noted in the recent UK National Audit Report on Central Oversight of Arm's Length Bodies, it can use a government department to directly deliver services or it may choose to establish an arm's length body when either it wishes to draw on technical expertise in a particular area or because it is "more appropriate for the body to be distanced from government." In the words of the National Audit Office (NAO), the term arm's-length body (ALB):

"is a term commonly used to cover a wide range of public bodies, including non-ministerial departments, non-departmental public bodies, executive agencies and other bodies, such as public corporations."²²⁸

In the case of the Department for Communities (or more precisely, its predecessor the Department for Social Development, DSD), it chose the non-departmental public body (NDPB) category when it established the Charity Commission under the Charities Act (Northern Ireland) 2008. The choice of this

standard NDPB model contrasts with the choices made by the Scottish government and Westminster when they established the Office of the Scottish Regulator (OSCR) and the Charity Commission for England and Wales (CCEW), respectively. In both latter instances, these regulators are non-ministerial departments. In its recent findings, the NAO Report noted that there is no central guidance for the variety of delivery models available (e.g., non-departmental public bodies, executive agencies, and non-ministerial departments) and that definitions for each have evolved over time, resulting in similar bodies having different classifications or being set up differently. This inconsistency in classification reduces opportunities for both sponsor departments and the ALBs themselves to benchmark performance, identify efficiencies or share good practice.

As an NDPB, the Charity Commission for Northern Ireland ('the Commission') is overseen by the Department, with a Voluntary and Community Division sponsor team responsible for governance and accountability. The relationship is governed by a framework document known as the Management Statement

²²⁸National Audit Office, Central Oversight of Arm's Length Bodies: Report by the Comptroller and Auditor General, (Session 2021-22, 23 June 2021, HC 297), p. 5.

and Financial Memorandum (MSFM), which dates from 2017. In 2017, the Cabinet Office developed a Code of Good Practice which set out how departments and ALBs should work together. This includes ensuring a mutual understanding of an ALB's purpose, implementing proportionate assurance arrangements, and sharing skills and experience through an open, honest and constructive relationship. The Cabinet Office's guidance states that the governing principles of an ALB should be formalised in the framework agreement between the department and the ALB. These agreements should set out the role of the ALB and the agreed lines of accountability. The Cabinet Office's Code of Good Practice mandates that framework documents are formally reviewed "at least once every three years."²²⁹ The Department of Finance issued an equivalent code in 2019, which also provides for a similar review period.²³⁰

This chapter scrutinises the relationship between the Department and the Commission from both an operational governance (through the lens of the 2017 MSFM) and a strategic governance perspective. It examines the suitability of the statutory provisions which govern this relationship and it reviews the responses of the Department to a number of events which underpinned the commissioning of this Review. As part of its review process,

the Panel consulted the Scottish Government on its relationship with OSCR and the Irish Department for Rural and Community Development (DRCD) on its relationship with the Irish Charities Regulatory Authority (CRA) to glean a comparative understanding of the management of arm's length body relationships in neighbouring jurisdictions and the lessons learnt from this engagement are further discussed.

2. Operational Governance and Oversight

2.1. The MSFM

Chapter 2 began an exploration of the corporate governance arrangements in place for the Commission and the Department's governance oversight role in this space. This chapter picks up on the threads of Chapter 2 by reviewing the operation of the Management Statement and Financial Memorandum (2017) which governs the Department's relationship with the Commission.

2.2. Operation of the MSFM

The 2017 Cabinet Office Code of Good Practice, which set out how departments and ALBs should work together, included the principles of;

- ensuring a mutual understanding of an ALB's purpose;
- implementing proportionate assurance

²²⁹Cabinet Office, Partnerships between departments and arm's-length bodies: code of good practice (2017), at [1.4].

²³⁰See Partnerships between Departments and Arm's Length Bodies: NI Code of Good Practice (March 2019, DAO (DoF), 03/19). See also the related Partnership Agreement Template (DAO (DoF) 05/19) and the Proportionate Autonomy Guidance (DAO (DoF) 06/19).

- arrangements; and
- sharing skills and experience through an open, honest and constructive relationship.

The Cabinet Office's guidance states that the governing principles of an ALB should be formalised in the framework agreement between the department and the ALB. These framework agreements should set out the role of the ALB, the agreed lines of accountability with a mandated formal review of these framework documents "at least once every three years."²³¹

As noted previously, the current framework agreement in the case of the Commission is the 2017 MSFM. Plans are underway to replace the MSFM with a new Partnership Agreement, a draft version of which has been seen by the Panel. When reviewing the MSFM and the Partnership Agreement, it is important to keep in mind the separate and complementary roles and responsibilities of the Commission and the Department. The Commission is the independent regulator of charities, as created by the 2008 Act. The Department is responsible for establishing the legislative and policy framework for charity regulation and for carrying out

meaningful oversight of the Commission in the delivery of its strategic and business objectives. In so doing the Department must ensure it respects the operational independence of the Commission in making statutory regulatory decisions about individual charities.

The MSFM provides for three different levels of engagement:

- i. Strategic level between the Minister and the Commissioners
- ii. Accountability level between the Sponsor team and the Commission's Accounting Officer; and
- iii. Operational level between the Commission's senior management team and the wider Sponsor team in liaison meetings.

In practice, there is also strategic level engagement between senior management in the Department and the Commission.

2.3. Lines of Accountability under the 2017 MSFM

The MSFM makes clear that the Commission is independent of government and is responsible for its own regulatory decisions and for the recruitment and management of its staff.

²³¹Cabinet Office, Partnerships between departments and arm's-length bodies: code of good practice (2017), at [1.4].

3. Roles and Responsibilities

3.1. Ministerial Responsibility

Under the terms of the 2017 MSFM between the Department and the Commission, the Minister for Communities is accountable to the Assembly for the activities and performance of the Commission. The Minister's responsibilities include:

- approving the Commission's strategic objectives and the policy and performance framework within which the Commission will operate (as set out in the MSFM and associated documents);
- keeping the Assembly informed about the Commission's performance;
- approving the amount of grant-in-aid to be paid to the Commission and securing Assembly approval; and
- carrying out responsibilities specified in the founding legislation and the Commission's strategic plan including appointments to the Commission's Board, approving the terms and conditions of Commissioners, approving the terms and conditions for the appointment of the Chief Executive, approval of terms and conditions of staff and laying of the annual report and accounts before the Assembly.

The suspension of Stormont from January 2017 to January 2020, inclusive meant

that for a considerable period of time no Minister was in place to carry out these responsibilities, which were administered instead by senior civil servants on a limited basis.

3.2. Sponsor Branch

The Sponsor Branch for the Commission sits within the Department's Voluntary and Community Directorate. The MSFM recognises the sponsor team as "the primary source of advice to the Minister on the discharge of their responsibilities in respect of the Commission, and the primary point of contact for the Commission in dealing with DfC." It is tasked with advising the Minister on three issues:

- an appropriate framework of objectives and targets for the Commission in light of the Department's wider strategic aims and commitments;
- an appropriate budget for the Commission in light of the Department's overall public expenditure priorities; and
- how well the Commission is achieving its strategic objectives and whether it is delivering value for money.²³²

From a performance and risk management perspective, the sponsor team, in support of the Departmental Accounting Officer, monitors the Commission's operational activities on a continuing basis in the realms of

²³²MSFM (2017), at 3.3.2.

performance, budgeting, control and risk management. It is tasked with addressing:

“in a timely manner any significant problems arising in the Commission, whether financial or otherwise, making such interventions in the affairs of the Commission as the Department judges necessary to address such problems.”

The Sponsor team may periodically carry out a risk assessment of Commission activities to inform the Department’s oversight of the body, strengthening those arrangements if necessary and amending the MSFM accordingly.²³³

In terms of communication with the Commission, the MSFM requires the Sponsor Team (again in support of the Departmental Accounting Officer) to:

“inform the Commission of relevant Executive/Government policy in a timely manner; if necessary, advise on the interpretation of that policy;” and to “bring concerns about the activities of the Commission to the attention of the full board of Commissioners, and require explanations and assurances from the Commissioners that appropriate action has been taken.”²³⁴

3.3. The Board of Commissioners

The Board of Commissioners comprises a body corporate, known as the Charity Commission for Northern Ireland (“the Commission”). Amongst its other responsibilities, the Board must establish the overall strategic direction of the Commission within the policy and resources framework determined by the Minister and the Department. Having set the strategic direction, Commissioners must also support the Chief Executive (CEO) to guide staff to deliver that direction and constructively challenge the executive team in its planning, target setting and delivery of performance to ensure that strategic direction is maintained. The current Board of 7 Commissioners is of relatively recent vintage with only one of the present Commissioners serving prior to 2019. The Chief Commissioner, Deputy Chief Commissioner and three of the ordinary Commissioners were appointed in 2019. A new legally qualified Commissioner was appointed in 2021 following the resignation of her predecessor (the Board utilising the skills of the Chief Commissioner, who is a barrister, in the interim period). More than half the Board will complete their terms in 2024. The Panel notes the loss of institutional knowledge that can occur when a Board

²³³Ibid., at [3.3.3.]

²³⁴Ibid [3.3.3.]

turns over completely in this manner. It recommends that provision should be made for staggered appointments, where possible, to enable better succession planning, allowing both for fresh voices to be heard at the Board table during the life of the Commission and avoiding the pitfalls of loss of institutional knowledge on one hand and the development of group think on the other. This result could be achieved in 2024 for instance by offering a 1 or 2 year extension to some Commissioners, while replacing others that year, thereby avoiding 50% Board turnover in that year. The Panel is aware that this has happened in other ALBs and the Department could take advice on approaches adopted.

Recommendation 70: The Minister should make provision for staggered appointments, where possible, to the Charity Commission.

In respect of this recommendation the Panel is conscious of the loss of institutional knowledge that can occur on a Board when all appointments expire simultaneously.

The MSFM sets out the role of the Chief Commissioner. According to section 3.5.2: “The Chief Commissioner is responsible to the DfC Minister. The Chief Commissioner shall ensure that the Commission’s

policies and actions support the wider strategic policies of the Minister and that the Commissions affairs are conducted with probity.”

While the Board is charged with establishing “the overall strategic direction of the Commission within the policy and resources framework determined by the sponsor Minister and Department”,²³⁵ the Chief Commissioner is given leadership responsibility in formulating the Board’s strategy.²³⁶ In recognition of the important relationship between the Board and the Minister in delivering on policy objectives, the MSFM provides for an annual meeting of the Board with the Minister “to discuss the Commission’s performance, its current and future activities and any policy developments relevant to those activities.”²³⁷

The MSFM also addresses the broader corporate responsibility of the Board, which is tasked with ensuring that it:

- Receives and regularly reviews financial information concerning the management of the Commission
- Is informed in a timely manner of any concerns about the Commission’s activities; and

²³⁵MSFM, [3.4.2]

²³⁶Ibid., [3.5.3].

²³⁷Ibid., [4.4.3].

- Provides positive assurance to the Department that appropriate action has been taken on such concerns.²³⁸

The Panel met with both the Chief Commissioner and the Board of Commissioners to better understand its place in the charity regulatory regime. At one level, and certainly up until the High Court decision in *McKee v Charity Commission* in 2019, a significant role of the Board, whose Commissioners are all part-time, centred on corporate governance compliance.

Under the MSFM, the Board is charged with establishing the overall strategic direction of the Commission. Thus, it was the Commissioners' decision not to 'grandfather' charities registered for charitable tax exemption onto the new charities register in 2013 that led to the requirement that each and every charity must apply to the Commission for registration.²³⁹ The Commissioners also approve detailed procedural manuals for staff that up until the decision in *McKee* were relied upon by staff to ensure consistency of approach in exercising Commission powers.

3.4. The impact of McBride J's findings and Schedule 1 Committees

McBride J's finding in the *McKee* case that the 2008 Act neither permitted the

discharge of the Charity Commission's statutory powers, duties and functions by, nor their delegation to, its staff, changed the Board's role dramatically. The Board is now responsible for taking all Commission decisions through what is known as its Schedule 1 Committee.²⁴⁰ While Commission staff still prepare cases up to the point of decision, it is the Commissioners who formally decide. This has slowed the rate of decision-making within the Commission, to the joint frustration of the Commission and the sector. It has also imposed additional costs on the Regulator and ultimately on the Department. Commissioners also commented that the commitments of the Schedule 1 Committee now prevented the possibility of them having a higher visibility at Commission events and thus being able to engage directly with charities.

In practice, Schedule 1 meetings occur monthly with 3 Commissioners sitting. In its meeting with the Chief Commissioner, the Panel explored the growing experience of Commissioners in taking decisions and possible avenues that could be taken to enable more frequent Schedule 1 Committees with fewer Commissioners required at each meeting. This would spread the workload of Commissioners and enable more frequent meetings thereby increasing

²³⁸MSFM (2017), at 3.4.2.

²³⁹Charity Commission NI, Second Submission to the Review Panel, p. 13.

²⁴⁰See Charity Commission NI, Schedule 1 decision-making Committee Terms of Reference (updated September 28, 2020).

decision-making outcomes. It would also enable a robust review mechanism to be put in place whereby other Commissioners, not involved in a particular decision, or the entire Board could undertake requests for internal decision reviews that arise, bringing back on stream an appeal mechanism that has been suspended since the introduction of Schedule 1 Committees in 2019.

The Chief Commissioner indicated a willingness to action Schedule 1 Committees with less than three Commissioners in areas relating to registration and consents. The Panel is cognisant that it will take time for the Charities Bill 2021 to gain royal assent and for the Scheme of Delegation required under that Act to come into force. Schedule 1 Committees are likely to remain a core part of business as usual for some time to come and will always be required in matters reserved to Commissioners. The Panel therefore recommends that the Commissioners review the Terms of Reference for Schedule 1 Committees in light of their operational experience to date with a view to making them as effective and as efficient as possible. Such an effectiveness review should consider the different skill sets and competencies of the Commissioners, the level of staff support required for these meetings and the decision types arising for consideration (e.g., it may be that a fewer number of Commissioners is required at a

registration or consent meeting compared to e.g., a decision relating to the exercise of powers by the Commission under ss.22-24 of the 2008 Act).

An issue regarding staff required for the Schedule 1 Committees was identified and we therefore further recommend that how staff service Committee meetings is also reviewed to ensure that more frequent meetings do not impinge more than is necessary on staff's time. We make recommendations here to facilitate these matters with regard to the Schedule 1 Committee process and these should be read in conjunction with recommendations relating to the same Committee in Chapter 8:

Recommendation 71: Commissioners review the Terms of Reference for Schedule 1 Committees with a view to making them as effective and efficient as possible.

In respect of this recommendation the Panel is conscious of the length of time likely to be required for legislation to effect practice on the ground and even when such legislation is agreed. The Panel is also conscious of staff required to attend Schedule 1 Committee meetings and further recommends that:

Recommendation 72: Commissioners should consider, when reviewing the Terms of Reference for Schedule 1 Committees, the staff attendance requirement for such meetings.

3.5. Relationship with Department

There was a general consensus amongst Commissioners that the relationship with the Department is good, particularly on the policy side. However, some Commissioners raised issues with the governance side and sought a reduction in the Department's demand for what were viewed as "unnecessary assurances" in light of good internal audit reports.

The Panel observes that the Department's ability to seek assurances from the Commission goes beyond mere corporate governance compliance and that while required to respect the Commission's statutory independence to regulate, the MSFM empowers the Department to:

"bring concerns about the activities of the Commission to the attention of the full board of Commissioners, and require explanations and assurances from the Commissioners that appropriate action has been taken".²⁴¹

The Panel believes that this is an important role of the Department in its task of regulatory oversight of an ALB and will not make recommendations in this area.

3.6. The Chief Executive for the Commission

The Commission's Chief Executive is designated as the Commission's

Accounting Officer by the Departmental Accounting Officer and the MSFM outlines in detail the substantial responsibilities which flow from this designation in terms of planning and monitoring, advising the Board, managing risk and resources and on accounting for the Commission's activities. The Chief Executive also acts as principal officer for Ombudsman cases. As noted above, the Chief Executive plays a pivotal role in leading the senior staff team to deliver strategy as set by the Board.

3.7. Analysis of Operational Oversight

In terms of scheduled contact, the Sponsor Team meets with the Commission on a quarterly basis although some slippage, not unusual, was noted between recent liaison meetings, which were pushed back "due to competing work priorities". Accountability meetings previously occurred on a bi-annual basis but in 2021 the Department moved these meetings to a quarterly basis in line with the MSFM, a move welcomed by the Commission.²⁴² Apart from these formally arranged meetings, ad hoc operational meetings are held with the Department as and when the need arises (e.g., meetings to discuss aspects of the proposed Charities Bill, meetings to discuss the Commission's move to new premises). Contact between sponsor team and Commission staff occurs frequently, usually a number of times a week.

²⁴¹MSFM between the Department and the Charity Commission NI (2017), at [3.3.3].

²⁴²Minutes of Charity Commission NI and Departmental accountability meeting of July 1, 2021.

At Ministerial level, since the return of the Assembly in January 2020, while the Minister has twice met with the Chief Commissioner no formal meetings between the Board and the Minister on matters of strategic importance have occurred. The Panel believes that the Commissioners play an important role in setting the strategic direction of the regulator when it comes to regulatory approach, risk appetite and risk management. Completion of the charities register remains the single most important step towards effective regulation of the sector and the leadership role of the Commissioners in taking steps to clear the backlog of charities awaiting registration must form part of the Commissioners' next strategic meeting with the Minister.

The Department's Internal Auditors undertake an annual internal audit programme for the Commission. As well as individual reports it produces an annual report. In all recent annual reports reviewed by the Panel the Head of Internal Audit issued a 'satisfactory' opinion on risk management, control and governance in the Commission. Internal Audit also conducts an Internal Quality Assessment every two years and an External Quality Assessment every five years. The most recent Internal Quality Review completed by the Department's Internal Audit service in February 2021

concluded that the service 'Generally Conformed' with the requirements of the Public Sector Internal Audit Standards.

