



Northern Ireland
Assembly

**COMMITTEE FOR
SOCIAL DEVELOPMENT**

**OFFICIAL REPORT
(Hansard)**

**Ministerial Briefing:
Draft Charities (Amendment) Bill**

17 February 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Simon Hamilton (Chairperson)
Ms Carál Ní Chuilín (Deputy Chairperson)
Mr Sydney Anderson
Mrs Mary Bradley
Mr Mickey Brady
Mr Fred Cobain
Mr Jonathan Craig
Mr Alex Easton
Mr Tommy Gallagher
Ms Anna Lo

Witnesses:

Mr Alex Attwood) Minister for Social Development

Mr Philip Gunn) Departmental Solicitor's Office of the Department for Social
Mr Roy McGivern) Development

The Deputy Chairperson (Ms Ní Chuilín):

I welcome the Minister for Social Development, Mr Alex Attwood, who is accompanied by Mr Roy McGivern and Mr Philip Gunn from the departmental solicitor's office. The Minister is here to brief the Committee on the draft Charities (Amendment) Bill.

The Minister for Social Development (Mr Attwood):

Thank you for the opportunity to speak to the Committee today. This may not be last time that I appear in front of the Committee before purdah. If there are reasons why the Committee would like me to appear again before 24 May — *[Interruption.]* I am sorry; a party member is waving at me for some reason.

The Deputy Chairperson:

Do you mean 24 March?

The Minister for Social Development:

Yes, 24 March. I will certainly be keen and willing to come back to the Committee, but if this is my last time, I wish to say that I have appreciated our relationship and I hope that it was useful to everyone.

I have come back to the Committee for a curious reason, which may even be a constitutional first. When I appeared before the Committee previously, it granted accelerated passage on one issue arising from the Charities Act (Northern Ireland) 2008. The issue was that, when the legislation was interrogated, in particular by the Charity Commission and its senior counsel, they identified a potential problem, which had been brought to their attention by a third party. It was that section 3 of the 2008 Act — subject to what Mr Gunn has to say — created a situation in which public benefit tests of the assessment of charities' intentions and purposes were a hybrid of what was in the English, Welsh and Scottish legislation. However that arose, it created a legal issue and a potential problem.

I recommended to the Committee that, to rectify that potential legal irregularity, there be accelerated passage whereby the legislation would rely on the English and Welsh tests and not the hybrid of the English, Welsh and Scottish tests. The Committee was minded to agree to that proposal and to accelerated passage although accelerated passage, as the Deputy Chairperson pointed out at the time, was not by any means the preferred option.

Since then, the matter has gone before the Executive on three occasions, because the

Executive have to endorse the recommendation. In the first instance, there was legal advice on the issue that was contrary to the legal advice on which I was relying. I was going in a certain direction after considering legal advice given to me from the Charity Commission and the Departmental Solicitor's Office. However, a contrary legal opinion then arose stating that there was no issue with the legislation and that although there was a hybrid model, we should proceed anyway.

I was not minded to adopt that approach. At various Executive meetings, and in discussions inside and outside the Executive, that situation changed in what I considered to be a fundamental way. The change was this: from a discussion on the public benefit test and the legal uncertainty that arose about the legislation, we moved to an Executive-endorsed approach at last week's Executive meeting when the Executive decided to re-introduce the presumption of public benefit test for religious institutions and maybe for organisations that deal with poverty issues. As I understand it, the presumption of public benefit test was the common law position before the 2008 Act, and was removed by that Act because there was to be no presumption of public benefit for any charitable organisation whatever its nature or character.

So, I have come to the Committee about a number of matters. As a member of the Executive, I am now obliged to take forward the Executive's decision that, through accelerated passage, there should be new legislation that will bring back into law the presumption of public benefit test, certainly for religious organisations.

I am here to advise the Committee that that is the decision of the Executive. It was not my recommendation to the Executive and is not my recommendation to the Committee because the 2008 Act was informed by two consultations; the consideration of the Committee and by all the legislative processes of the Assembly. Throughout those processes, it was accepted, agreed and understood by the Assembly and Executive that the presumption of public benefit that existed since 1608 was not to be the basis on which to go forward and that there would be no presumption of public benefit.

However, the Executive are minded to go down the road of re-introducing the presumption of public benefit, certainly for one category of charity. I did not recommend that, because that is a

material change to the legislation, and as such, and because it is contrary to the intention of the legislation, it requires a full consultation because it is, in my view, essentially new law. I was not minded to recommend that change, and there is an issue there.

