

**Submission by the
Committee on the Administration of Justice (CAJ)
to
Assembly Committee
regarding charities legislation**

February 2008

The Committee on the Administration of Justice (CAJ) is unfortunately unable to make a comprehensive submission to the Assembly Committee regarding its current study of charities legislation. However, we did follow earlier discussions of the draft legislation. Our primary concern is that the eventual legislation, and the procedures flowing from it, must strike the right balance between proper administrative and financial “oversight” and improper strategic or policy “control”.

CAJ is totally supportive of endeavours to ensure that voluntary organisations comply with effective financial controls – that they carry out audits, that their accounts are publicly available, and that their activities are such as are compatible with the aims set out in charities legislation. No individual or group should be able to mislead the public who assume that they are making a donation to a genuine charity, and there need to be proper safeguards to avoid any such situation. Moreover, the criminal law needs to ensure that it can detect and penalise the misuse of voluntary organisations for illegal activities. We understand that these arguments will have been made very forcefully (and rightly so) to policy makers.

At the same time, CAJ would want to urge proper caution. The community and voluntary sector should not be seen as an extension of the government sector, and there must be an arms-length relationship between the public sector and the voluntary sector. Such an arms-length relationship is to the benefit of both, since government does not want to have to render account for actions other than those for which it is responsible, and the voluntary sector can only thrive if it is seen by service-users or those for whom it advocates, to be genuinely independent.

We enclose for the Committee’s attention the submissions we made in October 2006 and previously in May 2005. We have not had an opportunity to review the draft legislation in the intervening period, so we are not aware if changes have been made to impose some limitations on the calling for inquiries (formerly article 24), or clarity between the roles of the Department and the Charity Commissions (articles 68-159?), or less ambiguity around definitional questions (article 88?). If the Committee believes that there would be some value in CAJ testifying before it on the appropriate balance to be struck, we would be happy to give more consideration to how to assist the Committee in its work. If you believe that you have received sufficient testimony on this point, we see little need in asking to appear before the Committee.

Also attached is a paper developed in Britain by Baroness Helena Kennedy QC about the need for legislators (she is herself a member of the House of Lords) to recognise the importance of independent advocacy when considering charities legislation.

Consultation on Draft Primary Legislation Proposal for an Order in Council: The Charities (NI) Order 2006

(October 2006)

The Committee on the Administration of Justice (CAJ) commented on the Review of Charities Administration and Legislation in Northern Ireland in May 2005. Most of the issues and concerns raised at that time bear reiterating in response to the specific draft legislation and we enclose herewith our earlier comments. All the following comments on the draft legislation should be read within that context:

1. CAJ welcomes the fact that charities legislation is being streamlined and modernised. We welcome in particular the fact that issues such as “human rights” and “equality” are explicitly included within the norm of charitable objectives.
2. We note, however, that sometimes there is an impression given in the course of the discussion (in the earlier consultation process, and in comments by the IMC and, more recently, by the Northern Ireland Affairs Committee, and even – indirectly - the Chancellor), that the proposed changes are necessitated by wide-scale impropriety or financial irregularities in the charitable sector. CAJ is not aware that there is any basis for such an assumption. CAJ urges the authorities, as they bring the debate forward, to take every opportunity to emphasise that these changes are ‘technical’ in nature, aimed at making the charity sector ever more efficient, and that the sector in Northern Ireland is (with very few exceptions) highly professional and effective. It would be deeply unfortunate if government’s attempts to strengthen the sector resulted in its weakening, by somehow implying that criminality was the norm - rather than the exception.
3. In this regard, we note that the DSD’s Advisory Group determined (page 12) to depart from the English & Welsh model in three “significant” areas. It is not clear if these departures are thought to be necessary because of some presumed laxity in the Northern Irish charitable sector? In particular, no explanation is given about the introduction of an extra “public benefit” test (para 5). All charitable activities have to meet the test of public benefit as well as complying with one or more of the detailed purposes laid down in para 4.2. Why is such an over-riding criterion said to be necessary? What meaning is going to be accorded to “public benefit”? Perhaps most importantly *who* will determine what constitutes “public benefit”? While many would argue that charities, by definition, are working for the public good, it would be very worrying if overly narrow definitions were to be used. At its most simple, could a fundraising effort for a particular individual fall outside of the public benefit test? Could effective advocacy for unpopular issues be countered on “public benefit”

grounds? This test needs to be dropped, properly defined on the face of the legislation, or codified in statute prior to its application in practice.