While there has been some flux in the number of meetings held between stakeholders at the various levels, overall, in terms of operational governance oversight, there is generally good evidence of engagement between the Department and the Commission's senior management at liaison meetings on routine issues relating to budgeting, staffing, business plan targets, risk registers and the provision of assurances to the Department.

The Panel welcomes the return of quarterly accountability meetings and the articulated desire in the minutes of more recent meetings to achieve a better balance between the operational level accountability and governance issues, and a more strategic focus on outcomes going forward. The Panel also believes that the annual meeting between the Minister and the Board provides an important opportunity to ensure high level accountability and recommends that these meetings should recommence.

Recommendation 73: The annual strategic meeting between the Minister and the Board should recommence as soon as possible.

3.8. Board Effectiveness

In January 2021, the Commission engaged Business Consultancy Services (BCS) of the Department of Finance (DOF) to undertake a Board Effectiveness Review. BCS examined how the Board currently assesses its performance, including its use of committees in light of its dual mandate to act in both a governance and decision-making capacity following the decision in *McKee v The Charity Commission*. It also sought to produce an Action Plan to enhance Board effectiveness. The report provided useful insights into the working of the Board under a number of different headings and offered a welcome opportunity for a relatively new Board to engage in self-reflection and forward planning. It identified both Board strengths and weaknesses and made a number of recommendations to further enhance Board effectiveness.

The Panel commends the Chief Commissioner for initiating the Board Effectiveness Review exercise and endorses BCS' recommendation that the exercise be completed on three-yearly cycles in line with the UK Corporate Governance code (2018).²⁴³

Recommendation 74: The Commission's Board Effectiveness Review exercise should be completed on three-yearly cycles in line with the UK Corporate Governance code (2018).

In terms of its main findings and recommendations arising from the Effectiveness Review, the Panel observes that several of these align with the Panel's separately observed findings and recommendations. For the purposes of this chapter, the Panel draws particular attention to four recommendations concerning: a) stakeholder engagement, b) Departmental partnership, c) Board skill sets and d) use of workshops to free up Board time.

a) Stakeholder Engagement

The BCS report recommended the development of a stakeholder engagement forum, as an area highlighted by the Board as needing enhancement. The Panel previously raised the need for greater stakeholder engagement in Chapter 4 of this report, citing the recommendations of the 2016 draft Review of the Charity Commission for Northern Ireland in respect of the discharge of its responsibilities under the Charities Act (NI) 2008 (hereafter referred to as 'the Scott Report'). The UK Corporate Governance code (2018)²⁴⁴ states that:

²⁴³<https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>.

²⁴⁴ <https://www.frc.org.uk/document-library/corporate-governance/2018/uk-corporate-governance-code-2018>.

“In order for the organisation to meet its responsibilities to shareholders and stakeholders, the Board should ensure effective engagement with, and encourage participation from, these parties. The Board should keep engagement mechanisms under review so that they remain effective.”

The Panel is encouraged by the Commission’s efforts over the summer to establish a stakeholders’ forum and further recommends that the composition of the forum be kept under review so that a diverse body of stakeholders – including those awaiting registration – have an opportunity to be heard.

Recommendation 75: The Commission should keep the composition of the Stakeholder Forum under review to ensure a diverse body of stakeholders have an opportunity to be heard, including those awaiting registration and those newly registered.

b) Departmental Partnership

The BCS report recommends that the Commission in tandem with the Department should document the new partnership arrangements, roles and responsibilities for future relationships with the Department in a new Partnership Agreement. In making this recommendation, BCS references the NIAO Board Effectiveness Guide (2016) which notes that:

“the relationship between a public Board and the Minister and its sponsor Department is one not always clearly understood by Board members and therefore clear explanation should be given, and discussion held on this subject”.²⁴⁵

The Panel endorses this recommendation and recommends:

Recommendation 76: The Commission, in tandem with the Department should document the new partnership arrangements, roles and responsibilities for future relationships with the Department in a new Partnership Agreement.

The importance of clarity of roles and responsibilities lies at the heart of good partnership. As both the Commission and the Department move from the MSFM to a new Partnership Agreement, the Panel would push both parties to clearly articulate the extent of autonomy, or conversely, accountability intended in this new partnership arrangement and for there to be informed discussion on how this relationship will operate in practice.

c) Board Skills Set

BCS recommended a review of Board Committee Terms of Reference (TOR), structure and membership, to ensure the right committees are in place with the right skills mix. The Panel agrees that a periodic review of committee structure is in line with good governance practice and

²⁴⁵<https://www.niauditoffice.gov.uk/sites/niao/files/media-files/Board%20Effectiveness-%20A%20Good%20Practice%20Guide.pdf>

notes that the Commission has two subcommittees in place: an Audit and Risk Committee and a Human Resources Committee. Since the High Court decision in *McKee v The Charity Commission* in 2019, the Commission also has a Schedule 1 Committee for making Commission decisions.

While the role of the Schedule 1 Committee will be further discussed in the context of delegated matters in Chapter 10, the Panel makes two observations at this juncture. Firstly, the relatively small size of the Board (7 members in total) reduces the ability of the Commission to support further Board Committees unless there is a facility to co-opt external (i.e., non-Commission) individuals. To this end, the Panel notes with approval the practice of the CRA which, in establishing its Charity Services Committee (which makes recommendations to the CRA Board on all consents applications, cy-près applications, giving advice under seal and sanctioning compromises in relation to claims made by or against charities), co-opted two external members (in that instance a judge and a practicing solicitor) who bring expertise in their fields to the committee's deliberations. The Panel notes that the Commission can co-opt an independent external member to its Audit and Risk Assurance Committee²⁴⁶ and recommends a wider use of co-option on other Commission committees as a way

of increasing the skills-mix available to the Board.

Secondly, the importance of ensuring that the relevant expertise and skills are present on the Board ultimately lies with the Department. The Panel observes that Board appointment criteria tend to focus on general administrative skills relating to leadership and strategic thinking with knowledge of the sector listed only as 'desirable' (see Appendix 2). Given the increased importance of the Board as a decision maker since the High Court decision in *McKee v The Charity Commission* – a role that will continue in respect of reserved powers even after the passage of the Charities Bill 2021 – an effective Board will require certain competencies in and experience of charity law matters.

Bearing these considerations in mind and in light of its review of charity regulator Board appointments in other jurisdictions, the Panel recommends that for succession planning purposes that the Department review its skills requirements for Board appointments and the associated time commitment expected of Commissioners. The Panel also recommends that the Department facilitate the administrative and resourcing changes necessary to enable the possible co-option of external experts to Commissioner subcommittees to bolster the expertise available to the

²⁴⁶Charity Commission NI, Audit and Risk Assurance Committee Terms of Reference, (Reviewed by Committee March 2020).

Commission in cases where the subcommittee is acting in an advisory role to the Board.

Recommendation 77: The Minister, in conjunction with the Commission, review the composition of, skills required for, and size of the Board to ensure proper resourcing for the tasks flowing from this report, and any amended legislation or standards.

Recommendation 78: The Commission and Department implement the practice of the CRA in co-opting external experts to Board committees as an effective option for enhancing Board skills and proceed to make provision for this to commence as soon as possible.

d) Use of workshops to free up Board time

Commissioner feedback to BCS suggested that Board papers were lengthy and detailed and that meetings tended to run over time. It was suggested that making use of workshops/task and finish groups to deal with specific issues could free up Board time, e.g., annual risk workshop. The Panel notes that better use of Board subcommittees (if the recommendation on co-option is adopted) may also assist to alleviate some of the pressure currently felt by the Board as it navigates multiple operational, strategic and governance roles. The Panel also reemphasises that having the right people on the Board who can navigate deftly or, at least have

experience of, the charity issues that typically come before the Commission would alleviate this concern.

4. Strategic Governance and Oversight

4.1. Departmental Oversight

In the words of the draft Scott Review:

“Good governance and Departmental challenge of arm’s length bodies is expected to go beyond checking and approving governance documentation. Challenging strategic direction, probing focus and testing performance against best practice is also vital if a sponsoring Department is to truly add value and provide Accounting Officers and Ministers with robust assurance.”

The Panel endorses this approach to good governance in the context of the Department’s oversight of the Commission. In its 2016 review, the Scott report found limited evidence of proactive Departmental oversight in relation to strategic direction and the application of best practice, and it noted room for greater robust engagement at accountability meeting level on matters relating to effective use of available resources, the recording of robustly defensible decisions and it encouraged greater Departmental challenge of the Commission’s approach to proportionality of effort across its various statutory duties.

Have matters improved since the review work undertaken by Scott in 2016? In answering this question, the Panel is cognisant of the collapse of the Assembly in January 2017, for a period of 590 days until its restoration in January 2020. During the Assembly's suspension civil servants were left to administer and implement policy with limited powers but were reluctant to take decisions they felt were out of their remit, meaning many important issues were stalled. During this period of time, the High Court delivered its decision in *McKee v Charity Commission*, holding that the 2008 Act did not contain a power of delegation by the Commission to its staff.²⁴⁷ A number of the Commissioners also completed their terms of service on the Board and new appointments were necessary for the Chief and Deputy Commissioners and three of the five ordinary Commissioners.

As part of its process, the Panel reviewed Accountability meeting minutes from 2018 to 2021. It found that generally, many of the issues already discussed at liaison meeting level are rerun with limited evidence of a greater focus on issues of policy development and delivery. To this end, the Panel believes that room exists for greater challenge by the Department of the Commission on its delivery of proportionate and effective regulation and its effective use of resources. While there is some useful evidence of greater discussion and

interrogation of these matters in the minutes from 2020 onwards, the Panel believes that there is room for further robust engagement in this space.

The Executive Office (TEO) Review, previously mentioned in Chapter 3, reported in August 2020. One of its recommendations to the Department was for it to consider its role as the custodian of charity regulation and sponsorship of the Commission. In October 2020, the Department's Permanent Secretary wrote to the ECG Deputy Secretary requesting changes to be taken forward to ensure that the Department as custodian of charity law and regulation is:

“over the detail of the regulatory framework and its effectiveness (including the effectiveness of the Commission in implementing the Charities NI Act 2008) and is close to Charity Tribunal decisions and significant interventions.”

The Panel understands that in response to this request, the Department is progressing the development of a new Partnership Agreement with the Commission. The Sponsor Team within the Department has also implemented the monthly receipt of the Commission's Tribunal Tracker to monitor progress with cases and to raise queries where necessary.

In a supplementary response to the Panel in September 2021, the Department acknowledged that:

²⁴⁷[2019] NICH 6.

“(I)t is absolutely arguable that the scope of the Department’s oversight of the Commission’s performance in the past may have been too narrowly focussed as the significance of the complaints and concerns raised with the Commission as a result of Statutory Inquiries may not have been fully understood. As a result opportunities to examine and learn from these issues at an earlier stage may not have been recognised and taken.”

The Department indicated to the Panel that it is currently engaged in a process of strengthening its approach to Commission oversight “to ensure that this provides a more holistic assessment of its performance in its regulator role.”

The Panel commends this move and recommends that the Department should formally review the metrics by which it measures the Commission’s performance so that there is greater focus on outcomes rather than simply outputs and greater discussion of how the actions of the Commission in a given year have contributed substantively to the achievement of its statutory objectives.

Recommendation 79: The Department should formally review the metrics by which it measures the Commission’s performance so that there is greater focus on outcomes rather than simply outputs and greater discussion of how the actions of the Commission in a given year have contributed substantively to the achievement of its statutory objectives.

As the Department and the Commission move to the negotiation of a new Partnership Agreement to replace the 2017 MSFM, the Panel recommends that certain fundamental building blocks underpin this future relationship. The relationship between the Department and the Commission must be based on trust, confidence, partnership and assurance, with clarity on respective roles. The 2008 Act makes the Commission responsible for its regulatory decisions. Therefore, the Department should not involve itself in the Commission’s operational decisions unless it has concerns regarding the Commission’s delivery or governance. In holding the Commission to the current MFSM (or future Partnership Agreement), the Department’s objective should focus on being assured that:

- the Commission is implementing the policy as given to the Commission by the Minister and is working to its agreed mandate;
- the Commission is delivering against its agreed targets, has strong governance and lives within its annual budgets;
- the Commission is clear in its own role and the Department’s role; and
- the Department recognises that the Commission can play an important role in informing the development of future policy and legislation.

In crafting the new partnership agreement, further thought should be given to there being informed, open

and professional dialogue between the Commission's CEO and either the Director of the Voluntary and Community Division or the Deputy Secretary on a regular basis on top of the 'standard' governance meetings.

4.2. The Legislative Framework governing the Commission-Department Relationship

Under s.8 of the 2008 Act, the Commission has a statutory function to give "information or advice, or making proposals, to the Department on matters relating to any of the Commission's functions or meeting any of its objectives." This general function includes (among other things):

"complying, so far as is reasonably practicable, with any request made by the Department for information or advice on any matter relating to any of the Commission's functions."

Section 8, however, must be read in light of s.24 of the 2008 Act. Section 24 governs the sharing of information by the Commission (i.e., the Board of Commissioners) with public bodies and officeholders, which includes information shared by the Commission with the Department.²⁴⁸ Section 24 was modelled on s.10 of the Charities Act 1993 (as amended by para 104 of Schedule 8 of

the Charities Act 2006). In England and Wales, however, CCEW is a non-Ministerial Department, and is answerable directly to Parliament. It does not have a sponsorship relationship with a government department. Given this statutory configuration, it is understandable that any sharing of information between CCEW and a government department would be made at Commissioner level.

In the case of NI, however, by virtue of its status as a non-departmental public body, the Commission is regularly required to share information with the Department, a fact borne out by the terms of the MSFM. In the words of the Commission:

"The 2008 Act contains no suitable provisions for sharing regular information with a sponsor department, with or without delegation. This kind of sharing should not be a statutory decision of the Commission."²⁴⁹

The Panel agrees that the legislative provisions relating to sharing of information between the Department and the Commission do not recognise the non-departmental public body status of the Commission sufficiently and it recommends that these legislative provisions be reviewed and revised by the Department to enable Commission staff to share information with the

²⁴⁸Charities Act (NI) 2008, s.24(4).

²⁴⁹Charity Commission NI. First Submission to the Review Panel, May 2021.

Department in the spirit of s.8, without the need for the holding of Schedule 1 Committee meetings.

Recommendation 80: The Department should review and revise the legislative provisions relating to information sharing between the Department and the Commission to enable Commission staff to share information with the Department in the spirit of s.8 without the need for a Schedule 1 Committee to meet.

4.3. Comparative Review of other regulators

In gaining a comparative perspective on government/charity regulator relationships, the Panel consulted the Scottish Government and officials from its Third Sector Unit in addition to the Interim Chair and CEO of OSCR. It also consulted officials from the Community Development Division at the Irish Department for Rural and Community Development (DRCD) in addition to Board Members and the CEO of the CRA.

a) Scotland

Scotland is currently engaged in its own review of its charity regulatory framework. Like NI, The Charities and Trustee Investment (Scotland) Act 2005 does not mandate a statutory review of the Scottish charity regulation regime. Instead, the Scottish review began with

OSCR as the Act approached its tenth anniversary when OSCR undertook a major consultative assessment of its regulatory approach in 2014. Bringing together sector feedback with its decade of regulatory experience, OSCR proposed moving to a more targeted compliance approach.²⁵⁰ The Scottish Government made a formal request of OSCR to prepare a reform paper in 2018,²⁵¹ and in 2019, the Scottish Government launched the first of two public consultations on reforming the charity regulatory framework.²⁵² The second consultation, which built on the feedback received from respondents in the first consultation, took place in 2021 with a February submission deadline.

The Third Sector Unit within the Scottish Government has a policy relationship with OSCR but not a control relationship given OSCR's status as a Non-Ministerial Public body. This tends to result in a very pragmatic relationship within which OSCR are recognised as the experts in charity regulation, but the Scottish Government is not bound by its proposals and is quite probing in its interactions with the regulator in the policy space. Day to day engagement occurred mostly with OSCR's CEO and deputies although the Third Sector Unit also interacted with the Board in relation to Board appointments.

²⁵⁰OSCR, Targeted Regulation of Scottish Charities - progressive, preventative, and proportionate. Post consultation report on annual reporting, publishing accounts, the creation of a trustee database and serious incident reporting (March 2015).

²⁵¹OSCR, A proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005 (March 2018).

²⁵²Scottish Government, Consultation on Scottish Charity Law, (January 2019).

The Panel observed that there is perhaps less leeway in the Scottish model for challenge of the regulator given that OSCR reports directly to the Scottish Parliament (rather than to a Scottish Minister or Department). The Framework Agreement between the Scottish Government and the Scottish Charity Regulator, while recognising the independence of OSCR, commits both sides to the principle of good communications, especially where the work of one has bearings upon the responsibilities of the other.

b) Ireland

The CRA/Departmental relationship in Ireland is a closer approximation to the non-departmental public body relationship found between the Commission and the Department. In its meeting with Irish government officials, the Panel learnt that the relationship between the CRA and the Department (DRCD) is governed by an oversight agreement, which is reviewed annually.

DRCD takes the lead on policy development and while working closely with the CRA, policy decisions ultimately lie with DRCD. Thus, it is DRCD which decides where the balance should lie between increased powers for the CRA and charity sector fears of over-regulation. What the DRCD lacks in terms of in-house policy expertise is sought externally when required.

DRCD's sponsorship relationship lies predominantly with the CEO and not the CRA Board and given the statutory independence of the CRA, it is the role of the Board rather than DRCD to set strategic targets for the CEO. The DRCD expects the Board to have a strategic vision for the regulator and to both set and be accountable for its strategic direction. In terms of accountability, under the terms of the Oversight Agreement, the Chair and CEO of the CRA have annual but separate meetings with the Minister and with the Secretary General of DRCD, respectively. These two accountability meetings are in addition to at least two formal meetings per year between the CEO and relevant Assistant Secretary of the Department.