Putting that aside, I am obliged, as a member of the Executive, to honour Executive decisions and that is why I have come to the Committee. The Executive's decision is to proceed by way of accelerated passage with a Bill that would, for one category of charity and maybe for more, re-introduce the presumption of public benefit contrary, in my view, to the intention and content of the current legislation.

Since the Executive meeting, the Office of Legislative Counsel (OLC) has provided a draft of what that might look like. However, given that the Executive decided to go in that direction and that that was further to advice given to the Executive, I need to verify what the Office of Legislative Counsel has drafted, in conjunction with the other legal opinion and the authors of that other legal opinion to ensure that the new draft fulfils the intentions of the Executive decision. As a result of circumstances that were beyond anyone's control, we have not been able to have that conversation nor confirm whether what the OLC is proposing is consistent with what the Executive have agreed and the legal advice that was given to the Executive. Until I am in the position to verify that, I am unable to come to the Committee with the new draft Bill.

That is the situation we now face, and, given that that is now the decision of the Executive, I thought that it was important for me to bring it to the attention of the Committee. It is not my preferred course of action, and I think that it raises constitutional issues, which I will explore independently. Nonetheless, as a member of the Executive, I am obliged to honour their decisions, and, subject to getting the draft Bill, that is the course of action that I advise to the Committee.

The Deputy Chairperson:

It sounds like those were two robust Executive meetings.

The Minister for Social Development:

Three.

The Deputy Chairperson:

My views on accelerated passage are well known. They are in Hansard reports, and there is no point in going over them again. How many charities do you anticipate that the draft Bill will affect? Do you have any idea?

The Minister for Social Development:

No; there are 7,000 charities in the North. However, I can come back to the Committee on the number that the Department believes to be religious charities.

The Deputy Chairperson:

That would be helpful.

The Minister for Social Development:

One cannot have a situation in which the presumption of public benefit is reintroduced if it does not extend to all religious charities or all religious institutions. Clearly, there will be a large scope. It may be that the proposed amendments to the legislation will go beyond religious institutions and will deal with those that touch upon poverty.

However, the danger is that we will have a piece of legislation with two different tests when it comes to different charities, with a presumption of public benefit for one or more categories and not for others. The situation could become more complicated, because there are large charities in Britain and here. For the purposes of assessing their charitable status in Britain, there may be no presumption of public benefit, yet their operations in Northern Ireland will have that presumption. Therefore, the draft Bill will create a hybrid system, with some charities having the presumption of public benefit and some not, plus the presumption of public benefit for charities when it comes to their work in Northern Ireland, but not for their work in England, Scotland and Wales. There will be operational and practical difficulties.

This will also have an impact on the authority and standing of the Charity Commission. The core architecture of the Charities Act (Northern Ireland) 2008 established the Charity Commission and laid out what work it was to do. However, clearly, the ground rules have changed somewhat. There are consequences that must be considered over and above the wider

principle of legislation being revisited in what I consider to be a material way, in the absence of full consultation. The advice given to me is that the Assembly and the Executive have the authority to do that—

The Deputy Chairperson

Regardless?

The Minister for Social Development:

The arguments are whether Executive have the right to revisit legislation in such a way that it materially changes legislation without full consultation and whether the Assembly is capable of legislating on the basis of that decision. My understanding is that they do, and that if there was a legal challenge it is unlikely that the High Court would intervene with the Executive's decision or the view of the Assembly to legislate further to that decision. That might be the legal position, but I also think that there is an issue about process.

We started in a situation where I was arguing that the hybrid model did not work. Now, there is a recommendation for a different hybrid model. I said that the hybrid model did not work and other legal opinion said that it would. We have moved from that situation to a point where legal opinion now says that the legislation should be revisited fundamentally. Maybe the Committee finds it all a bit confusing and contradictory: I do as well.

I want to make it clear that the matter has been considered exhaustively around the Executive table to the point of excess and extravagance, and they have made that decision, and I will honour it. I hope to bring the draft to the Committee as soon as possible. However, we need to ensure that what has been drafted is consistent with the intention, and I need to verify with the relevant people that that has been reflected in the draft. Nevertheless, I am coming to the Committee to recommend accelerated passage for that matter.

Mr Craig:

Minister, that is the worst defence of an Executive decision that I have ever heard in my life. You clearly do not agree with it.

There is an important issue here. Although you did not agree with the Committee's original position, it took a lot of debate in Committee to find agreement on the issue. There was huge concern at the time around the protection of religious charities because there was growing evidence then, and that evidence is still growing, that in other jurisdictions the benefits test was being used to close down religious charities. I do not have a problem with the Executive's decision to beef up that position. I am all for freedom of religious expression. If charities call themselves religious charities and use that status, I do not have a problem with it. That applies across the board, although a lot of those charities would not feed into my sympathies at all. However, they have the right to be there and the right to the status.