4. Very important for the long term health of the sector, is the need for the authorities to resist any temptation towards over regulation. It is appropriate to ensure that any charity registered as such is complying with its legal obligations, and is in no sense misleading its donors as to its use of their monies. It is obviously appropriate to ensure that charities do not benefit from a positive tax regime without just cause. It is however quite inappropriate to oversee the operations of charities in such a way that – deliberately or inadvertently – charities lose their autonomy and independent status. When individuals make donations to charities, they clearly do not want those donations to be misappropriated or criminally mis-applied. Equally, however, nor do they intend those donations to be subject to governmental controls or necessarily applied to government ‘approved’ purposes. Accordingly, it is vital that the new legislation regulate to the extent necessary, but no further.

CAJ believes that in at least two key areas, the legislation goes too far and risks seriously damaging the proper arms-length relationship that should exist between the statutory sector and the charitable sector.

- i. **Article 24 etc. Power to institute inquiries:** this provision seems to apply no restrictions whatsoever to the grounds on which the Commission may institute inquiries.

One can well imagine situations in which the Charity Commissioners ought to mount an inquiry into the financial dealings of a particular group, where – for example – there has been a serious allegation of mis-use of funds. But can the Commission require that detailed membership records be made available to scrutiny; insist that board minutes be studied to determine exactly who and how operational or policy decisions were arrived at; or respond to concerns by disgruntled members of the public who query the factual accuracy, or motivation, of an organisation’s publicity material? Article 24 seems to give very broad discretion to the Charity Commissioners. They are to be accorded extremely wide-ranging powers to call for documents, search records, remove trustees or staff, and disclose information to other parties. Whilst the Tribunal can review the use of some of these powers, the authority to call for documents falls out-with the Tribunal’s review authority (Schedule 3, para 2).

While the Commission has some authority to penalise persons who “knowingly or recklessly” provide the Commission with false or misleading information, it is not at all clear that this would deter those who simply have a (misplaced?) grievance against the charity concerned, and seek to engage the Charity Commissioners in their cause.

It is interesting that when the Northern Ireland Human Rights Commission sought similar kinds of powers to uphold and protect human rights, they were denied them – as being too wide-ranging. At a

public meeting, a previous Presbyterian Moderator poured scorn on the request of the NIHRC to have the power to enter premises (provided in this draft in article 54 to the Charity Commissioners), given that his private home and personal records would then be 'fair game'. The NIHRC was roundly derided at the session for proposing such an all-encompassing power, but it seems to be being offered to the Charity Commissioners with no obvious safeguards.

The legislation does not spell out in which ways the Commission might properly exercise any of these extraordinary powers, nor indeed how they might properly resist pressure placed on them by irate individuals to exercise these powers. CAJ believes that these provisions need to be radically overhauled.

- ii. **Article 68, 159, and elsewhere:** It is not clear why at several places throughout the text it is the Department, rather than the Charity Commissioners, that is given authority to make regulations. Nor is there any explanation as to why it was determined that Northern Ireland not follow the English & Wales model of the Non-Ministerial Government Department option. According to page 227, at least one of the consultees was aware of the difference, and appeared to think that greater accountability, and independence, was assured by the English and Welsh model than the one proposed for Northern Ireland.

CAJ has not had the opportunity to explore the differences between British models and the one proposed for here, and whether there are acceptable and even welcome modifications to reflect the different jurisdictions. However, given that we are concerned about the extent of independence between the charitable sector and the statutory sector, we believe that there would have been great merit in a fuller exploration of the various institutional options. There should be clear lines of demarcation (in terms of staffing, resourcing and powers) between the sponsor Department and the Charity Commissioners, and we are unconvinced that this is provided in the current model.