Annual reports and financial statements are furnished to DRCD, and the CRA Chair provides a letter of assurance, but this type of assurance differs from the more comprehensive assurance framework found in NI. There are further expectations of weekly and monthly reports on regulator activity both to monitor strategic statement targets and to allow the Minister to respond to parliamentary questions, as required. The lack of corporate independence was raised, with CRA staffed by civil as opposed to public servants. At DRCD's suggestion, the move to corporate independence has now become a strategic objective for the CRA.

5. Analysis and the Panel's View

The notable feature in the Panel's consultations with both the Scottish and Irish government officials was the strong sense of ownership of both the charity legislative and charity policy arenas expressed by officials. While both recognised the practical experience of their respective regulators, there was no doubt in either consultation of the importance of the departmental/third sector unit role in leading on regulatory reform and implementation. It is useful in this regard to note the language of the Scottish Government's Framework Agreement with OSCR which provides:

"The Scottish government will seek advice from OSCR on policy and other developments affecting charities, and where appropriate the wider third sector. OSCR has particular expertise, knowledge and information that can assist the Government's formulation and implementation of policy. OSCR will draw relevant issues to the Scottish Government's attention."²⁵³

The Panel observes that the Commission has built up substantial expertise and experience in charity regulation and this should inform the Department's development of new policy and legislation. There should be a process whereby the Department garners this expertise and experience on a rolling

basis. At the same time, the Commission needs to fully recognise that the Minister holds responsibility for policy and legislation and that all political representatives are key stakeholders. This journey of mutual understanding would be aided by the planned annual meetings between the Chief Commissioner, the Board (given the strategic development role entrusted to the Commissioners under the MSFM), and the Minister referenced at paragraph 3.7 and also by the Permanent Secretary and appropriate senior officials being in attendance.

In the case of the 2008 Act, serious drafting flaws have now twice impeded the Commission's ability to deliver on both its statutory objectives and its statutory functions. As previously discussed in Chapters 1 and 3, the unworkability of s.3 of the 2008 delayed the roll out of registration until after the commencement of the Charities Act (NI) 2013. The more recent decision in *McKee v Charity Commission* confirming the absence of a power of delegation in the 2008 Act not only undermined all decisions taken by Commission staff to date, putting the register of charities in limbo and jeopardising compliance-related, reporting-related, consent-related and enforcement-related decisions but it also severely curtailed the Commission's ability to carry out its regulatory functions pending promised amending legislation in the form of the Charities Bill 2021.

²⁵³Framework Agreement between the Scottish Government and the Scottish Charity Regulator (2020), at [5.2].

The Panel is aware that the Commission raised its concerns directly with the Department (then DSD) about the need for express delegation powers in the Act in 2011. The Department was entitled to rely on legal advice to the contrary and to reaffirm its interpretation of the 2008 Act when it became an intervener before McBride J in *McKee v Charity Commission*, a view which ultimately did not prevail before the High Court or Court of Appeal.

Nevertheless, as much as the Department is entitled to adhere to its views on legislation and its effect, it must also own its mistakes in this arena. The initial inability of the Commission to carry out its primary task of charity registration in 2010 was not of its making. The Department's decision to commence compliance and enforcement powers over an as-yet to be registered sector in 2011 put the Commission in an untenable position, by re-ordering the natural order for any new regulator and depriving it of an opportunity to gain an understanding of the charity sector through a staggered approach to registration and reporting before launching into compliance and enforcement mode. Equally, the Commission's reliance on staff to make decisions, the legality of which was ultimately found wanting in *McKee*, was justifiably based on Departmental reassurance that the Commission was acting within the four corners of the Act in this manner.

Many of the engagement and cultural issues which abound today and discussed in Chapters 4 and 8 of this Review can be traced back to flawed legislation which either went unnoticed or misunderstood in terms of the significant impact it would ultimately have in the first instance and poor policy decisions regarding legislative commencement in the second. While the Commission is responsible for its regulatory actions under the Act, the Department must shoulder responsibility for the legislative environment in which the Commission has been forced constantly to react in difficult circumstances rather than being able to strategically commence its regulatory narrative in a logical and ordered fashion.

The Panel believes that the Department needs to provide greater visible leadership in and ownership of the policy and regulatory framework for charities. The Department should be able to demonstrate to all stakeholders, including the Commission, that it has the skills and expertise to ensure that policy is developed and kept up to date against best practice.

Recommendation 81: The Department should consider and plan for how it can provide greater, visible leadership in, and ownership of, the policy and regulatory framework for charities.

In respect of this recommendation the Panel is concerned that the Department be able to demonstrate to all stakeholders, including the Commission, that it has the skills and expertise to ensure that policy is developed and kept up to date against best practice.

In its written response to the Panel, the Panel notes the Department's admission of its shortcomings and welcomes the Department's admission that it needs "to reflect and refresh its approach to charity regulation in terms of leading and advancing the policy debate for the benefit of charities."²⁵⁴ It commends the Department's intention to better inform itself on the needs of the charity sector through a proposed series of joint workshops with sponsor team officials, Commissioners and Commission staff and NICVA. The Panel would strongly urge the Department to ensure that its face-to-face engagement does not end with these parties. It must be extended to include other representatives in the charity sector and relevant government and regulatory peers in neighbouring jurisdictions.

The Panel further recommends that the Department should examine flexible options to significantly enhance its own expertise in respect of charity law and policy in NI. To this end, the Department should also proactively monitor developments in charity policy and regulation in the Republic of Ireland,

Scotland and England and Wales. As part of this process on at least an annual basis, the Department should meet with its counterparts in these jurisdictions. To further integrate stakeholder expertise in this regard, the Department, should, on an annual basis, formally seek input from the Commission on policy and other developments affecting charities.

Recommendation 82: The Department should examine flexible options to significantly enhance its own expertise regarding charity law and policy including knowledge of developments in the Republic of Ireland, Scotland and England and Wales.

In respect of this recommendation, the Department should extend its own engagement to include other representatives in the charity sector and relevant government and regulatory peers in neighbouring jurisdictions.

The Commission should be formally required to draw all relevant issues to the attention of the Department on briefing basis, which should form the briefing document for the Commission's annual strategic meeting with the Minister.

The Panel recognises that implementation of the recommendations of this report may require legislative amendments going beyond those envisaged in the current Charities Bill 2021. While

²⁵⁴Director of Community and Voluntary Division's Response to Panel's request for a formal evaluation by DfC of the Charity Commission's performance, August 2021.

cognisant of the sometimes slower than anticipated timeline for the introduction of amending legislation, the Panel would urge the Department to take a holistic approach to reform and to avoid, where possible, a piecemeal approach of ‘quick and temporary fixes’ which may tackle short-term problems, but over time contribute to greater legislative inertia when the policy window closes without resolving fundamental underlying policy questions.

Recommendation 83: The Department should monitor the implementation by the Commission of the agreed recommendations of the Review Panel’s Report.

6. Conclusion

This chapter has examined the Department’s ownership of the regulatory policy space. It has explored the key relationships that inform the Department’s ownership, noting the importance of having the right people in the room when policy decisions are being made. It has emphasised the need for good ongoing dialogue between the Minister, the Department and the Commission in giving effect to a strategy that contributes to the achievement of the Commission’s statutory objectives and functions. This may require greater focus in the future on the composition, skills and experience of appointed commissioners and on the agreed strategic focus necessary to complete the charity register and give greater visibility to the charity sector in NI. The Panel now turns in its final chapter to more technical issues, the delivery of which will yet again require the input of the Department, informed by the guidance of the Commission, in the legislative space.

Chapter 10 – Technical Issues

1. Introduction

This chapter addresses a number of important but disparate issues that have been referred to in previous chapters of this Report in the context of the broader issues of registration, reporting and the operation of the Charity Commission for NI (the Commission) but which raise particular technical issues that require them to be the subject of further scrutiny in this chapter for recommendation purposes. In the course of the many submissions made to the Panel during its consultation exercises, other technical issues that may require technical resolution were also identified by various respondents and several of these issues are also raised in this chapter. The Review Panel is cognisant of the fact that it cannot address every issue raised and it has therefore adopted an approach that seeks to prioritise either easily accommodated ‘fixes’ that will bring greatest benefit to largest number of stakeholders or those more convoluted issues that while not so easily resolved nevertheless require serious attention for the overall integrity of the charity regulation framework.

The chapter begins by considering the introduction of a new legal form for charities, the Charitable Incorporated Organisation (‘CIO’), before moving on to consider the current plight of s. 167 institutions and cross-jurisdictional cooperation on charity regulation, the possibilities for delegation of Commission powers to Commission staff and other technical issues raised by respondents with the Review Panel.

2. Charitable Incorporated Organisations

2.1. What is a CIO?

Part 11 of the Charities Act (NI) 2008 (the 2008 Act) provides for the creation of a new legal structure for charities in NI – the Charitable Incorporated Organisation (‘CIO’). As its name suggests, a CIO provides an incorporated structure to a charity, giving it the benefit of certain characteristics typically associated with a corporate legal structure, namely, limited liability²⁵⁵ and separate legal personality.²⁵⁶ Unlike a company limited by guarantee – which is the traditional form that charitable companies in NI take -- a CIO is subject to regulation by the

²⁵⁵Limited liability is a form of legal protection for members of a company that prevents individuals from being held personally responsible for their company’s debts or financial losses. In a typical company limited by guarantee, members are legally responsible for the debts of company only to the extent of the nominal value of their guarantee – traditionally as low as £1.

²⁵⁶Separate legal personality means that a company has a legal distinct existence of its own and is independent of its members. Creditors of a company can recover their money only from the company and the property of the company. They cannot sue individual members.

Charity Commission only and is not regulated by either company law or Companies House. Part 11 of the Act has not yet been commenced and would require the Department for Communities (the Department) to enact enabling regulations under s. 122 of the 2008 Act. Upon passage, it would also require the Charity Commission to assume responsibility for accepting such applications for CIO status as part of the registration process for new charities and dealing with additional applications from existing charities to convert to the CIO legal form.

The Review's Terms of Reference (TOR) specifically ask the Panel to consider Part 11 of the 2008 Act in the context of the Department's role and responsibility for the development of the regulatory framework.

2.2 The Advantages of a CIO

The CIO legal structure which, as noted below, has been in force in Scotland since 2011 and in England and Wales since 2013, provides several attractive benefits to new or existing charities that choose it as their legal form. Firstly, it eliminates the burden of dual regulation since, upon registration as a CIO with the Commission, it gives charities the benefit of incorporation without the need to additionally register with or report to Companies House. This may make it easier to set up and register a new charity. According to respondents, volunteers are

more willing to serve as charity trustees when they have the legal protection offered by the corporate form. Use of the CIO legal form also reduces the regulatory burden, particularly on smaller charities as these charities will have the benefit of limited liability without the burden of having to file with two regulators, namely the Commission and Companies House.

The second major attraction of the CIO form for smaller charities is that it is possible to apply a simpler reporting framework to CIOs (which are only regulated by charity law) than currently exists for charitable companies limited by guarantee (which must satisfy both company law and charity law). In England and Wales and in Scotland, CIOs may opt to prepare receipts and payments accounts if their gross income is less than £250,000. This is a less onerous reporting format than the SORP-compliant accruals accounts usually required from all charitable companies, regardless of their income levels.

The CIO is not suitable for every charity. Experience in other jurisdictions has shown that this structure is most beneficial for small to medium sized charities which employ staff or enter contracts. Some of the disadvantages of the CIO structure include that:

- a CIO does not come into existence, and by definition cannot start operations, until the Commission has registered it and its existence is

dependent upon it maintaining its charitable status;

- all CIOs must submit an annual return and accounts to the Commission, regardless of the income of the CIO. This means that if the Minister were to adopt some of the Panel's recommendations on reporting requirements in Chapter 6, the exemption from filing accounts would not apply to CIOs, even if their income levels were low;
- CIOs also need to register amendments to their constitutions with the Commission before they are implemented and would require prior consent for some amendments;
- once constituted as a CIO, there is currently no means of converting to any other legal form in jurisdictions where this legal form exists; and finally,
- corporate insolvency law would apply to CIOs just as it does to limited companies.

2.3 Comparative Experiences of CIOs

The CIO structure currently exists in both England and Wales and in Scotland (where it is known as an 'SCIO'), and it has proved particularly popular with smaller charities. In Scotland, the framework for SCIOs was set out in the Charities and Trustee Investment (Scotland) Act 2005 and with the passage of the Scottish Charitable Incorporated Organisations

Regulations 2011, newly established Scottish charities were able to apply to register as a SCIO or existing charities could apply to convert to a SCIO on a staggered basis (beginning with unincorporated charitable associations and trusts in 2011 and extending to charitable companies and Industrial and Provident Societies from 1 January 2012). In September 2021, there were 5,247 SCIOs registered on the Office of the Scottish Charity Regulator's (OSCR) Charity Register, accounting for approximately 20% of all registered charities in Scotland.

The legal framework for CIOs in England and Wales is set out in the Charities Act 2011 and regulations enabling their establishment were first introduced under the Charitable Incorporated Organisations (General) Regulations 2012. Charitable companies limited by guarantee that wish to re-register as CIOs were provided with a mechanism to do so under the Charitable Incorporated Organisations (Conversion) Regulations 2017 so there was a longer lead-in time in England and Wales before charitable companies were given the opportunity to convert to a CIO than was the case in Scotland. According to the Charity Commission for England and Wales (CCEW), there were approximately 17,000 CIOs on the CCEW Charity Register in May 2021.

In its meetings with both CCEW and OSCR, the Review Panel heard that the CIO, while a welcome addition to the suite of

legal forms available to charities in both jurisdictions, is not a panacea and like every legal form, creates its own regulatory difficulties. The Panel noted however the offer of both Regulators to share with the Commission and the Department their respective experiences of drafting and implementing CIO regulations and to offer advice on avoiding regulatory pitfalls. To this end, the Panel recommends that the expertise of both CCEW and OSCR be sought on the roll out of CIOs in NI.

Recommendation 84: The Department for Communities advance, as a matter of priority, the necessary regulations to give effect to Part 11 of the Charities Act (NI) 2008. The Panel also recommends that staggering the availability of this legal form so that priority is given firstly to those unincorporated charities on the combined list awaiting charity registration, then to unincorporated registered charities who wish to convert to a CIO, before extending consideration to incorporated charities who wish to convert to a CIO (and again, prioritising those incorporated entities on the combined list awaiting call forward for registration).

The Panel is mindful that the introduction of the CIO form will require the Commission to devote some time and energy to setting out registration and conversion procedures and a reallocation of tasks between Commission staff may

be required to accommodate the processing of this new legal form. Notwithstanding this observation, the Panel is reassured by the experiences of both OSCR and CCEW that the introduction of the CIO should not overwhelm the capacity of the Regulator to deliver on its statutory functions.

While the Commission does not speak directly to the issue of the implementation of the CIO in either of its submissions to the Review, a more general concern was expressed in meetings with the Panel, on the commencement of any new statutory Commission responsibilities without a commensurate increase in its resources.

2.4 What we heard from respondents

When consulted upon the need for the CIO provisions in the 2008 Act to be commenced, respondents at both our community webinars and in our online questionnaire were predominantly in favour of the CIOs' urgent introduction. Just over half (52%) of respondents felt that the commencement of provisions relating to CIOs is a matter that the Department should prioritise. It is worth noting that if 'no view' responses are excluded, then of those who did have a view, 94% said it should be a priority. In the words of one respondent:

“We understand that the Commission has limited resources, but the introduction of the CIO is very much needed. Charities are

converting from unincorporated associations into companies ltd by guarantee to benefit from the limited liability aspect of the company. They are doing this without fully realising that companies have to prepare accrual accounts that then must comply with the charities SORP.” ID 117

Another respondent noted that:

“Many charities have been forced down the route of registering as a Limited Company to provide some protection for Trustees.” ID 4

Of those who responded to the question whether they would avail of the CIO structure if it were introduced, 57% affirmed that they would do so.

2.5 Analysis

Given the strictures of the current registration process and the strong calls by stakeholders for the introduction of the CIO legal form, the Panel believes that the commencement of Part 11 of the 2008 Act enabling its introduction would improve the charity registration and regulatory experience and reduce some of the bureaucracy that smaller incorporated charities experience.

Drawing on the experience of the CIO’s introduction in both Scotland and England and Wales, the Panel notes that in both instances the roll out of this new legal form occurred on a staggered basis. To spread the workload for OSCR, existing charitable companies and industrial and provident societies were unable to convert to SCIOs until 2012; other forms of charity in Scotland were able to apply from April 2011. Implementation in England and Wales has likewise been phased, starting in 2013 with brand new charities, followed by conversions of existing unincorporated charities according to income, and then followed by charitable companies.

The staggered approach to conversions also starts with those organisations most legally vulnerable that do not currently have the protection of limited liability – namely the conversion of unincorporated associations or trusts – before making the benefit of the CIO legal form available to charitable companies. To the Panel’s mind, in a time of limited resources and capacity, such a staggered approach to the introduction of CIOs in NI has much to recommend it. Given the learning other regulators have on this and other matters relating to CIOs the Panel recommends that the Department and Commission take up the offer of assistance and experience sharing from them.

Recommendation 85: That the Department for Communities and the Commission take up the offers of assistance from both CCEW and OSCR to share experience on drafting CIO regulations as well as operational insights in managing their registration and regulatory oversight.