As Minister, are you 100% convinced that the only way that a charities register can be delivered is through setting up another public quango? I questioned that at the start of the legislative process. I noted with interest that OFMDFM has just done away with a quango and that the Assembly's long term aim is to reduce the number of quangos and not increase them. I argued strongly at the start that we should have kept this matter in the Department and allowed local councils to do the registration and have a central database that a number of people could look at. However, I did not get my way.

The Deputy Chairperson:

You did not, Jonathan. That happens, does it not?

Mr Craig:

It does.

The Minister for Social Development:

I have read the Hansard report and the Committee's report on the Charities Bill, as it then was. You are right: people did ask questions. However, if you interrogate the narrative around all of that and, subject to those concerns being raised, there was a settled view that the legislation as drafted and passed by the Assembly was the right approach, namely no presumption of public benefit test and that the issue of peril to any one or other charitable organisation was not of sufficient weight to fundamentally revisit the presumption of the public benefit test.

I have asked officials to determine whether there was peril to any one or other organisation, including religious organisations, especially small ones, in other jurisdictions, because that issue was raised. I have not been able to find the peril that you identify. If you are aware of cases in the Scottish or Welsh jurisdictions where organisations have been at peril and have not been granted charitable status because they are on the wrong side of the public benefit test, please let us know.

Members may be aware that the Charity Commission for England and Wales recently approved the Druids as a religious organisation. Under the law, they are a religious organisation. Therefore, far from organisations being at peril, the evidence is that they are on the right side of the law. It is true that interventions have been taken against certain sects, but I do not think that any of those sects are going to be of the character that we are talking about here.

There is a need for a Charity Commission. There are 7,000 charities in Northern Ireland, and the notion that those organisations can be managed without a dedicated organisation does not seem right. The scale of the charities and the issues around them are such that they need a dedicated resource, hence an institution is required. Issues have been raised about finances, and my understanding is that the potential costs were made clear by an official, who has since moved to the Department of Education. Therefore, I very much come down on the side of the Charity Commission.

There is an issue with quangos, but it is not that their functions should all be taken into central government. The issue is that if there are quangos not doing their job properly or if there is a better way of doing it, we should do it that way. In my view, the functions of some quangos should be merged with others, especially those quangos that are working well. If you look at the quality of people who are charity commissioners, you will see that those people are very serious, have proven records, know their business and have a deep commitment to charitable activities. The quality and character of the full-time staff and members of the commission indicate that they are going to do very serious and good work.

Mr Roy McGivern (Department for Social Development):

The other danger is that, without an independent regulator in Northern Ireland, there would be charity regulation in other parts of the UK and in Ireland but very light touch regulation here,

which could potentially leave the charitable sector here open to abuse.

Mr Cobain:

After listening to the Minister, I can understand why he chose the profession that he did. We have heard three different opinions on the same subject. I am concerned that the legal opinion from Britain is different from the legal opinion that we got here on the hybrid situation. Are there any consequences around that? Is any of that influenced by issues around tax freedom?

Mr McGivern:

There is a slight issue about tax in that it is a reserved matter. However, Revenue and Customs would have an issue with different legislation in different jurisdictions in the UK, as it would have a different test to apply, which would cause difficulties.

Mr Cobain:

Was the legal opinion that you received internal?

The Minister for Social Development:

Yes.

Mr Cobain:

Was the legal opinion that the Executive received internal? Were there two different legal opinions on the same subject?

The Minister for Social Development:

Yes.

Mr Cobain:

This is a general point. I am never in favour of accelerated passage, particularly with this Bill, which has gone through a consultation period. It disadvantages people if a decision is taken in this Assembly to make a piece of legislation on which the public will have had no consultation. That is totally unacceptable.

The Minister for Social Development:

To confirm, there were three legal opinions. One was given to me from the Departmental Solicitor's Office, another was given to the Charity Commission by its council, and a third was given to me but shared with the Executive. That is entirely proper and appropriate.

The decision and course of action that I took was endorsed by the Committee and was viewed as legally competent. It seems to me that on policy issues, where a proposal is legally competent, those matters should, in general, proceed. The decision by a Minister on a policy matter, which was deemed to be legally competent, opened up a wider policy issue in the Executive. A legal opinion was given to the Executive that the wider policy issue could be re-legislated for. The Executive and the Assembly have the power to do that. I am concerned that that is over and above the hybrid model being replicated in a different form in the legislation and all the operational tax issues that arise from it. I am not content that when legislation is moved materially to a different place, even when the power is available to do so, there is not also an obligation to consult on that.