Finally, some concern has been brought to CAJ's attention regarding the significance to accord to **Article 88**. Obviously, it is quite appropriate to ensure that charity trustees pose no serious risk of financial mis-management or even criminal fraud, and therefore the legislation needs to establish grounds which would lead to the disqualification of certain kinds of persons. Some have queried however whether the current formulation might be interpreted by some to mean a blanket exclusion of people who have previously served prison sentences.

CAJ assumes that reference to "offences involving dishonesty and deception" is intended to refer by and large to financial dealings and cannot therefore be interpreted broadly to include many if any of the offences relating to the conflict in Northern Ireland. However, it is important to avoid ambiguity in this area.

Given the very high proportion of individuals who have served prison time for activities directly related to the conflict, but who otherwise would have no criminal record, any overly broad interpretation of article 88.1(a) could exclude a large number of people who pose no financial or criminal risk to a charity. The equality screening exercise, which says that there are no equality implications, indicate that government shares CAJ's perspective in this regard, since clearly if there had been any intention of providing some blanket exception for ex-prisoner involvement as trustees, there would have been major equality implications.

CAJ believes that it is necessary to clarify this point for the avoidance of doubt.

Attached below is CAJ's submission to the 2005 consultation paper.

Consultation on the Review of Charities Administration and Legislation in Northern Ireland in 2005

(May 2005)

Charity Registration

In principle, the Committee on the Administration of Justice (CAJ) sees no problem with a formal registration system for all charities, subject to this not entailing any excessive administrative burden, nor any political screening of charities by government. A registration system that merely formalises the current less formal registration system by way of the Inland Revenue, would be entirely acceptable. Any system however that, deliberately or otherwise, increased government controls on the work of charities would be much more problematic and we comment on this below.

Background to Review

Reference is made to a Northern Ireland review of the charities' legislation being undertaken by the Department of Social Development alongside the review of English and Welsh practices. CAJ was unaware of anything other than the latter review, and our attention was drawn to this exercise last year by the NI Human Rights Commission (NIHRC). The NIHRC had made a formal submission to the Charity Commissioners on the grounds that previous developments in English law have been routinely followed in Northern Ireland; presumably, the DSD is in contact with the NIHRC and will have been made aware of their submission? To avoid any doubt, the CAJ is presuming that the Northern Ireland Review has to date been a purely internal DSD one, which has now resulted in the consultation document, upon which views are being sought? If we are mistaken in this regard, we would appreciate some clarification. Regarding the other two reviews alluded to – the Taskforce on

Resourcing the Community and Voluntary Sector and the Review of Rating Policy – CAJ has already engaged with both of these processes.

Policy Aims

CAJ accepts the seven principles laid out as policy aims but recognises that the challenge will lie in interpreting these aims into practice. We noted earlier, for example, that it is vital that principles such as “transparency” and “accountability” not be interpreted in an overly legalistic, proceduralist, or cumbersome manner. Charities are sometimes extremely small groups, with little or no staff, and with very small budgets. Accordingly, we welcome principles such as “proportionality” and “simplicity” which should be pursued alongside the principles of transparency and accountability.

With regard to the specific principles outlined, we would like to make the following comments:

- **Clarity**

CAJ welcomes the various points included within the definitions of charity. Given that we work in the area of human rights, we are pleased to see this theme explicitly listed as one of the themes that can qualify for charitable purposes. The NIHRC submission to the English/Welsh review addressed the interpretation to be accorded to “human rights”, but it is not clear from this consultation document whether you are seeking comments of an interpretative nature? Human rights work, by definition, is about challenging those in authority and holding them to account, and might well be described by some as “political” in nature, though it should never be politically partisan, or advance the cause of any particular political party or ideology.

CAJ also welcomes the inclusion in the Northern Ireland definition of ‘charity’, work which is aimed at the “promotion of peace” (item 12).

We also in principle welcome the addition of item 13 (the promotion of good community relations) but believe that there might be some confusion about the terminology used. The Policy and Strategic Framework for Good Relations in NI (issued by OFM/DFM in March 2005) notes that “‘community relations’ refers specifically to division between the Protestant and Catholic communities in Northern Ireland and that ‘good relations’ refers to Section 75.2 of the NI Act 1998, which includes people of different religious belief, political opinion or racial group” (para 5.5.1). In item 13 of the Charities Administration and Legislation definitions, both ideas seem to be conflated - what remit is intended to be include in the term “good community relations”?