3. Section 167 Institutions

Up until 2006, the only UK regulator of charities was the CCEW. In Scotland and in NI, HMRC was the de facto default regulator of those charities that obtained charitable tax exemption. The introduction of the Charities Trustees and Investment (Scotland) Act 2006 which established OSCR and a Scottish charity test, which was different to the English charity test, meant that when English and Welsh charities were required to register with the Scottish regulator, this often required them to amend their charity constitutions to meet Scottish law requirements in a way that caused conflict for CCEW. Over time, CCEW and OSCR have developed a Memorandum of Understanding to help resolve these issues, making the CCEW the lead regulator for many charities established in England and Wales but operating in Scotland.²⁵⁷

3.1. Rationale for Section 167

When the 2008 Act was passed and it too had a slightly different charity test to that of England and Wales, on the advice of the CCEW, a legislative decision was made to try to avoid the issues that had arisen between Scotland and England because of the differing charity tests. The 2008 Act (like its English counterpart Acts of 2006 and 2011) provides only for the registration of ‘charitable institutions’ that are established in NI and operating under the jurisdiction of the NI High Court. The 2008 Act supplements this approach by providing a second avenue of recognition for charities established elsewhere that are operating in NI. The objective of this approach was to avoid the necessity of the Commission having to further scrutinise the constitutions of charities registered elsewhere to seek compliance with the NI charity test prior to registration on a parallel register. In essence, the legislative solution envisaged by s.167 of the 2008 Act was to allow for the uncontested registration of non-NI established charities operating for charitable purposes in NI on a separate register and to impose certain reporting duties upon them. The commencement of this section is dependent upon the Department making regulations under s. 167(5) as to the registration and regulation of these s.167 institutions.

²⁵⁷ It should be noted that as part of its current charity law reform consultation, the Scottish government is considering whether charities that are not established in Scotland should continue to be eligible for registration on the Scottish Charities Register or whether all charities in the Scottish register should be required to ‘have and retain a connection with Scotland’ and whether this should require a physical presence in Scotland, such as an office address or trustee address.

To date, s.167 has not been commenced. There are over 500 organisations on the Charity Commission’s Combined List that fit this category and are waiting to be called forward for registration. The lack of progress on commencement of this section and the lack of clarity on what would be required of such charities upon commencement has caused understandable concern and uncertainty amongst affected charities, many of whom shared their views with the Panel at the community webinars and through the online questionnaire. The Charity Commission also shared concerns over the workability of the s.167, as currently drafted.

3.2. Terms of Reference

The Terms of Reference specifically ask the Panel to consider whether the requirements envisaged for s. 167 institutions are fit for purpose and to formally explore the related issue of how statutory cooperation with charity regulators in neighbouring jurisdictions can be strengthened. In pursuit of these ends, the Panel met with representatives of the Irish Charities Regulatory Authority (CRA), OSCR and the CCEW as well as representatives of the Charity Commission for NI. There is good working engagement between the Chief Executives and senior management teams of each of these regulators.

Memoranda of Understanding (MOU) governing cooperation already exist between the Commission and its counterparts in both OSCR and CCEW. A draft MOU between the Commission and the Irish CRA was initially delayed until the passage in Ireland of the Charities Act 2009 (Section 34) Regulations 2017²⁵⁸ and has since been further delayed due to the UK leaving the European Union. Ireland, which requires all charities (regardless of place of establishment) that are active in the state to register with the CRA, counts 21 NI charities on its Charities Register. In Scotland, the number of NI established charities registered with OSCR stands at 2. In England, the CCEW only registers charities that are established in England and Wales and are operating under the jurisdiction of the English High Court; presently, England does not have a s.167 equivalent in its charity legislation.

In addition to MOUs governing administrative cooperation, the various charity regulators (again at Chief Executive and SMT level) meet every 18 months for the International Charity Regulators Forum and more often for the UK and Irish Charity Regulators’ Forum. This sharing of peer learning and problems is a valuable exercise and is to be commended.

The Panel believes that where a government unit with responsibility for charities can be identified (e.g., the Irish

²⁵⁸ S.I. No. 587/2017.

Department for Rural and Community Development or in Scotland, the Third Sector and Public Bodies Unit in the Scottish Government or the Department for Digital Culture Media & Sport at Westminster), the Department, with its clear legislative and policy remit, must actively cultivate a peer network with the relevant officials within these units to ensure broader discussion of shared charity law policy regulation issues.

3.3. What we heard

Attendees at the Review’s community webinars and respondents to the online questionnaire raised concerns over the non-commencement of s.167. The predominant concerns related to frustration over the non-commencement of s.167, coupled with fears of onerous reporting requirements being placed on s.167 charities if the section were to be commenced. These concerns were in addition to concerns raised by the Commission itself on the workability of s.167 in its current form.

On the issue of non-commencement of s.167, the Panel heard of the consequent inability of charities established outside NI but active in NI to be recognised by the Commission and the effect that such lack of registration caused for their activities in NI in terms of public recognition and full access to funders. One respondent noted:

“Currently, section 167 charities can be excluded from or face a disproportionate administrative burden in accessing Northern Ireland specific funding streams. The public perception of section 167 charities operating in Northern Ireland without a charity number is also affected. It damages public trust with members of the public questioning whether money raised in Northern Ireland is invested in services and support for people in Northern Ireland.” ID 126

It was also noted that NI donors and consumers need the protection of s.167 oversight of external charities. Webinar attendees relayed that if customers don’t see a NI charity number in charity shops, they believe the money isn’t being spent in NI, which is not the case.

With regards to burdensome regulation, attendees at the lawyers’ webinar shared that there is anxiety among s.167 charities because they are concerned that they will need to do a large amount of additional work if regulators do not work together. More general concerns were raised by other stakeholders over the possibility of excessively onerous reporting requirements being made of s.167 charities (which are often subject to full regulation in another jurisdiction) if s.167 was to be commenced in its current form. Webinar attendees also made a plea for greater cooperation between charity regulators and the adoption of a more

communicative approach towards s.167 institutions currently awaiting registration, many of whom felt frustration at the lack of progress in this area.

Over a quarter (28%) of respondents felt that the commencement of s.167 is a matter that the Department should prioritise. However, just over three-fifths (61%) of respondents had no view on this matter. If the ‘no view’ responses are excluded, then of those who did have a view 73% said it should be a priority.

3.4. Is s.167 fit for purpose?

The Panel believes that the current wording of s.167 renders the section unfit for purpose for the reasons set out below;

a) The meaning of “Institutions which are not charities”

Section 167 applies to “any institution which is not a charity under the law of Northern Ireland, but which operates for charitable purposes in or from Northern Ireland.” Neither the word ‘institution’ nor the word ‘operates’ are defined in this context by the 2008 Act itself. Both matters were flagged as issues of concern by the Commission in its first submission to the Review Panel.

An immediate issue arises in that as currently phrased, any non-charitable institution established outside NI could apply to the Charity Commission under s.

167 for registration if it was operating for charitable purposes in NI. In the words of the Commission:

“This could result in the Commission being required to register any organisation, whether charitable or not and from any part of the world, that undertakes any work to advance a charitable purpose in Northern Ireland, even as part of a mixed purpose.”²⁵⁹

The section does not expressly require an applicant to be registered with and subject to the full scrutiny of a charity regulator in another jurisdiction to justify the lighter touch registration process that would otherwise flow from s.167.

It is possible that this broad and nebulous wording flowed from an attempt to ensure that exempt charities in England and Wales would not be excluded from the possibility of registering under s.167. As previously discussed in Chapter 5, such charities are not registered with or subject to the control of CCEW. However, departmental records pertaining to the drafting of the 2008 Act and its legislative intention have been lost over time and were not available to the Panel for review.

The Panel believes that the scope of s.167 should be redrafted to better define those charitable institutions that fall within its remit. To this end, the Panel recommends that the Department should make prior

²⁵⁹Charity Commission for NI, First Submission to the Review Panel, at p. 40.

registration with a charity regulator in another jurisdiction a pre-condition to applying for registration under s. 167. This amendment would ensure that any charity applying for s.167 registration was already subject to regulatory scrutiny elsewhere in the context of charity regulation. The compromise offered by s.167 in the Commission's acceptance of a 'foreign' charity's constitution without requiring further amendment to the charitable objects clause to align with the wording of the 2008 Act should be dependent upon the Commission's relationships of trust and confidence in other charity regulators with whom it enjoys good working relationships.

To further bolster the basis for this compromise upon which s.167 operates, the Panel also recommends that in the accompanying regulations to s.167 the Department should name those regulators with whom the Charity Commission enjoys such relationships of mutual trust and cooperation that justify the simplified s. 167 registration process. In instances of applications from foreign charities regulated by other charity regulators not identified in the regulations, the regulations should give the Commission leeway to carry out greater due diligence in reviewing these applications on a case-by-case basis before admitting these charities to the s.167 Register.

Recommendation 86: The Department for Communities should commence s.167 when it has completed the following tasks:

- reviewed and amended the language of s.167 to clarify the organisations that fall within its remit and the scope of activities that may trigger a requirement to register;
- make prior registration with a charity regulator in another jurisdiction a pre-condition to applying for registration under s.167;
- amend the regulations to s.167 to name the regulators to whom the amended regulation applies;
- consider how the regulations can give leeway to the Commission to carry out greater due diligence, on a case-by-case basis, to consider applications from foreign charities primarily regulated by regulators not named in the legislation before admitting these charities to the s.167 register;
- consider how to revise the wording so there is a better definition of the issues s.167 is intended to prevent.

b) The meaning of 'operating'

The meaning and scope of the term 'operating' in s.167 is also unclear. While operating is defined by reference to 'charitable purposes' (which in turn are defined by s.2(2) of the 2008 Act), s.167(1)(b) contextualises those operations as being either 'in or from Northern Ireland.'

This would conceivably allow an organisation engaged in non-charitable activities or a for-profit organisation established elsewhere, which as part of its activities carries out purposes meeting s.2(2) of the 2008 Act ‘in or from NI’ to fall within s.167. Given that the commencement of s.167 would presumably impose an obligation on the charity trustees of such institutions to apply for registration, clarity as to the threshold for triggering the operations requirement would also be welcome. Does operating pertain to substantive ongoing charitable activity or would ad hoc activities or once-off activities be covered? What if an institution engages in a fundraising campaign or owns or occupies property in NI – does this constitute ‘operating’ for the purposes of s.167, thereby requiring an institution to apply to the Commission for registration? In the words of one respondent who expressed a general sense of uncertainty and lack of clarity as to what was expected of them under s.167, particularly noting:

“There was some confusion as to what would count as a charitable operation here in Northern Ireland given that some UK charities simply fundraise here or perhaps have a single staff member working here remotely but as part of a London-based team.” ID 136

While the motivation for s.167’s introduction may have been driven by a desire to appease charitable institutions established in England and Wales but operating in or from NI, the language of s.167 cannot be interpreted in a narrow fashion to limit its application to such institutions, whether registered or not with CCEW. Nor necessarily should a provision receive such a narrow interpretation so as to rule out charities established in other jurisdictions – whether in the Republic of Ireland, the EU or further afield – that are carrying out charitable activities in NI from being required to register and subject to the supervision of the Commission when operating for charitable purposes in NI.

The Panel recommends that the Department should revisit the wording of s.167 and revise it, whether by way of better definition or further amendment as to scope so that the legislative intention is more clearly articulated and the issues which s.167 is intended to prevent is better captured than the current provisions allow. The Department should also consult with the Commission on whether there should be a de minimis threshold of operations below which either the Commission should be able to refuse a s.167 registration request, or a prospective applicant would know that registration was not legally required (but might be optionally sought) because of its limited activity in NI. The Panel points to de minimis thresholds which currently

exist in Scottish and Irish legislation to this effect.²⁶⁰

The Panel appreciates the frustration of charities affected by the non-commencement of s.167 and recommends that the Department should consult all relevant stakeholders in its revisions of the language of s.167 to ensure that the nature and extent of reporting requirements and the consequent enforcement powers of the Commission are clearly articulated in the legislation and the associated statutory regulations, as appropriate and makes the following recommendations:

Recommendation 87: The Department for Communities consult with the Commission on whether there should be a de minimis threshold of operations below which either the Commission should be able to refuse a s.167 registration request, or a prospective applicant would know that registration was not legally required (but might be optionally sought) because of its limited activity in NI.

Recommendation 88: The Department for Communities should consult with stakeholders regarding revision of language in s.167 and the regulations to ensure reporting requirements and enforcement powers are clearly articulated.

c) The Nature of Reporting required of s.167 Institutions

Webinar respondents drew the Panel's attention to their concerns over the mandatory nature of the reporting required for s.167 institutions. Section 167(3) provides:

“The trustees of a section 167 institution shall prepare in respect of each financial year of the institution—

- a) a financial statement, and
- b) a statement of activities,

relating to its operations for charitable purposes in or from Northern Ireland”

As currently drafted, this subsection would require these institutions to prepare two separate financial statements – one for their lead regulator and a separate NI specific statement for the Charity Commission. The rationale for the requirement of NI specific accounts is not entirely clear to the Panel. Deciphering the legislative intent is further hindered by the fact that in circa 2015 the Department for Social Development (DSD) conducted a file destruction exercise when hundreds of thousands of files were destroyed. Some charities files relating to the 2008 Act were destroyed in error during this exercise. However, in a briefing to the Communities Committee in December 2020, the Department advised that the

²⁶⁰See in Scotland The Charities and Trustee Investment (Scotland) Act 2005, s.14; see in Ireland the Charities Act 2009, s. 46(6). See further, Oonagh B. Breen, Patrick Ford and Gareth G. Morgan, “Cross-Border Issues in the Regulation of Charities: Experiences from UK and Ireland” (2009) 11(3) International Journal of Not-for-Profit Law 5-41.

purpose of s.167 “is to enable applicable institutions to register with CCNI on a separate register of ‘167 institutions’ and be subject to a ‘lighter touch’ regulatory framework to be determined through future legislation.” ²⁶¹

Many of the respondents who raised the regulatory requirements of s.167 sought assurance that such a light touch approach would be adopted. Some respondents, particularly English charities suggested that the Commission should accept a copy of the accounts already prepared for the CCEW, which is currently acceptable to OSCR. In the words of one respondent:

“In considering the Section 167 register, reporting requirements should take into account the reporting requirements of the other charity regulators in the UK and Ireland. Reporting requirements should not be onerous, avoid duplication or put a disproportionate administrative burden on charities. This could be helped by early engagement with Section 167 charities.”
ID 126

Another respondent suggested:

“Having to submit separate NI accounts would be extremely challenging as we currently submit a consolidated report to CCEW and OSCR as a large charity with operations in 4 countries. The wording of s.167 should be amended to ensure that purely NI accounts would not be required.”
ID 116

Other respondents, however, thought that there was merit to there being a requirement to account for charity services actually delivered in NI, with an attendee at the accountants’ community webinar telling the Panel that “in terms of NI services: s167 should be NI activity only, so we know what is actually provided here.”

The Panel believes that the starting question here should be the purpose of the reporting requested and the use the Commission will make of it. If s.167 is a ‘recognition’ mechanism that allows charities operating under the auspices of a specified lead charity regulator elsewhere to which the Commission defers on most regulatory matters relating to that charity, then the need for reports that differ greatly from those already filed with the lead regulator may be less. If, on the other hand, the Commission is expected to play a proactive role in the regulation of these ‘foreign’ charities in NI, then it may have specific information requirements that differ from the information supplied already to other regulators.

At present, the wording of s.167(3) points to the preparation of bespoke financial returns that speak to the impact of its charitable purpose and activities in NI. In comparative terms, both approaches exist – OSCR allows charities established in England and Wales and registered with

²⁶¹Department for Communities, Part input for briefing to the Communities Committee on Section 167 Institutions (December 2020).

OSCR in Scotland to provide OSCR with a copy of the accounts submitted to CCEW. On the other hand, the CRA requires all charities active in the Republic of Ireland to be registered and to comply with the full ambit of Irish charity accounting regulations. The Minister therefore has a policy decision to make about both the purpose of s.167 registration and the legislative requirements necessary to give effect to this purpose. Is the aim simply to protect the public in their engagements with all charities operating in NI (wheresoever established), thus fulfilling the public trust and confidence objective, whereby the Commission alerts a lead regulator elsewhere to issues arising with the charity should investigation be necessary? Or, does it go further and require those s.167 institutions to be able to fully articulate the benefit of their charitable activities within the territory of NI, as opposed to more general benefit elsewhere so that the Commission can effectively regulate them within NI itself?

Beyond financial reporting requirements, the Regulations will need to be clear on the extent to which the Charity Commission will be able to exercise its other powers against s.167 institutions and whether a light touch regulatory approach is envisaged (and if so, its intended nature) or whether s.167 institutions will be subject to the same scrutiny as charities established in NI except for the fact that they sit on a parallel register to the Charities Register

under the 2008 Act. Submissions to the Review indicate that while respondents view s.167 as unfit for purpose in its current form, the Department should engage with stakeholders when it moves to amend and commence this section in the future. As one respondent noted:

“Until CCNI confirm what processes including reporting will be required for section 167 charities, then we cannot be sure what exactly the challenges may be, but there are concerns around possibility [sic] requiring separate accounts for each nation and multiple annual reporting systems.” ID 128

Similarly, another commented:

“the delay in implementing s.167 is confusing and difficult for UK-wide charities that typically have their main jurisdiction in E&W and are also registered with OSCR but which have no formal charitable status in NI. However, the details of s.167 registration and the associated reporting requirements need further consultation.” ID 15

The Panel therefore recommends that the Department consider further and clarify the purpose of regulation under s.167 and in conjunction with relevant stakeholders assess the necessary and proportionate reporting requirements to be made of charities along with a clearer articulation of the policies around regulation of these entities in NI in terms of the statutory powers available to the Commission in its

oversight and the statutory duties imposed upon it in light of maintaining public confidence in the operation of the sector as a whole.

Recommendation 89: The Department for Communities should consider further and clarify the purpose of regulation under s.167 and, in conjunction with stakeholders, assess necessary and proportionate reporting requirements, clear articulation of policy regarding regulation of s.167 charities in terms of powers available to the Commission to maintain public confidence in the operation of the sector as a whole.

4. Delegation Powers

4.1. The Context for Delegation

The Review Terms of Reference ask the Panel to consider options for the configuration of a statutory regulatory body. This matter has increased significance given the 2019 findings of the High Court in *McKee v The Charity Commission for Northern Ireland*, which were subsequently affirmed on appeal by the Northern Ireland Court of Appeal in 2020. The *McKee* case found that the Commission had no express or implied power to delegate its functions to staff. While the 2008 Act contained a specific provision permitting the Commission to employ staff,²⁶² it did not include an

explicit provision allowing for Commission functions to be performed by those staff. In this regard, NI law differs from the charities law in England & Wales,²⁶³ Scotland²⁶⁴ and the Republic of Ireland.²⁶⁵ Each of these jurisdictions makes explicit provision in their respective legislation, allowing staff to deliver the functions of the charity regulator. The impact of the Court's finding in *McKee* was to make around 7,500 orders, directions and decisions taken by Commission staff unlawful and prevent Commission staff from performing functions under current legislation.