Ms Lo:

I agree with the Minister; there is a need for the Charities Act 2008 to be implemented and for the establishment of the Charity Commission, both of which were long-awaited. I worked in the charity sector for 20 years. We have to address the anomaly of the gap that has existed in Northern Ireland for a long time. We never had a Charities Act and a Charity Commission to advise and monitor charities, which the rest of the UK had. I am concerned about this change. It is sad that, after people waited for so long to get the Charities Act 2008, we are in this backwards-and-forwards process. Will the proposed change be subject to challenge by those organisations that do not pass the presumption of public benefit test? I am opposed to accelerated passage. We need to put it out for public consultation and see what the public response is going to be.

The Minister for Social Development:

Any policy decision or proposal is open to challenge. It is a matter for the courts to decide whether, on a prima facie basis, there are grounds for a challenge. If there are, it is up to the courts to take it to the next stage, through judicial review or another mechanism. The legal advice that I have been given, and which I accept, is that if the Executive have made that decision

and if the Assembly legislates for it, whatever are my concerns or the concerns of others, it is unlikely that the courts will interfere with the authority of the Executive and the Assembly to make the laws, even in the circumstances that may have arisen. It is important to note that. Could there be a further legal challenge thereafter by organisations claiming to have been treated differentially? That is a matter for those organisations to determine.

It seems to me — I am looking to Mr Gunn — that, if the courts were minded to say that the Executive have a right to do what they are doing and the Assembly has the right to legislate for what it is doing, it may not be very successful for a third party organisation to say, latterly, that legislation treats organisations differentially and should, therefore, be stopped. The presumption is that it is unlikely that any third party organisation would be successful in launching a legal challenge. Would that be correct?

Mr Philip Gunn (Departmental Solicitor's Office):

Yes. It is fair to say that the courts would give a great deal of deference to the legislative arm of the state. They would be very wary of offending against the principle of constitutional law, namely, the separation of powers. As the Minister has indicated, the justification for not extending the presumption of benefit to all charities may require further investigation. I would operate on the basis that the courts would be very wary of interfering in what is primarily a legislative matter.

Mr Gallagher:

With the number of charities that we have here and all of the issues around them, we need some kind of body to hold everything together.

Is it always the case that when a Minister goes to the Executive with a legal opinion, it is checked with a further legal opinion?

The Minister for Social Development:

Yes. If there is any proposed change in law or a proposed new law, over and above legal checks that any Minister may have to take, we circulate the detail to all Ministers, to OFMDFM and to the office of the Attorney General. That is a requirement of law to ensure that what we are doing

is legally competent. It might not always be the case that a different legal opinion will arise, although it is very often the case with pieces of legislation and proposals or policies.

So, in that conversation, a contrary or varied legal opinion might arise. However, in virtually every case, a settled view is reached between the Minister and all the legal advisers. In this case, there was not a settled view, and the Executive decided to take a contrary view to the one that I was taking.

Mrs M Bradley:

It is quite unfortunate that this has happened, because there are registered charities out there doing excellent work. What is the situation going to be with the charities that, as you said, are registered in England, Wales and Scotland and working under different legislation? That situation is bound to be of great concern to those charities.

The Minister for Social Development:

We do not know. There has not been a change in the law, so the issue has not arisen.

The Charity Commission is getting on with its work, and by the end of this month it will have the power of investigation. That will be a critical power, and it will be very interesting to observe whether cases are referred to the Charity Commission when people think that there is a need for investigation.

As Roy can explain, save that of registration, the Charity Commission will have all of its powers in the next short while. Therefore, there is a lot of substantial work that it will get on with.

Mr McGivern:

The legislation contains a whole range of powers for the Charity Commission, around reporting accounts from charities, public collections and other issues that there are real concerns about and about which you receive regular correspondence. The commission has been preparing to enact the legislation and, as the Minister said, from the end of this month it will have quite extensive powers to intervene where there are serious public concerns about individual charities.

The Deputy Chairperson:

What is the timetable for the revised Bill's passage?

The Minister for Social Development:

That will be subject to legal certainty about what any amendment might look like, detail of which I will have before the Committee well in advance of next Thursday. One of the parties to that conversation is not available at the moment. I am not minded to chase anybody; I want to give an opportunity for that conversation to arise and then have something before the Committee by next week.

After seeing the draft Bill, it will be for the Committee to decide on whether it wants to endorse the recommendation for the Bill to receive accelerated passage. I am not sure whether it can all be completed by 24 March.

Mr McGivern:

It is probably just still possible, but it will be very tight.

The Deputy Chairperson:

Our position is pending the draft amendment coming forward, so we will defer a decision on accelerated passage until then. On behalf of the Committee, I thank the Minister, Roy and Philip.