CAJ would argue for the widest possible interpretation and believes that no narrow interpretation of item 13 – for example one that excluded the promotion of anti-racism - should be accepted. We note that the Northern Ireland Council for Voluntary Action (NICVA) in its comments endorsed the changes being proposed to the English legislation, and suggested that it might be better to transpose these in their entirety to

Northern Ireland. We have some doubts about this approach. In the English formulation, one definition would include “the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity”. The underlined section here was instituted at the proposal of the Joint Steering Committee and NICVA prefers this formulation, and would integrate the concepts of “peace” and good community relations” into the revised English legal wording. CAJ would instead recommend retaining the “Northern Ireland specific amendments” proposed in the consultation document, and add a free-standing charitable definition of the “promotion of equality”..

Our reservation about the English wording as proposed is that it might be narrowly interpreted to relate to “equality” and “diversity” in terms only of racial or religious harmony. If this were to be so – what about groups working to promote the rights of people with disabilities, to counter homophobia, to promote equal treatment of women? It would be better to recognise as a free-standing charitable objective the “promotion of equality”. Of course, most equality work could simply be incorporated within the rubric of “human rights”, but this could allow for some ambiguity. In the Northern Ireland context, there are two distinct statutory bodies and two distinct bodies of legislation dealing separately with “human rights” and “equality”, so CAJ believes it would be preferable to list ‘equality’ explicitly within the definitions of charitable activities. The English formulation is not an adequate alternative in this regard.

- **Transparency**

Point 1 – reference is made to the footnote about exemptions in England and Wales, though it is not clear if these exemptions are being ruled out, or being considered for NI. While CAJ would have no objection in principle to the exclusion of very small groups (income under £1000 and no endowment or land), we see no reason why churches, places of worship or voluntary schools would be automatically exempted from registration.

Point 3 – regarding the reference to “exemption from oversight” – CAJ has no problem with this terminology if it is intended to refer only to the oversight of the raising and disbursement of funds for charitable purposes. Any wider oversight is presumably a matter for the body’s executive or management group, membership, or as otherwise specified in its constitution (see on for more on this issue). We would be very hesitant about the Charity Commissioners (still more the Department) taking on any responsible for the general oversight of a charity’s work.

Point 8 – again, CAJ has no problem in principle with the need for some organisational details to be treated in confidence, but this begs the question about what material will be routinely placed in the public domain by way of the register? In principle, we see no reason why anything other than basic facts and figures should be available to the general public. Transparency is owed to an organisation’s membership, its funders and potential funders, and all of these constituencies should be able to access financial information, an organisation’s statute or constitution, and a record of activities confirming that the group concerned is carrying out its agreed objectives (by way of an annual report or whatever). The granting of charitable status

should not give *carte blanche* to the authorities to require that extensive information about the organisation be placed in the public domain. It would be helpful if the authorities would clarify what information they expect to be held in the public register.

Point 10 – is this reference to the Department a typo? A registered charity should presumably be required to prepare annual reports and accounts for the Charity Commissioners (not the Department), and maybe this is what was intended? What significance should be read into the obligation on the charity to provide material on request to “the public”? Small charities could be easily bankrupted if they were inundated with perhaps malicious requests for information and were not allowed to refuse such requests, or could not comply with this obligation by referring inquirers to the register of charities.

- **Accountability**

There are two distinct issues relating to accountability that need to be addressed in this debate. One, which is not addressed explicitly at all in the document, is what level of accountability is owed by the individual registered charities, and to whom. CAJ would argue that charities owe accountability only to those bodies laid down in their statute or constitution – normally a membership, an executive committee, or both. A charity, by being registered as a charity, and gaining thereby certain tax benefits, has a duty to account to the Charity Commissioners, but this duty is, however, not entirely open-ended. The charity must provide information to assure the Commissioners that the charity (a) is undertaking the activities laid down in its statute, and which secured it authority to act as a ‘charity’; and (b) is spending its monies for the purposes agreed to be charitable. We see no justification for the Charity Commissioners engaging in discussions with charities about their recruitment policy, their media profile, their strategic plans etc. etc. The accountability for overseeing such issues lies solely with the authorities laid down in the organisation’s statute. Arguably, according wide-ranging oversight authority to the Charity Commissioners will undermine rather than underpin the accountability that should be required of the organisation’s executive committee or other governing organs.