The Panel has reviewed the 2004 Report of the NI Charities Advisory Panel, a multi-stakeholder panel convened by DSD to consider the advantages and disadvantages relating to the establishment of a Charity Commission, amongst other matters. The 2004 Report considered several structural models for the then proposed Charity Commission, based on an assessment of the structures in place in OSCR, CCEW and OFREG in NI. These models were further considered and re-costed by DSD before being whittled down to the Commission structure which ultimately found acceptance in the 2008 Act. As part of its review process, the Panel considered the existing workings of the Commission and its relationship to the Department

²⁶² Charities Act (NI) 2008, Schedule 1, s.4.

²⁶³ See Charities Act 2006 (as passed), Sch.1 para. 8.

²⁶⁴ See Charities and Trustee Investment (Scotland) Act 2005, Schedule 1, para. 6.

²⁶⁵ Charities Act 2009, s.14(4) and s.21.

(discussed in Chapter 9). Conscious of the parallel intention of the Department to introduce amending legislation during the course of the independent review process, the Panel sought the views of respondents on whether it is appropriate in the first instance to delegate some decision making powers to Commission staff and if so what types of decisions should be delegated and what type of decisions should be reserved to the Commissioners themselves.

4.2. What we heard

Four-fifths of respondents (80%) believed that it was appropriate to delegate some decisions to Commission staff with the vast majority (86%) of respondents agreeing that decisions that are more administrative in nature, such as charity registration or the making of schemes, could be generally delegated to Commission staff, as is the case in other jurisdictions. Comments in favour ranged from the detailed:

“it is appropriate that the Commission should have an express statutory power of delegation equivalent to the Charity Regulators in [other] jurisdictions. Decisions that should be retained by the Commissioners could include when a statutory inquiry is opened, suspension or removal of a trustee and appointment of an interim manager. Delegated decisions could include those of a more

administrative or routine nature including more straightforward and less contentious operational matters.” ID 134

to the concise:

“It is not practical for every decision to go to the Commissioners, there needs to be a balance and if the staff are well trained and competent with sufficient oversight then delegation should work well.” ID 66

to the more nuanced comment that:

“A broad power of delegation is needed. However, the CCNI board will need to set detailed parameters on how this works, so that major decisions are taken by the board. But better to leave the details to the board rather than writing into legislation.” ID 15

A minority of respondents (11%) opposed delegation to Commission staff. One organisation said that:

“the reason why other jurisdictions are permitted to delegate responsibilities to their staff, is because the staff are specifically trained to carry out these duties, something which staff within the Charity Commission are not required to have.” ID 7

The current intention of the Department, as expressed in its Charities Bill 2021 is to amend the 2008 Act to explicitly allow for Commission functions to be delegated to Commission staff. It further requires this

delegation to operate within a Scheme of Delegation, as developed by the Department. In this context, a Scheme of Delegation may detail what functions can be delegated, and the specific staff to whom these may be delegated.²⁶⁶ The majority of respondents supported this proposed approach, subject to the important caveat that the Department actively maintain the Scheme of Delegation over time, by relevant revision or amendment, as necessary. The broad thrust of what were seen as acceptable matters for delegation were described as administrative matters, although some respondents urged that there be great clarity as to what constituted a delegated matter in the Scheme to avoid uncertainty in application. There was general consensus that if a matter affected the reputation of a charity, or individual trustees, then decisions relating to that matter should be reserved to the Commissioners for decision. In the words of one respondent:

“I would expect major decisions with serious consequences to third parties to still be made or vetted by the Commissioners or a relevant sub-committee, in particular,

- initiating Investigations and appointing external investigators,

- Appointing Interim Managers
- Removing or suspending trustees
- Issuing press releases or press contact where individuals are criticised
- Publishing Interim Reports
- [there may be others].” ID 121

4.3. Comparative Analysis

The Review considered the delegation practices in Scotland, Ireland, England and Wales, New Zealand and Australia. A common feature in all these jurisdictions was the existence of an express power to delegate specific or general functions to the Chief Executive and staff of the Regulator. The Panel noted that in the Australian Charity Law Review (2018), the Australian McClure Commission recommended a broader power of delegation be granted to the Australian Charities and Not-for-Profit Commission (‘ACNC’), a recommendation which the Australian Federal Government accepted in its 2020 response to that report.²⁶⁷

In the case of New Zealand, delegation is authorised by statute but power is given to the Board to best decide when delegation is the most effective route to fulfilling its statutory functions. Under s.9 of the NZ Charities Act 2005, as amended,²⁶⁸ the Board must not make a delegation unless

²⁶⁶Art. 9A (3) and (4) of the 2008 Act, as drafted by clause 2 of the Charities Bill as introduced.

²⁶⁷Australian Government, Strengthening for Purpose: Australian Charities and Not-for-Profits Commission Legislation Review, 2018 (hereinafter ‘The McClure Commission’); Government Response to The Australian Charities and Not-For-Profits Commission Legislation Review 2018 (6 March 2020).

²⁶⁸New Zealand Charities Act 2005, s.9, as amended by Charities Amendment Act (No 2) 2012, s.7 and by the Public Service Act 2020, s.135.

satisfied that the delegation is consistent with s.8(5) of the 2005 Act which requires that the Board itself “consider whether it could most efficiently and effectively perform or exercise any functions, duties, or powers itself or by delegating the functions, duties, or powers to the chief executive or some other person under section 9.” The New Zealand legislation provides an interesting approach which places delegation on a statutory footing while simultaneously providing the Board of the NZ Regulator with some autonomy as to the nature of the decision-making powers delegated to staff.

In England and Wales, the CCEW’s governance framework²⁶⁹ sets out the three tiered approach to decision making within the CCEW, with a limited number of specified matters reserved to the Commission (comprising the Commissioners), followed by decisions made by the ‘Board’ (which is the Commission, plus the Chief Executive) which is responsible for delivering specific functions relating to strategic management of the Commission and its business, and finally then the Chief Executive and her staff who are largely responsible for the many operational decisions, including casework decisions, made by the Commission. These matters

are set out in an appendix entitled Levels of delegated authority,²⁷⁰ which tables the matters reserved to both the Commission and the Board and notes that “The majority of operational decisions are delegated to the Chief Executive, in line with his or her responsibilities for managing the organisation in accordance with the strategic, planning and budgetary parameters and risk management strategy, as approved by the Board. The Commission’s quasi-judicial powers are delegated by the Commission through the Chief Executive to the Executive Leadership Team (ELT) and staff designated as duly authorised members of staff of the Commission (in accordance with current statute).”²⁷¹

Two further points for consideration arise. The first relates to the fact that the Commission still does not exercise the full decision making powers intended by the 2008 Act. Part 7 of the 2008 Act on Charity Land has not yet been commenced and the powers relating to consents to disposals of land which must be sought by charities in certain instances are still made to the Department and not to the Commission. In its first submission to the Review the Commission noted that it currently does not have the capacity/ resources to take this area of work forward.

²⁶⁹See <https://www.gov.uk/government/publications/charity-commission-governance-framework/governance-framework>.

²⁷⁰See <https://www.gov.uk/government/publications/charity-commission-governance-framework/appendix-3-levels-of-delegated-authority>.

²⁷¹Ibid.

A second point which feeds more directly into the balancing of decision-making power between the Commissioners and the Commission staff relates to the skill set of the Board. As previously raised in Chapter 9, it is the statutory responsibility of the Minister to appoint suitably qualified individuals to the Board of Commissioners. With a Board capped at 7 Commissioners, the Commission is comparable in size to OSCR's Board (6 members) and CCEW (8 members) but significantly smaller than the CRA's Board of 11. If regulatory decisions of significance are to be reserved to the Commission on an ongoing basis, there is clearly a need to revisit the appointment criteria for Commissioners in terms of their expertise and sector knowledge, not only in light of their reserved functions but also in light of the proposed internal review function that Commissioners will need to serve in an effective system of Commission case management that provides hearing routes to resolve matters with affected parties without the automatic need to escalate a case to a Tribunal hearing.

4.4. Panel Analysis

The Panel believes that delegation of decision-making to staff is supported on both practical and professional grounds. On the practical front, the Commissioners are part-time appointees who are tasked with overseeing the strategy and governance of the Commission, as previously discussed in Chapter 9.

They retain responsibility for the Commission's actions and have, since the 2019 decision in *McKee*, undertaken the decision-making role of the Commission by way of Schedule 1 Committees. However, there is no reason why with an appropriate and regularly reviewed Schedule of Delegation to suitably trained and experienced staff, that Commission staff cannot once more undertake operational decisions of a more administrative nature in a way that is beneficial to all in terms of both efficiency and effectiveness.

Over the past decade, the Commission has built up its institutional knowledge in the fields of registration, annual reporting and compliance. The ability of staff to take decisions in these areas would be in line with staff counterparts in other common law regulators. These operational decisions by their very nature often involve senior members of Commission staff or depending on the nature of the application, the advice of the Commission's legal team, thereby providing a further sounding base. Having operational decisions of this nature made by staff further enables internal review by a higher echelon within the Commission, whether senior team officials or the Commissioners themselves.

The introduction of an express delegation power would allow the Commissioners to be more strategic in their involvement in operational decisions. For instance, if

registration issues are normally made by staff under a Scheme of Delegation, were a novel or precedented issue to arise for the first time, the Commissioners could be consulted. This would follow the English regulatory approach which sees CCEW’s Commission reserving to itself “regulatory decisions, and decisions on policy guidance where these are considered to be high risk, high profile, or precedent setting.”²⁷²

A Scheme of Delegation would also reserve to the Commission the decision-making power in opening a statutory inquiry or any other area involving possible reputational damage to a charity. The Review Panel has previously commented in Chapter 8 on the fact that in Scotland and in Ireland, the decision to remove a trustee requires an application by the regulator to court and is not a decision that can be made by the regulator itself. The entrusting of such powers to the Commission in NI follows the English practice in this area where CCEW does hold such powers. To deliver a Scheme of Delegation that is fit for purpose the Panel makes the following recommendations:

Recommendation 90: In line with international best practice, the Department legislate for and develop a Scheme of Delegation allowing Commissioners to be more strategic in their involvement in Commission decisions.

Recommendation 91: The Department consider an approach similar to that for CCEW when drafting a Scheme of Delegation.

In respect of this recommendation, the Panel sees value in the English regulatory approach whereby CCEW can reserve to itself regulatory decisions, and decisions on policy guidance where these are considered to be high risk, high profile, or precedent setting.

Recommendation 92: The following matters be reserved to the Commission:

- decisions relating to suspension or removal of trustees;
- decisions relating to the appointment of an interim manager, and decisions relating to the initiation of statutory inquiries (whether to be conducted by Commission staff or externally appointed investigators);

In respect of this recommendation the Panel believes that, given the knowledge and expertise of staff within the Commission, in all matters reserved to the Commission, Commissioners should enjoy the advice and guidance of staff.

²⁷²See <https://www.gov.uk/government/publications/charity-commission-governance-framework/governance-framework>.

Recommendation 93: The Department for Communities should take note of powers reserved to the Commission and fulfil its statutory responsibility to ensure that suitably qualified individuals are appointed to the Board of the Commission who will have the necessary skill sets and time to properly make the decisions required of them.

5. Other Technical Issues

In its first submission to the Review, the Commission outlined a number of technical issues that it considered essential, extremely beneficial or desirable for review and revision should legislative amendment be otherwise afoot. Many of these issues are prompted by the continued revisions of the English legislation, as a result of the work of the

Law Commission, which have taken place in the time since the passage of the 2008 Act. The consolidation of the Charities Act 2011, coupled with the introduction of the Charities (Protection and Social Investment) Act 2016 and the now proposed Charities Bill 2021²⁷³ have seen a leapfrogging of English charity law to take account of additional CCEW oversight and regulatory powers in its interactions with charities or powers that would allow greater deregulation by CCEW in the interests of greater overall regulatory efficiency and effectiveness. The Panel has addressed the various essential issues raised by the Commission along with a number of the technical issues that the Commission deemed would be extremely beneficial to better charity regulation in the relevant substantive chapters of this report.

²⁷³See Queen's Speech 2021 (Prime Minister's Office, April 2021), p. 121.

Review Panel Conclusion

“Trusting people to be creative and constructive when given more freedom does not imply an overly optimistic belief in the perfectibility of human nature. It is, rather, belief that the inevitable errors and sins of the human condition are far better overcome by individuals working together in an environment of trust and freedom and mutual respect than by individuals working under a multitude of rules, regulations, and restraints imposed upon them by another group of imperfect individuals.”²⁷⁴

An effective register forms the bedrock of a good charity regulation regime. The Panel is strongly of the view that significantly accelerating the pace of registrations is now the urgent and primary task for the Commission. Attending to the task of registration will ultimately enable the Commission to fulfil its other statutory objectives more effectively and give greater visibility to the charity sector in NI. Accelerated registrations in the short term must be accompanied by a more proportionate reporting regime if the Commission is to fulfil its potential as a responsive, effective regulator providing assurance

of well governed charities to its stakeholders and maintaining a regulatory regime in which the public can have confidence.

The Panel believes that the statutory objectives and statutory functions outlined in the 2008 Act remain fit for purpose and does not recommend any change. However, two important legislative flaws have deeply impacted where we are today. Due to a problem with the public benefit test in the original legislation, registration did not actually commence until December 2013 (following necessary legislative amendment) and was preceded by the introduction of investigation and enforcement powers. The February 2020 Court of Appeal decision in *McKee v Charity Commission* had a profound impact on the Commission’s decision-making processes, its reputation and also confidence in the regulatory framework. The Minister is currently seeking to make important legislative changes through the Charities Bill 2021 to rectify this. The Panel has recognised the implications of these historical drafting flaws, their impact on the Commission’s regulatory culture and upon broader trust in the regulatory process.

²⁷⁴Peter Senge, (1985). *The new management: Moving from invention to innovation*. (Boston: Systems Dynamics Group, Sloan School of Management, Massachusetts Institute of Technology). Accessed October 4, 2021, from <http://dspace.mit.edu/bitstream/handle/1721.1/2134/SWP-1754-14372002.pdf?sequence=1>.

We have made many recommendations and all of them are important. However, core to our conclusions is the following:

- Completing the Charities Register and clearing the backlog of applications for registration of charities in NI must be the top priority.
- Not every non-profit is or needs to be a charity. Much good is done by non-profits in our society and greater recognition of the difference between non-profits (which do not need to register) and charities (which do) is important.
- A more proportionate, tiered approach should be adopted to reporting for small charities.
- The introduction of the regulations necessary to enable the creation of Charitable Incorporated Organisations and commencement of a revitalised s.167 would significantly enhance the current legislative framework.
- The Commission's culture must change. It must engage in responsive, targeted regulation. It must become more outward facing, enabling the sector in the task of compliance and working proactively to engage with charities. It must take account of the need for good clear communication and work with the sector to build public confidence in the essential work of charities.
- The Board of Commissioners play a key role in leading the work of the Commission. Their resources are limited

and should be reviewed to ensure they are sufficient.

- There are important powers which must be reserved for the Commissioners.
- The Department plays a critical role in providing the policy framework for the Commission's work and has significant work ahead of it to improve this role.

The Minister will want to consider the type of regulator she wishes to see develop as a result of the Panel's recommendations and also her ability to fund that change. This will require a review of the funding model for the Commission. Not all our recommendations have a resourcing consequence but clearly many do, and the Minister and the Department will want to see a costed and staged plan for their implementation. The Panel would emphasise that early momentum can be achieved and that this will be important to enhance public confidence. The Department should therefore examine the need for short term, interim resources to be provided to the Commission before the current legislation has completed.

The Commission is to be commended for its commitment to improving its processes and this drive should continue. However, questions about the Commission's culture have led us to emphasise a direction of travel for the Commission to engage more in responsive regulation. This self-understanding will place the Commission in a different relationship with the sector,

one which supports, encourages and works with the sector in the first instance. For that to happen the tone of its engagement with the sector will need to be reset. We have therefore recommended that the Commission review its approach to engagement and communication to facilitate better cooperation. The Panel believes the Commissioners should take the lead in setting the tone and direction and seek more relationship building opportunities.

A key question for the Panel was whether or not the Commission, in exercising its powers, has struck the right balance between encouraging charities to do the right thing and deterring misconduct. The Panel believes that the Commission should move towards a truly risk-based assessment system in which proportionate regulation is manifested through a reduction in Commission scrutiny of compliant, particularly smaller charities. We recognise that there are times when the Commission must bring the full weight of its regulatory powers into play. Until that becomes necessary the Commission's focus should be on supporting charities to comply in the context of a clearly set out, escalating approach towards inquiry and enforcement.

The Panel, in the course of its work, received submissions from and met with some stakeholders who have been deeply and negatively impacted through their engagement with the Commission in the

area of enforcement. The new Chief Commissioner took the initiative of engaging Independent Counsel to examine these matters. The Panel has not had sight of Counsel's final report, only an Executive Summary. However, we have recommended that the Commission should report on the implementation of its own Action Plan arising out of Independent Counsel's final report as part of its published Annual Report.

Overall, the role of the Commissioners is vital. In line with international best practice, the Panel recommends that the Department legislate for and develop a Scheme of Delegation allowing Commissioners to be more strategic in their involvement in Commission decisions and that the Department consider an approach similar to that for CCEW when drafting such a Scheme. In terms of the capacity and capability for change to be implemented, the Panel are of the view that the composition of, skills required for, and size of the Board should be reviewed to ensure proper resourcing for the tasks flowing from this report. Turning to the Department it needs to demonstrate to all stakeholders, including the Commission, that it has the skills and expertise to ensure that policy and legislation is developed and kept up to date against best practice.

The Commission has a strong record on operational governance and this is to be commended. However, for a public regulator this of itself is not enough.

It must work to ensure its use of its regulatory powers, its approach and engagement with the sector stands scrutiny against best practice. The Department should therefore review how it measures the Commission's performance so that there is greater focus on outcomes and focus on how the actions of the Commission have contributed substantively to the achievement of its statutory objectives.

In our consultations there was agreement that regulation was necessary for public trust and good governance, and a broad consensus that the regulatory process can be improved. We have said clearly that the Commission must reset its culture. Proportionate and collaborative regulation delivered by an enabling regulator will require a cultural reset by all involved. This Report represents an opportunity for those involved in charity regulation (The Department, the Commission, and the Sector) to set that direction together. It should not be missed.

Terms of Reference - Independent Review of Charity Regulation in NI

1. Background to the review

1.1 The Department for Communities is responsible for the framework of policy and legislation, principally the Charities Act (Northern Ireland) 2008, which constitutes the regulatory regime for charities in NI.

1.2 The Charity Commission for Northern Ireland²⁷⁵ is the statutory body with responsibility for operational decision making in relation to charity regulation. The Commission commenced operation in March 2009. The NI Charity Tribunal is the judicial forum which determines appeals or requests for review of decisions made by The Charity Commission for Northern Ireland (CCNI) in the conduct of its statutory functions. Matters may also be referred to the Charity Tribunal by the Attorney General for NI.

1.3 In February 2020 the NI Court of Appeal upheld Madam Justice McBride's High Court decision of May 2019 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.

This has had a profound impact on the operation of the Commission's decision making processes²⁷⁶ and for charity sector confidence in the regulatory framework.

1.4 In addition to the High Court and Court of Appeal decisions in relation to the legislation governing the operation of the Commission, confidence within the charity sector in the effectiveness of the regulator and the Department's oversight has been negatively impacted by a series of challenges to the proportionality of decision making and communications approach over a number of years.

1.5 It is therefore appropriate to conduct a review of the legal and regulatory framework within which the Commission operates and the Commission's relationships with stakeholders. The review will examine whether the legislation and the Commission's efforts within that legal framework strike the right balance, in light of best practice, between supporting charities to do the right thing and deterring or dealing with misconduct.

²⁷⁵The Charity Commission for NI is a Non – Departmental Public Body sponsored by the Department for Communities.

²⁷⁶It should be noted that from the date of the original judgment the Commission has been taking decisions via a committee led by Commissioners.

The purpose of the review

2.1 The review will focus on learning from past experience in order to inform future development. It will not revisit decisions in individual cases but will examine the legal and regulatory framework. It will make recommendations on changes that can be made to improve the delivery of services and the operation of the Commission going forward.

2.2 In particular the review will consider:

- How the five original objectives and statutory functions have been delivered by the Commission to date and whether they remain fit for purpose;
- How these could be delivered in the most effective manner going forward;
- Whether the Commission's engagement with stakeholders is in accordance with best practice e.g., dealing with concerns raised about charities, decision reviews, complaints handling, FOI procedures etc.
- Whether the regulatory framework envisaged in the Act remains appropriate and is in line with best practice and developments across England and Wales, Scotland and Ireland. To include:
 - Whether all charities should be required to register in NI;
 - Whether the current system of charity registration is fit for purpose, and in addition whether the particular requirements envisaged

for s167 institutions are fit for purpose;

- Whether there are other statutory or non-statutory approaches short of the use of a Statutory Inquiry which could be implemented as part of the regulatory framework to assist with achieving resolution of concerns in relation to charities.
 - Whether there are other statutory or non – statutory approaches which could be implemented to provide the opportunity for independent review of a regulatory decision short of an appeal to the NI Charity Tribunal.
 - How the Department's role in and responsibility for the development of the regulatory framework is informed, delivered and communicated and whether further improvements can be made. The Minister has requested that this include a focus on s167 (charities established outside Northern Ireland operating in the North) and Part 11 of the Act (CIOs) and formal exploration of how statutory cooperation with charity regulators in neighbouring jurisdictions can be strengthened.
 - Some issues may be identified by the Panel that fall outside the scope of the Terms of Reference but affect charity regulation. The Panel should advise of these matters and recommend whether further examination should be undertaken.
-

3. Conduct of the review

- 3.1 It is proposed that Minister appoints a panel of three people (the Panel) to conduct this independent review. Members must be able to demonstrate an understanding of the wider voluntary and community sector and charities in particular. Taken together, the Panel should include expertise and experience of charity law and regulation, legislation, organisational structure, public sector governance and knowledge of the local charities sector. Any private, voluntary, charitable or political interest which may be material to the assignment will rule someone out.
- 3.2 The panel in conducting the review will be informed by submissions from charities and the wider public and through engagement with a number of stakeholders as the Panel decides with appropriate input from the Department and others. These are likely to include the Commission, other regulators in GB and Ireland and representative bodies from the voluntary and community sector to include the Northern Ireland Council for Voluntary Action (NICVA).
- 3.3 The panel will be provided with a small administrative support team to manage correspondence / arrange engagement / consultation etc.

4. Deliverables and timeframe

- 4.1 The Panel will be appointed by end December 2020 and the Review will commence on 25 January 2021.
- 4.2 The Panel will deliver the following outputs:
- i) An interim briefing to the Minister for Communities on the main regulatory themes emerging from public and stakeholder engagement – **by 4 June.**
 - ii) A report setting out an assessment of the delivery of the regulatory framework to date, including the effectiveness of the current regulator in delivering on its agreed objectives and statutory functions; options for optimal charity regulation in NI, including the configuration of a statutory regulatory body; and making final recommendations to be presented to the Minister for Communities - **by 26 July 2021.**

Stakeholder Engagement Meetings

Meeting No.	Stakeholder
1	Department for Communities (DfC) – DfC Governance and Director of Voluntary & Community Division (VCD)
2	DfC Permanent Secretary, Deputy Secretary (Engaged Communities Group) and VCD Director
3	Charity Commission NI, Chief Commissioner
4	DfC Sponsor Team
5	Charity Commission NI – Chief Executive and Head of Charity Services
6	DfC Sponsor Team – former Grade 7 and VCD Director
7	NICVA
8	Edward & Co. Solicitors
9	Robbie Butler MLA along with former and current members of Disabled Police Officers Association of Northern Ireland and Lough Neagh Rescue
10	Irish Charities Regulatory Authority (CRA) - Chief Executive
11	Irish Charities Regulatory Authority (CRA) -Authority Chair and members
12	Charity Commission NI, Board of Commissioners
13	Department of Rural and Community Development, Ireland – Assistant Secretary General for Community Development
14	Charity Commission England and Wales (CCEW) - Interim Chair, Chief Executive and Director of Legal & Accountancy Services
15	Office of the Scottish Charity Regulator (OSCR) - Chief Executive and Interim Chair
16	Scottish Government – Legal Directorate, Senior Policy Officer, Charity Law, Head of Third Sector Unit, Public Sector Reform, Third Sector & Public Bodies Unit
17	Communities Committee
18	Independent regulator of charitable fundraising in England, Wales and Northern Ireland
19	Charity Commission NI - Chief Executive and Chief Commissioner
20	Charity Commission NI - Chief Commissioner

Webinar Attendees

Webinar Date	Organisation ²⁷⁷
Charities in rural areas Monday 12 April 2021 at 11am	Omagh Forum For Rural Associations
	Prospect Awards
	Be Mindful
	Rural Community Network
	County Armagh Grand Orange Lodge Community Development Committee Limited (Known as County Armagh Community Development)
	NICVA
	Cookstown & Western Shores Area Network
	S.T.E.P.S.
	Carrowshee Park/Sylvan Hill Community Association
	COSTA-Community Organisations of South Tyrone & Areas Ltd
	Northern Ireland Rural Women's Network (Nirwn)
	Glenshane Community Development Ltd
	Coventry University
	Ballykelly Men's Shed
Fermanagh and Omagh District Council	
Medium sized charities Tuesday 13 April 2021 at 1pm	North Down & Ards Womens Aid
	Royal Ulster Academy of Arts
	Replay Productions Limited
	Hope 4 Life NI
	Development Trusts NI
	Foyle Downs Syndrome Trust
	Raidió Fáilte Teo
	Jigsaw Northern Ireland
	Evangelical Alliance NI

²⁷⁷More than one person per organisation may have been in attendance. Individual attendees have not been named.

Webinar Date	Organisation
	NICVA
	Speedwell Trust
	Ulster GAA
	Old Library Trust Healthy Living & Learning Centre
	Portadown 2000
	Ballynafeigh Community Development Association
	Culturlann McAdam O'Faich
	Multi-Ethnic Sports and Cultures NI (MSCNI)
	Hope Magherafelt
	Family Mediation NI
	Centre for Civic Dialogue and Development
	The Scout Association
	Project Ballynahinch
	Belfast Philharmonic Society
	Bates Wells
	Larne YMCA
	Boring Wells
	LCC Community Trust
	Ligoniel Improvement Association
	Irish League of Credit Unions - International Development Foundation
	Void Art Centre
	Scout Foundation NI/Scouting Ireland
	FONIC Trust
	Belfast Print Workshop
	North West Community Network
	Waterside Womens Centre
	Cats Protection
	Northern Ireland Environment Link
	Falls Womens Centre
	GEMS Northern Ireland Ltd
	Ballybeen Womens Centre

Webinar Date	Organisation
Small charities Monday 19 April 2021 at 6.30pm	Bangor Historical Society
	Riding for the Disabled Coleraine
	FND Matters NI
	MRUlster
	Portglenone Enterprise Group Ltd
	The Cithrah Foundation
	Polish Educational and Cultural Association
	Ulster Federation Of Rambling Clubs
	Belfast Music Society
	Millisle Regeneration
	Halifax Foundation for NI
	Killeeshil Community Centre
	Federation of Experts By Experience
	All About Us -ASD Teens
	Girlguiding Ulster
	Cairde Cheathrú na Gaeltachta
	FOCUS
	BMCA (Belfast Multi-Cultural Association)
	All Nations Ministries
	Thrive Ireland
	NICVA
	Strathfoyle Women's Activity Group Ltd
	Pint-sized Productions Ltd
	Greener Fields
	Metal for Life NI
	County Armagh Community Development
	Assistance Dogs Northern Ireland
	Seventh Heaven Animal Rescue Trust
	OG Cancer NI
	Lisburn Sea Cadets
TunMicro Sickle Cell Foundation	
Omagh Men's Shed	
Irish Citizens Endeavour	

Webinar Date	Organisation
	Carrickfergus Community Forum
	Erne District Chinese Families' and Friends' Association
	Focus: The Identity Trust
	Vasculitis Ireland Awareness
	1 in 3 Cancer Support Group
	Irish Football Association Foundation
	CANS (Counselling All Nations Services)
	The Ulster Society for Promoting the Education of the Deaf and the Blind
	Samaritans Ballymena
	APAC - Associated Photography for Art and Culture
	Causeway Older and Active Strategic Team
	Omagh Forum For Rural Associations
	Loup Womens Group
	Enterprise NI
	Scout Foundation NI/Scouting Ireland
	Ross Boyd (Belfast) Ltd
	Advocacy VSV
	County Down Rural Community Network
	Dance Associates Ltd
	Voices Women's Group
	Catholic Guides of Ireland (Northern Region)
	Cappella Caeciliana
	Ulster Aviation Society
	Grove Ju-Jitsu Club
	Let's Do Veterans Support & Rehabilitation Limited
	Bayburn Historical Society
	Prison Fellowship NI
	North West Community Network
	Goodwill Gifts
	Womens Aid Antrim, Ballymena, Carrickfergus, Larne and Newtownabbey
	Irish Christian Endeavour Union
	Waterside Womens Centre
	Northern Ireland Cross Community Angling Club

Webinar Date	Organisation
	Contemporary Christianity
	Dundrum Cricket Club
	Canoe Association of NI
	Tools for Solidarity
	Cathedral Quarter Trust
	Friends of Pavestone
	Belfast Print Workshop
	Shelter NI
	Ark Kingdom Ministries
Large charities Wednesday 21 April 2021 at 1pm	St John Ambulance NI
	Positive Futures
	Disability Action NI
	Praxis Care
	Cancer Focus Northern Ireland
	Employers For Childcare
	Southern Area Hospice Services
	Air Ambulance (NI) Ltd.
	Orchardville Society Ltd
	Centre for Independent Living N.I.
	Omagh Early Years Centre
	Girlguiding Ulster
	Action Mental Health
	Depaul
	British Heart Foundation NI
	Community Finance Ireland
	NICVA
	Girls Brigade Northern Ireland
	Victim Support Northern Ireland
	Young People's Gambling Harm Prevention Programme
	Lough Neagh Rescue
	Fermanagh Community Transport
	Ulster Wildlife
	The Towell Building Trust Ltd

Webinar Date	Organisation
	RSPB Northern Ireland
	Shine
	Inspire Wellbeing
	North Down Community Network
	Belfast Central Mission
	Family Care Adoption Services
	The Mac (Metropolitan Arts Centre)
	MACS Supporting Children & Young People
	NIACRO
	Childrens Law Centre
	Cultúrlann Uí Chanáin
	Camphill Community Glencraig
	Society of St Vincent de Paul Northern Region
	Camphill Communities Trust (NI)
	Save The Children Northern Ireland
	Ashton Community Trust
	The Odyssey Trust Company Limited
	Moore NI
	Womens Aid Federation Northern Ireland
	The Bytes Project Head Office
	The British Horse Society Ireland
	Start 360
	Rural Support
General public session 1 Thursday 22 April 2021 at 11am	Fermanagh and Omagh District Council
	Probity
	Grove Ju-Jitsu Club
	Saintfield Development Association
	NICVA
	NI Childminding Association
	Leukaemia Research Fund
	Mind Wise New Vision (Head Office)
	Boys Brigade NI

Webinar Date	Organisation
Solicitors / Lawyers / Developing Governance Group Monday 26 April 2021 at 1pm	Bannatyne Kirkwood France & Co.
	Mason Hayes & Curran
	Worthingtons
	Fields of Life
	MacCorkell Legal and Commercial
	Northern Ireland Sports Forum
	Sport Northern Ireland
	NI Hospice Head Office
	NICVA
	Volunteer Now
	Early Years the Organisation for Young Children HQ
	Arthur Cox
	The Kubernesis Partnership LLP
	Edwards & Company Solicitors
	Wrigleys Solicitors LLP
	Elliott Duffy Garrett Solicitors
	Supporting Communities NI HQ
	Clever Fulton Rankin
	Age NI
	Mills Sellig
	Walker McDonald
Family Care Adoption Services	
Belfast Print Workshop	
RSPB Northern Ireland	

Webinar Date	Organisation
Funders Tuesday 27 April 2021 at 11am	LFT Charitable Trust
	Department for Communities
	Halifax Foundation for NI
	The Gallaher Trust
	Heritage Lottery Fund (Northern Ireland)
	The Fermanagh Trust
	The National Lottery Community Fund - Northern Ireland Office
	St Stephen's Green Trust
	Belfast Charitable Society
	Community Foundation for Northern Ireland
	Joseph Rowntree Charitable Trust
Accountants / Independent Examiners Wednesday 28 April 2021 at 1pm	Donaldson & Thompson
	ASM Accountants Belfast Ltd
	RSPB Northern Ireland
	Tax Help for Older People
	Jackson Andrews
	McAnerney Accountants
	Corrigan CA Limited
	CANTAB
	Finegan Gibson
	Storm Technology
	Queen's University Belfast
	Belfast Charitable Society
	NICVA
	Southern Area Hospice Services
	Rathmore Grammar School
	Action Cancer
	NI Chest Heart & Stroke
	Neeson Chambers
	Christian Aid Ireland
	Rainey & Associates
Kevin Higgins Accountant	
Watson & Colhoun	

Webinar Date	Organisation
	Ross Boyd (Belfast) Ltd
	Kearney & Co
	Bridge Chartered Accountants
	Start360 Ltd (head office)
	PGR Accountants
	HMW Hamilton Morris Waugh
	Libraries NI
	Cavanaghkelly
	Ulster Society of Chartered Accountants
	Cunningham & McPartland
	Clarke & Co Accountants
	Admor Business Solutions
	Broad Street Advisory
	Eastside Partnership
	Moore (NI)
General public session 2 Thursday 29 April 2021 at 1pm	The MAC Trading Company
	Omagh Early Years Centre
	Henderson Group
	Pebblebeach Fundraising
	The PILS Project
	Parentkind NI
	Fitzsimons Redmond
	National Secular Society
	Christian Aid Ireland

List of Submissions to the Review

Submissions by Organisation Name	
7th Heaven Animal Rescue Trust	Magheralin Community Association
Age NI	Metal for Life NI
AGE North Down Ards (AGEnda)	MHS (Maghera) Heritage & Culture Ltd
Aghalee Village Hall	Migrant Centre NI
Altram	NACN
Association of Baptist Churches in Ireland	National Secular Society
Barcroft and Ballybot residents association	NIACRO
Beginning Experience	NICVA
Belfast Central Mission	North West Migrants Forum
Belfast Charitable Society	Northern Ireland Environment Link (NIEL)
Belfast Music Society	Odyssey Trust Company
British Heart Foundation Northern Ireland (BHF NI)	Omagh Early Years Centre Ltd
Butterfly Conservation	Omagh Forum for Rural Associations
Carrickfergus and Larne Child Contact Centre	Parentkind
Carrickfergus Community Forum	Portadown 2000 MCAC
Carrickfergus Reformed Presbyterian Church	Positive Futures
Catholic Guides of Ireland	ProbityAACNI
Centre for Civic Dialogue and Development	Royal Society for the Protection of Birds
Charis - Servant Trust	Rural Community Network
Charity Commission NI	Rural Support
Cloona Child Contact Services	S.T.E.P.S. Mental Health
Coaching4Christ	Stewardship
Community Finance Ireland	Seapatrik Community Association
Community Foundation Northern Ireland	Shaftesbury Square Reformed Presbyterian Church
Contemporary Christianity	South Belfast Sure Start
County Armagh Community Development	Special Olympics Ireland
Dance Associate Ltd	St John Ambulance (NI)
Drumellan Community Association	Start360
Dundonald Baptist Church	Supporting Communities