The second issue around accountability relates to the authority of the Charity Commission itself. It is vital for many charities that they not be seen to be dependent in any way on government, and accordingly CAJ would agree that a completely independent NI Charity Commission is preferable to any body linked directly or indirectly with the Department. We have no objection to the Charity Commissions having a status as a Non Departmental Public Body, as long as the protocol governing its relationship with the sponsoring department is clear and the department cannot interfere in policy decisions of the Charity Commission.

It is difficult for CAJ to comment on the size and appropriate staffing for the new body, but we assume that the proposed model has been drawn up on the basis of similar activities carried out by bodies in the Republic of Ireland & England and Wales.

The consultation document asks about the ideal appeals mechanism and it would have been helpful to learn what the other jurisdictions in these islands do regarding appeals. CAJ wonders if there would be any value in the various Commissions working collaboratively for the purposes of appeals – so that Commissioners from other jurisdictions would hear appeals, but this would depend on a certain commonality of legislative approaches across the various jurisdictions. If this were to prove possible, it would be a cost-effective way of ensuring that all the Commissions routinely exchange information about best practice. Whatever appeal mechanism is decided, CAJ believes that the appeal mechanism cannot lie with any government department.

Compliance

The language here is somewhat worrying. In point 1, reference is made to “regulation”, and the need for a charity to be “well run” and “deserving of public support”. As noted earlier, CAJ believes that organisations should be adjudged by those governance bodies laid down in the organisation’s statute. Whereas the Charity Commissioners can assess certain aspects of a charity’s functions, they should not be attempting to judge overall whether a body is “well run” or “deserving of public support”. An alternative formulation, which would meet the presumed objectives of the Department, and CAJ’s concerns about independence would be *“All NI Registered Charities should be financially regulated to ensure that they comply with their constitutional aims and objectives, and as such can be considered to be well-run and deserving of public support”*. Underlining indicates the proposed areas of change.

All other principles should flow from this first one. Accordingly, the Charity Commissioners should only have powers relating to instituting inquiries, accessing documents etc. with a view to allowing them to reassure themselves that monies are being properly spent on the purposes laid down in the organisation’s statute. CAJ finds no justification in the document, and in principle would be totally opposed to a trend whereby Charity Commissioners were in any sense to replace the oversight provided by an organisation’s elected and appointed officers.

In the section entitled “Powers to Control Abuses”, there is presumably a typo again, in that it would surely be the Charity Commissioners, not the Department, which could require a charity to change its name?

On the question of auditing: we assume that all charities with an income of over £100,000 currently are audited - or is the Department proposing something that will bring a whole range of new organisations within the ambit of auditors?

Governance - Charitable Collections

In this section (and elsewhere, as already noted) reference is sometimes made to the Department when it might more appropriately be made to the Charity Commissioners? For example, why would exemption orders (relating to PSNI notification for door-to-door collections) in future be awarded by the Department rather than the Charity Commissioners?

On the specifics of PSNI involvement, CAJ can understand that someone must regulate door-to-door collections, but we are not clear why there is a need for “all public charitable collections to be approved by the PSNI”. Nor do we understand why the promoters of collections will be required “to account to the PSNI for the proceeds”. Surely, once the Charity Commissioners have been established, they should be the body approached for authorisation for a NI-wide door-to-door collection? While the Commissioners would be well advised to consult with the PSNI to ascertain any counter-indicators (other non-charitable events occurring at the same time for example), the decision should surely lie with the Commissioners.

Certainly, any oversight regarding the proper collection and disbursement of monies should be a matter for the Commission, not the PSNI. CAJ believes that the use of PSNI for such work is unnecessary and an improper use of resources.

For future use – when issuing consultation documents, page numbers are useful for reference purposes.