Submissions by Organisation Name	
Early Years	The Boys' Brigade - NI District
East Belfast Mission	The Confederation of Community Groups
Edwards & Co.	The Erne District Chinese Families' and Friends' Association
Evangelical Alliance, NI	The Fermanagh Trust
Family Mediation NI	The Law Society of Northern Ireland (the Society)
FND matters N.I	The National Lottery Community Fund
GEMS Northern Ireland Limited	The National Trust for Places of Historic Interest or Natural Beauty (Reg. Charity No. 205846)
Girlguiding Ulster	The Speedwell Trust
Glenanne Loughgilly and Mountnorris Community Development	The Wildfowl & Wetlands Trust
Greater Shankill Seniors Forum	Transform Europe Network
Halifax Foundation NI	Trinity Reformed Presbyterian Church
Harmoni	TunMicro Sickle cell Foundation
Harry Gregg Foundation	Ulster Garden Villages Limited
Head of Synod Services, Church of Ireland	Ulster Wildlife
JWB Consultancy	Vasculitis Ireland Awareness
Knockbracken Reformed Presbyterian Church	Volunteer Now
LEARN Global	Waringstown Community Development Organisation
Let's Do Veterans Support & Rehabilitation Limited	Women's Aid Federation NI
Lisburn Community Choir	Woodland Trust
Lisburn Downtown Centre	WRAP
Local Economic Development Company (LEDCOM) Limited	Youth for Christ Northern Ireland Ltd
Lurganville and District Community Association	

Submissions by Individual's Name (where permission granted)	
Gregory Burke	Robin Masefield
Nathan Campbell	Trevor McKee
Robert Crawford	Gareth G Morgan
Keiron Forbes	Lekan Ojo-Okiji Abasi
Dr Patrick Ford	Sam Snodden
Bob Loade	Clive Walker
Alderman Stephen Martin	Frederick David Tughan

List of Documents that relates to the Assessment of the Commission's Governance

Papers for the previous 3 financial years were reviewed in relation to below:

- The Commission's budgetary performance
- The Commission's performance against Business and Corporate Plan
- The Department's assessment of the Commission's performance
- Minutes of accountability meetings and liaison meetings between the Department and the Commission
- The Commission's Assurance Statements submitted to the Department
- Internal Auditor's reports in relation to the Commission
- The Commission's Risk Register
- Northern Ireland Audit Office's (NIAO) Reports to those Charged with Governance
- The Department's Audit and Risk Committee papers referencing the Charity Commission NI

Full list of Recommendations from the Independent Review Panel of Charity Regulation in NI

Recommendations

Chapter 1 - The Charity Landscape in NI

1. The Department -
 - a. undertakes a mapping and information gathering exercise to develop a clear picture of the non-profit sector and its charity subsector (this should include consideration of the government-supported work of Benefacts in Ireland referenced in Chapter 5, 4.2.);
 - b. implements a plan to provide greater guidance to government departments, local authorities, other public bodies, individuals and organisations on the range of options outside the charity subsector to better inform choices for those seeking to support their communities through voluntary activities;
 - c. develops an action plan to provide ongoing, collated data about the non-profit sector, its benefits, scope, scale and contribution.

Chapter 2 - Charity Regulation: Objectives Functions and Duties

2. The Department develop a workplan for the implementation of recommendations in this Report to be delivered in a timely manner.
3. The Commission embrace this opportunity to reset the culture of regulation.
4. The wider charitable sector commit to collaborate fully with the Commission to create a good regulatory environment for charities.

Chapter 3 - The Commission's Regulatory Approach

5. The Commission should prioritise completion of the new Risk Assessment Framework and the supporting IT and the Department should provide additional resources should they be required (recommendation 10), to assist.
In respect of this recommendation the Panel is conscious that there will be a lag while the system is completed and then while awaiting the desired trend data to ensure proportionality. We encourage the Commission to take steps to ensure proportionality and flexibility in approach in the interim.
6. The Commission should move towards a targeted regulatory approach in line with its proposed Risk Assessment Framework. The Risk Assessment Framework should be tested for proportionality and flexibility in functionality.
In respect of this work, the Panel believes the adoption of such an approach should result in a shift in Strategic and Annual plans with greater articulation of risk appetite, along with a shift in priorities about engagement with the sector and a focus on outcomes.
7. The Commission refocus its regulatory efforts on its primary statutory objective to complete the register of charities by clearing the backlog of registration applications.
In respect of this recommendation the Panel will propose supporting measures to achieve this in Chapter 5. The Panel is also aware that Royal Assent to the new Bill has yet to be given and it will take some time to implement. It is the Panel's view that the intervening time should be used to register as many charities awaiting registration as possible.
8. The Commission should develop its learning approach to include how the new Risk Assessment Framework and the IT to deliver it, informs the culture of the Commission to mirror a transformation in regulatory approach.
In respect of this recommendation the Panel is conscious of the need for there to be a meeting of strategic and operational thinking on the approach necessary to support a culture that enables the sector, focuses on responsive regulation and leads to an enabling regulator.
9. The Department should review its funding model for the Commission with a view to better understanding the full extent of what is required for regular ongoing support of the regulator and examining whether greater baseline funding is required (or not) in light of the type of regulation the Department expects the Commission to deliver over the short to medium term. This should happen within 4 months of this Report and result in the required appropriate funding for the implementation of the recommendations in this Report.

10. The Department should examine the need for short term, interim resources to be provided to the Commission before legislation has completed. This should form an aspect of the funding required for the implementation of the recommendations in this Report.
11. The Department, should, as a matter of priority, explore, with the Commission how skills exchange can happen whether from the civil service to the Commission or from other sources, particularly in the area of legal services to supplement legal capacity within the Commission.
12. The Department should critically review how legally trained staff are provided to the Commission, including grading and salary levels for retention of same.

Chapter 4 - Engagement with Stakeholders

13. The Board should take the lead in setting tone and direction for taking full advantage of every relationship building opportunity (e.g., registration, annual reporting etc) and develop a plan for collaborating with Commission staff to achieve this. In all forms of engagement, tone matters.
14. Board members should play an active role in the Stakeholder Forum.
15. The Commission should build into its values and planning a commitment to proportionate enforcement that allows sufficient resources to be directed towards supporting charities to achieve compliance (see further Chapter 7) and takes steps to ensure that this commitment is central to staff approaches.
16. The Commission should develop action plans to embed a commitment to supporting charities to achieve compliance. In this respect the Commission should at least consider:
 - Resourcing or delivering trustee training, both initial and refresher sessions;
 - Improving the website (see recommendation 19);
 - Reviewing how guidance is pitched and communicated to charities. This may involve simplifying guidance or going beyond the posting of technical guides on the Commission's website.
 - Increasing roadshows and attendance at them by using the emergence of virtual platforms (e.g. Zoom, YouTube) to provide low-cost, wide-reaching, recordable (and re-playable) sessions;
 - More front facing engagement by Commission staff (see recommendation 18);
 - How communications by letter or email are signed, either by a staff member or the Chief Executive.
17. The Commission should review its communications strategy as part of the bigger recalibration of its engagement. Such a review should include:
 - The website;
 - A review of standardised letters, particularly in relation to compliance matters, to improve tone and clarity of content;
 - A review of how the submission of annual reports and accounts is acknowledged and the level of feedback provided to charities;
 - A review of how internal review procedures operate and are communicated;
 - The use of virtual technology for engagement, training, clinics, roadshows and other methods of engagement.
18. The Commission should ensure that its phone service helpline (whether operated by NI Direct or otherwise) allows escalation of a call directly to a Commission staff member if there is not an immediate connection to a staff member.

The Panel understands the resourcing issue related to answering calls. While it would be preferable to connect directly to a staff member other mechanisms to manage the resource required could be considered: for example, an options to triage calls; default referral to existing online resources in the first instance; and limited hours service with an out-of-hours answering service that is responded to in a timely way.
19. The Commission should draw up a plan to improve and update the website in light of recommendations in this report:
 - The website should be re-designed so that material and guidance is easier to find
 - Online guidance should be updated so that important information is conveyed at a level that is understandable to the average charity trustee who will not be well versed in charity law or charity accounting procedures.

The Panel notes that all stakeholders, the Commission included, have expressed dissatisfaction with the unwieldy nature of the Commission's website.
20. The Commission should set up a learning opportunity, for both the Board and staff, with CCEW to better understand both the importance of a language shift to authoritative and engaging and how that shift can be achieved.
21. The Commission should set up a learning opportunity, for both the Board and staff, with OSCR to better understand what is meant by becoming an 'enabling' regulator

Chapter 5 - Registration

With regard to registration generally:

22. The Commission should make the completion of the Charities Register a priority.

In respect of this recommendation the Panel notes the importance that registration plays in the regulatory framework. Clearing the backlog of organisations awaiting registration will require the Commission to manage its staff and resources so that registration is front and centre in terms of staged priorities. No charity should be waiting prolonged periods of time – in the Commission’s current regime, years – for its registration application to be processed. The Panel therefore makes recommendations about the Combined List to assist with the registration process.

With regard to the Combined List:

23. The Commission should separate those charities on the Combined List who are awaiting registration call forward from those which are dormant or closed and those who have failed to come forward for registration.

In respect of this recommendation it is important to note that the “unfinished business” nature of the Combined List can become a tool of disempowerment for both the Commission and the sector. With this in mind, the Panel further recommends:

24. The Commission should not list charities that fail to come forward when called as actively applying for registration and once removed, the onus should be on the charity trustees to reapply.

In respect of this recommendation the Panel notes the Commission’s view that the current Combined list “is an asset.” The Panel appreciates that this is the Commission’s view but finds it is not a view shared by the sector.

25. The Commission should, given the ‘resource-intensive’ nature of maintaining the Combined List, review the purpose of the list.

In respect of this recommendation, the Panel believes that adapting the Combined List to indicate current call forwards and estimated waiting times for the next tranche of applicants would be of greater service to the sector in the registration process and of greater service to the Commission allowing staff to focus on delivering registrations without further delay.

With regard to whether all charities should be registered the Panel notes that this is ultimately a decision for the Minister and recommends:

26. The requirement to register all charities, regardless of size, should remain.

In respect of this recommendation, the Panel believes that the statutory requirement to register all charities serves a valuable purpose to society as it makes visible the significant work charities carry out and the crucial contribution they make to the fabric of society.

27. (If 26 is accepted) The Commission should simplify and streamline the process of registration and make it proportionate to the size of charity applicant

In respect of this recommendation, the Panel commends the Commission on the changes that it is introducing to its registration process via its Transformation project. This will streamline and simplify registration and the Panel would encourage greater efforts along this vein. Finding the right balance between facilitating charities to deliver their charitable missions and ensuring that they do so in compliance with charity and other legal requirements is critical.

With regard to supporting charities to register:

28. The Commission should prioritise the provision of guidance and education of prospective applicant charities, in conjunction with helper groups and the Department, to ensure that non-profit organisations seeking guidance about charity registration are aware there may be other options for them (see chapter 1).

In this context the Panel believes that the regulatory approach of the Commission should clearly delineate the charity sphere from the broader non-profit sphere and that only charities or those truly wishing to apply for charitable status are channelled towards the registration process.

29. The Commission works with its helper group organisations and with its Stakeholder Forum to better understand charity trustee’s existing knowledge of regulatory requirements and engage in an ongoing education programme to raise charity trustee awareness of their statutory responsibilities.

With regard to progressing registration:

30. The Commission’s main focus should be on registering those charities which have come forward and are actively awaiting registration and that this focus should frame how the Commission’s sets its priorities at this time.

31. The Commission should prioritise registration of the remaining deemed charities on the Combined List. The Panel recognises that separate issues arise with regards to deemed s.167 institutions (see further recommendations in section 6.5 below). In the case of deemed schools, the Panel recommends that the Department for Communities and Department of Education liaise on resolving matters relating to how these bodies operate that lie beyond the competence of the Commission.

32. The Commission should develop a list of potentially dormant charities from the Combined List to form the basis of a pilot revitalising trust project for NI once the Commission has reduced its backlog of charities actively awaiting registration.

With regard to s.167 charities:

33. The Commission should prioritise the agreement of an MoU with the Irish CRA in the interests of furthering a consistent regulatory approach.

The Panel notes existing MoUs with OSCR and CCEW and believes completing this task would provide the Commission with formalised contact across these Islands in support of learning and development.

34. The Department, in conjunction with the Commission, should review and amend the wording of s.167 prior to commencement to clarify the organisations that fall within its remit and the scope of activities that may trigger a requirement to register. The Panel will speak further to the required changes in Chapter 10.

35. The Department should consider making prior registration with a charity regulator in another jurisdiction a pre-condition to applying for registration under s. 167.

The compromise offered by s.167 in accepting a 'foreign' charity's constitution without requiring further amendment to the charitable objects clause to align with the wording of the 2008 Act should be dependent upon the Commission's relationships of trust and confidence in other charity regulators with whom it enjoys good working relationships. These regulators would remain the lead regulators for problems arising with these charities, thereby reducing the workload of the Commission in their regulation but still providing it with the necessary powers to step in, either at the request of the lead regulator, or should there be a fear of loss or damage to NI beneficiaries or society more generally. The Panel notes that this approach would currently rule out the automatic registration of English and Welsh exempt charities operating in NI, but it would provide a more reasonable registration route for all other foreign charities.

36. In any regulations passed to give effect to s.167, the Department should name the regulators with whom the Commission enjoys mutual cooperation relationships, whereby the s.167 registration process might be simplified as a result of this respect for the lead regulator.

In instances of applications from charities regulated by charity regulators from another jurisdiction not mentioned in the regulations, the Charity Commission should be given leeway to carry out greater due diligence on a case-by-case basis before admitting institutions primarily regulated by these other regulators to the s.167 Register.

37. Upon the commencement of s.167, greater legislative clarity should be provided by the Department regarding the operation of the provision. To this end, further technical consideration is given to s.167 in Chapter 10 and further recommendations relating to s.167 will be made there.

Chapter 6 - Reporting

In relation to the red-flagging of accounts, the Review Panel recommends:

38. The Commission should introduce a traffic light system that allows greater differentiation between filing defaulters
- green flag for on-time submission
 - yellow flag for 'slightly late' (which at the Commission's discretion could be one week or one month after the due date), and
 - red flag for all other defaulters.

The Panel recognises that the Commission may need to work with the CCEW which provides its registration system to enable this bespoke alteration to occur since this would need to be an 'automatic' setting in the reporting portal triggered by the filing date and not dependent upon manual changes. The Panel also recognises that such a system change is likely to give rise to cost and therefore recommends:

In relation to lack of Commission feedback on submitted reports, the Panel recommends that:

39. The Commission should provide greater feedback to charities through the completion of an increased rate of basic compliance checks.

In respect of this recommendation the Panel recognises that its implementation is contingent upon the Department's acceptance of Panel recommendations relating to reporting thresholds, discussed below. If the Panel's recommendations regarding reporting thresholds were not to be adopted, then the Panel considers that the Commission would not have the capacity to give effect to this recommendation.

In relation to reporting regulations, the Review Panel recommends:

40. The Department review the 2015 regulations and in addition to the existing power upon application to grant dispensation from audit, also give the Commission the power upon application to grant a dispensation from the requirement of preparing accrual accounts in favour of receipts and payments account when a charity experiences an exceptional year of income.

The Panel believes the implementation of this recommendation would have a significant outcome for charities in that a charity experiencing an exceptional year of income (as a result of an unprecedented legacy, for example) which pushes it over its normal income threshold of less than £250,000 per annum could apply to the Commission for dispensation from the requirement to prepare accrual accounts in compliance with the Charity SORP.

In relation to reporting the Panel recommends:

41. The Commission should implement a proportionate approach to reporting.

To achieve this the Review Panel recommends:

42. The Minister bring forward amendments to the Charities Act 2008 and The Charities (Accounts and Reports) Regulations (NI) 2015 to enable the Commission to adopt a more proportionate, tiered approach to reporting for small charities to reduce their reporting burden. This should include

- The removal of the requirement to file an annual statement of account and of the requirement for independent examination,
- Charities in this bracket being required to complete an annual monitoring return and to complete an online financial template setting out basic financial information.

In relation to the financial threshold for reduced reporting requirements, the Panel recommends that:

43. The Minister consult key stakeholders on whether the proposed threshold should be defined solely in terms of gross annual income or whether a combined income and assets threshold is required.

- In terms of setting a possible income threshold (aside from the separate policy question of whether assets should also be considered), the income threshold should relate to a gross annual income of £25,000 or less.

To assist the Commission to apply proportionate reporting standards the Panel recommends that:

44. The Department amend s.64 of the 2008 Act and the Charities (Accounts and Reports) Regulations (NI) 2015 to include content requirements as to the format of receipts and payments accounts and the statement of assets and liabilities.

Note: This recommendation should not apply to those charities with annual income less than £25k as set out in recommendation 43 above.

45. The Department amend the definition of 'gross income' in s.180 of the 2008 Act to provide greater clarity to charities as to its meaning.

46. The Department should prioritise the commencement of Part 11 of the Charities Act, and the associated regulations to introduce CIOs as a legal form option for charities.

In relation to Commission Oversight of Charitable Accounts and Reports

In light of Panel recommendations 41-46 which, if accepted will result in charities submitting and the Commission receiving less but better-quality financial data on an annual basis, allowing for more proportionate charity oversight and reducing the regulatory burden on charities, the Review Panel recommends that:

47. The Commission develop an API (Application Programming Interface) to enable charities (or their third-party providers), particularly those in the £25,000 - £250,000 category, more easily to file their annual monitoring return (AMR) and ultimately their financial statements in the correct format.

48. The Commission actively apply its Risk Assessment Framework to concentrate on protecting charitable assets at risk of mismanagement or misconduct where most risk exists to public trust and confidence.

49. The Commission should review how it communicates its existing written guidance and best practice on financial accounting and reporting to charity trustees to raise the level of charity trustee awareness of their responsibilities in this sphere and their general competence to deliver on those responsibilities.

In respect of Group Accounts:

50. The Department review Section 6(1)(b) of Schedule 6 of the 2008 Act with a view to amendment if it considers that the reference to asset threshold was in error.

51. The Department review and amend the current audit threshold for group accounts.

In this respect, Panel believes that the Scottish approach to the audit requirement for connected charities is an interesting approach and recommends that the Department, in consultation with the Commission, consider its adoption.

Chapter 7 - Compliance and Investigations

52. The Commission should review the information requested of charities during the registration process with the aim of speeding up registrations and ensuring only required information is sought from charities.
53. The Commission should review and improve its communications about compliance to ensure:
- That there is clarity about the types of concerns that the Commission can pursue and those that it cannot and in cases where concerns have been raised, the Commission provides direct feedback with assurance they have been followed through, and
 - That there is clarity in communications with charities about the nature of a compliance issue, definition of the nature of the problem and clearly set out steps that could be taken to resolve the situation.
- In respect of this recommendation the Panel is conscious of the anxiety that can be caused to trustees and others when concerns are being responded to by the Commission. Having clear information should assist them.
54. The Commission should use its Risk Assessment Framework to move towards a truly risk-based assessment system in which proportionate regulation is manifested through a reduction in Commission scrutiny of compliant charities, particularly smaller charities, that continue to meet the basic required registration and annual reporting benchmarks.
- In respect of this recommendation the Panel believes that by adopting this approach the Commission will free up its limited resources to focus on charities where the Risk Assessment Framework indicates greater risk exists.
55. The Commission should view a warning power, should it be agreed, as the final opportunity for a charity to choose to comply and therefore should approach the warning as an enabling tool.
56. The Commission reviews communications specifically with reference to anonymising letters, emails etc. to ensure:
- a. that correspondence is issued in the name of a relevant case worker or line manager where there is no security issue. The Panel further recommends that this policy should be reviewed annually and practice amended accordingly; and
 - b. that where security issues are of concern, that correspondence indicates a named or clear point of contact at senior management level for those in receipt of communications.
57. That the Commission review and improve written records of the decision-making process in relation to statutory inquiries, record keeping and file management to ensure best practice standards apply and that manuals are updated on an ongoing basis as experience grows.
58. The Commission should review long running inquiries with a view to reaching the necessary decisions to close them out in a timely and effective fashion.
59. That the Commission explores new, more streamlined ways of sharing learning from compliance cases, outside of the traditional thematic report format, for example through social media and other virtual learning platforms to widen outreach for its compliance learnings.
- In this respect, the Panel draws attention to the IT aspect of the Transformation Project which is still being developed and the opportunity that may exist to build-in learning that can be reproduced with ease and without significant resource being applied.

Chapter 8 - Enforcement and appeals

60. The Commission review its operating procedures to ensure that staff are fully briefed on the nature and format of material that Commissioners need to exercise the full scope of their powers effectively.
- In respect of this recommendation, the Panel emphasises that for the Commissioners to exercise their responsibilities they should be fully informed and able to engage in deliberative decision-making in a manner that properly records the procedures followed and the reasons for the decisions reached.
61. The Schedule 1 process continue with regards to Commissioners' exercise of reserved powers post the passage of the Charities Bill 2021 and its proposed scheme of delegation.
- In respect of this recommendation, the Panel is conscious that when a Scheme of Delegation has been put in place some powers will be reserved to Commissioners. To facilitate the deliberative space needed to fully interrogate cases that come before the Commissioners for decision it is important that the Schedule 1 Committee process remains in place for the exercise of these reserved powers.
62. The Commission should report on the implementation of its Action Plan arising out of Independent Counsel's final report in its published Annual Report. The Panel also recommends that the Department seeks ongoing assurance from the Commission on progress on the implementation of the Action Plan as part of its quarterly accountability meetings with the Commission.
63. To assist the Commission to regulate in an effective and proportionate manner the Review Panel recommends:
- In line with best practice elsewhere, the Commission should revise its approach of automatically naming charity trustees in its statutory inquiry reports.

- Expanding the scope of the power to remove trustees to include those trustees who have resigned from office. This power should be reserved to Commissioners.
- A power granted to the Commission to issue directions to trustees not to undertake certain actions. This power should be delegated to staff.

64. The Department consult appropriately on the possible introduction of an official warning power and whether it should be treated as a reserve power of the Commissioners or exercisable by Commission staff.

65. The Commission should, when reviewing its internal review process, mirror the flexibility provided by OSCR's approach to who reviews what decisions within the Commission.

The Panel is aware that OSCR's approach enables peer and superior review of decisions right up to Board level, providing greater opportunities for dispute resolution without the additional time and cost associated with a tribunal appeal. The Panel will return to the powers of Commissioners in Chapter 10.

66. The Department for Communities should collaborate with the Department of Justice with a view to amending Charity Tribunal Rules (NI) 2010 to allow a stay to be sought when a Commission decision review is underway.

In respect of this recommendation, the Panel is concerned that there should be speedy access to justice.

67. The Commission should extend the time limit for initiating a Commission decision review to a period longer than three months.

In respect of this recommendation the Panel believes the current time limit for bringing cases is considered to be too short (42 days). It gives trustees limited time to make decisions and fails to reflect the reality that many trustee meeting cycles operate on a monthly or quarterly basis. It would allow for many charities' quarterly trustee meeting cycles, allow decisions on taking action to be made after due reflection and allow charities without the benefit of staff a longer period to prepare their case, thereby facilitating access to justice.

68. There be no change to the Tribunal's jurisdiction as defined in Schedule 3 of the Charities Act (NI) 2008.

69. The Commission improve communication with the Courts Service of NI, the Law Society of NI and the Bar Council of NI to bring the existence of s.54(2) of the 2008 Act to the wider attention of these various stakeholders to enable its effective application.

Chapter 9 - Sponsor Department Ownership of Policy and Regulation

70. The Minister should make provision for staggered appointments, where possible, to the Charity Commission.

In respect of this recommendation the Panel is conscious of the loss of institutional knowledge that can occur on a Board when all appointments expire simultaneously.

71. Commissioners review the Terms of Reference for Schedule 1 Committees with a view to making them as effective and efficient as possible.

In respect of this recommendation the Panel is conscious of the length of time likely to be required for legislation to effect practice on the ground and even when such legislation is agreed. The Panel is also conscious of staff required to attend Schedule 1 Committee meetings and further recommends that:

72. Commissioners should consider, when reviewing Terms of Reference for Schedule 1 Committees, the staff attendance requirement for such meetings.

73. The annual strategic meeting between the Minister and the Board should recommence as soon as possible.

74. The Commission's Board Effectiveness Review exercise be completed on three-yearly cycles in line with the UK Corporate Governance code (2018).

75. The Commission should keep the composition of the Stakeholder Forum under review to ensure a diverse body of stakeholders have an opportunity to be heard, including those awaiting registration and those newly registered.

76. The Commission, in tandem with the Department should document the new partnership arrangements, roles and responsibilities for future relationships with the Department in a new Partnership Agreement.

77. The Minister, in conjunction with the Commission, review the composition of, skills required for, and size of the Board to ensure proper resourcing for the tasks flowing from this report, and any amended legislation or standards.

78. The Commission and Department implement the practice of the CRA in co-opting external experts to Board committees as an effective option for enhancing Board skills and proceed to make provision for this to commence as soon as possible.

79. The Department should formally review the metrics by which it measures the Commission's performance so that there is greater focus on outcomes rather than simply outputs and greater discussion of how the actions of the Commission in a given year have contributed substantively to the achievement of its statutory objectives.

80. The Department should review and revise the legislative provisions relating to information sharing between the Department and the Commission to enable Commission staff to share information with the Department in the spirit of s.8 without the need for a Schedule 1 Committee to meet.

The Panel is conscious of the significant role the Department plays in providing a policy framework for the Commission and ensuring legislation is fit for purpose. This leadership role is critical for good regulation and so we recommend that:

81. The Department should consider and plan for how it can provide greater, visible leadership in, and ownership of, the policy and regulatory framework for charities.

In respect of this recommendation the Panel is concerned that the Department be able to demonstrate to all stakeholders including the Commission that it has the skills and expertise to ensure that policy is developed and kept up to date against best practice.

82. The Department should examine flexible options to significantly enhance its own expertise regarding charity law and policy including knowledge of developments in the Republic of Ireland, Scotland and England and Wales.

In respect of this recommendation the Department should extend its engagement to include other representatives in the charity sector and relevant government and regulatory peers in neighbouring jurisdictions.

83. The Department should monitor the implementation by the Commission of the agreed recommendations of the Review Panel's Report.

Chapter 10 – Technical Issues

Recommendations about CIOs

84. The Department should advance, as a matter of priority, the necessary regulations to give effect to Part 11 of the Charities Act (NI) 2008. The Panel also recommends that staggering the availability of this legal form so that priority is given firstly to those unincorporated charities on the combined list awaiting charity registration, then to unincorporated registered charities who wish to convert to a CIO before extending consideration to incorporated charities who wish to convert to a CIO (and again, prioritising those incorporated entities on the combined list awaiting call forward for registration).

The Panel is mindful that the introduction of the CIO form will require the Commission to devote some time and energy to setting out registration and conversion procedures and a reallocation of tasks between Commission staff may be required to accommodate the processing of this new legal form. Notwithstanding this observation, the Panel is reassured by the experiences of both OSCR and CCEW that the introduction of the CIO should not overwhelm the capacity of the Regulator to deliver on its statutory functions.

The Panel further recommends:

85. The Department and the Commission take up the offers of assistance from both CCEW and OSCR to share experience on drafting CIO regulations as well as operational insights in managing their registration and regulatory oversight.

Recommendations about S167

86. The Department should commence s.167 when it has completed the following tasks:

- reviewed and amended the language of s.167 to clarify the organisations that fall within its remit and the scope of activities that may trigger a requirement to register.
- make prior registration with a charity regulator in another jurisdiction a pre-condition to applying for registration under s.167.
- amend the regulations to s.167 to name the regulators to whom the amended regulation applies.
- consider how the regulations can give leeway to the Commission to carry out greater due diligence, on a case-by-case basis, to consider applications from foreign charities primarily regulated by regulators not named in the legislation before admitting these charities to the s.167 register.
- consider how to revise the wording so there is a better definition of the issues s.167 is intended to prevent.

87. The Department should consult with the Commission on whether there should be a de minimis threshold of operations below which either the Commission should be able to refuse a s.167 registration request, or a prospective applicant would know that registration was not legally required (but might be optionally sought) because of its limited activity in NI.

88. The Department should consult with stakeholders regarding revision of language in s.167 and the regulations to ensure reporting requirements and enforcement powers are clearly articulated.

89. The Department should consider further and clarify the purpose of regulation under s.167 and, in conjunction with stakeholders, assess necessary and proportionate reporting requirements, clear articulation of policy regarding regulation of s.167 charities in terms of powers available to the Commission to maintain public confidence in the operation of the sector as a whole.

Recommendations about Delegation

90. In line with international best practice, the Department legislate for and develop a Scheme of Delegation allowing Commissioners to be more strategic in their involvement in Commission decisions.

91. The Department consider an approach similar to that for CCEW when drafting a Scheme of Delegation.

In respect of this recommendation, the Panel sees value in the English regulatory approach whereby CCEW can reserve to itself regulatory decisions, and decisions on policy guidance where these are considered to be high risk, high profile, or precedent setting.

92. The following matters be reserved to the Commission:

- decisions relating to suspension or removal of trustees;
- decisions relating to the appointment of an interim manager, and decisions relating to the initiation of statutory inquiries (whether to be conducted by Commission staff or externally appointed investigators);

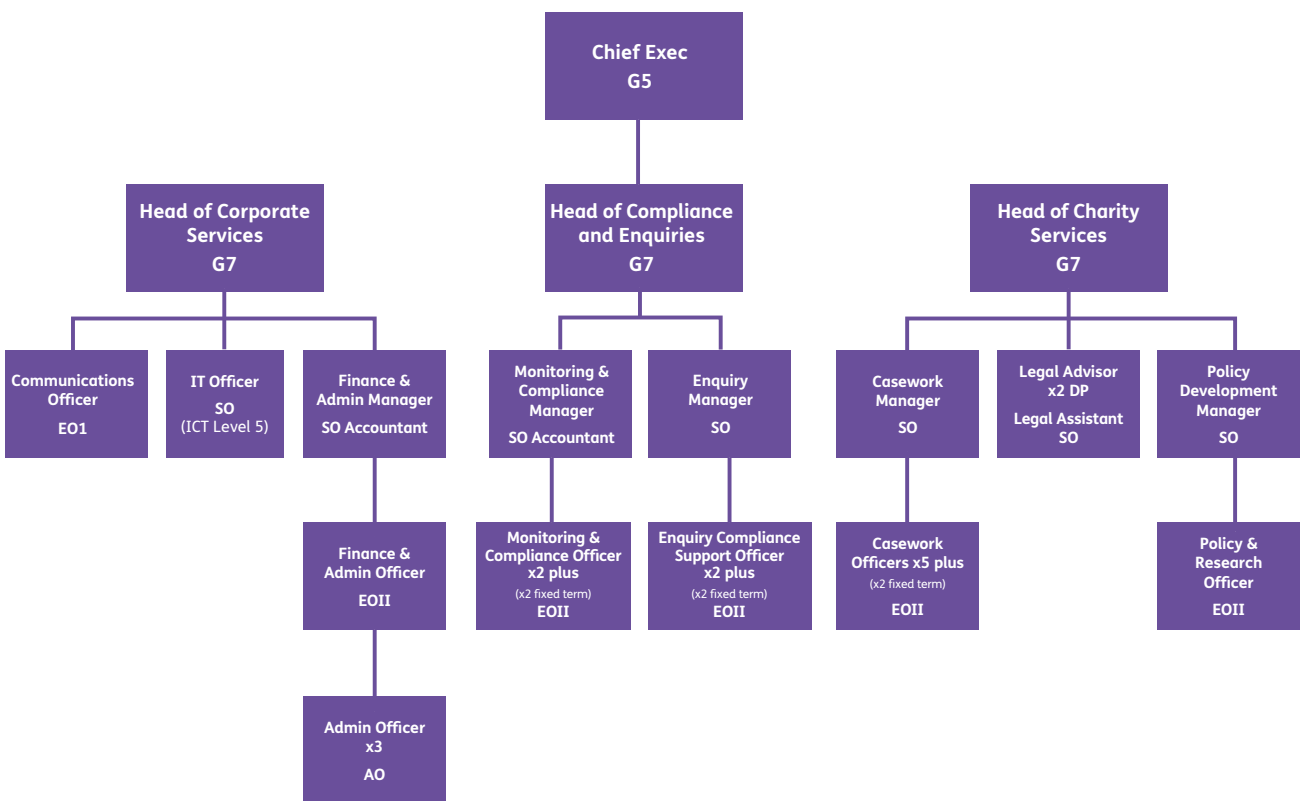
In respect of this recommendation the Panel believes that, given the knowledge and expertise of staff within the Commission, in all matters reserved to the Commission, Commissioners should enjoy the advice and guidance of staff.

93. The Department should take note of powers reserved to the Commission and fulfils its statutory responsibility to ensure that suitably qualified individuals are appointed to the Board of the Commission who will have the necessary skill sets and time to properly make the decisions required of them.

Charity Commission NI Staff Structure

(As at August 2021)

The Commission has a Board comprising of a Chief Commissioner, a Deputy Chief Commissioner and five Charity Commissioners, all on a part time basis.



Comparative Table of Appointments

Regulator	Position	Remuneration	Time Requirement	Job Description / Criteria
CCEW	Charity Commission – Chair (March 2021)	£62,500 per annum	2.5 days per week	Charity Commission – Chair (cabinetoffice.gov.uk)
CCEW	Charity Commission – Board Member (August 2020 and May 2019)	£350 per day plus reasonable expenses	Approx 24 days per year	1) Charity Commission, Board Member (cabinetoffice.gov.uk) 2) Charity Commission x 2 Board Members (cabinetoffice.gov.uk)
OSCR	Board Chair (Nov 2018)	£270 per day	Up to 4 days per month	Scottish Government – Public Appointments (appointed-for-scotland.org)
OSCR	Board Member (Nov 2017)	£200 per day	Up to 1.5 days per month	Scottish Government – Public Appointments (appointed-for-scotland.org)
CRA	Board Chair (Appointed 2014) according to 2018 Board member advert below	€11,970 (Category 3)	-	Job description not available. Remuneration is governed by the Code of Practice for the Governance of State Bodies (https://govacc.per.gov.ie/wp-content/uploads/Remuneration-and-Superannuation.pdf), the latest fee structure can be found at https://govacc.per.gov.ie/wp-content/uploads/25-Fees-Payable-to-Chairpersons-Members-of-State-Boards.pdf . Since 2019, the Charities Regulator is under Category 3 of the Non-Commercial State Bodies.
CRA	Board Member (Nov 2018)	€7,695 (from 2019)	10x half day meetings, 1x half day preparation	booklet.htm (stateboards.ie)
CCNI	Chief Commissioner (Chair) – (April 2019)	£5,750 per annum	2 days per month	Candidate information booklet
CCNI	Board Member – Legally qualified (March 2021)	£2,352 per year *Daily rate of £500 per day for additional decision making committees	1-2 days per month (currently under review) *Additional 1-2 days per month for decision making committees	Candidate information booklet
CCNI	Board Member – Deputy Chief Commissioner and 2x commissioners (one with accountancy experience) (March 2018)	£3,500 per year (Deputy Chief Commissioner) £2,300 per year (commissioners)	2 days per month 1-2 days per month	Candidate information booklet

Available in alternative formats.

© Crown Copyright 2021



Department for
Communities
www.communities-ni.gov.uk

An Roinn
Pobal

Department for
Commonities

