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The Charities (Amendment) Bill 2022 – A Commentary on the General Scheme of Bill

Oonagh B. Breen, Professor of Law, UCD Sutherland School of Law and Philip Smith, Arthur Cox Solicitors, authors of Law of Charities in Ireland (Bloomsbury: Dublin, 2019)

Introduction

April 29 saw the publication of the General Scheme of the Charities (Amendment) Bill 2022. The General Scheme comprises the draft heads of Bill which will undergo scrutiny before the Joint Oireachtas Committee on Social Protection, Community and Rural Development and the Islands before the text of the Bill is finalised. The Committee may invite stakeholders to participate in that scrutiny process by attending meetings to discuss the proposed provisions of the Bill so now is a good time to learn a little more about what the 32 provisions of this Bill contain. This commentary provides a basic outline of the Bill and highlights some of the major changes to be introduced. Space constraints means that not all changes can be discussed in this note and the coverage of those highlighted provides just a taster of the debate ahead.

Divided into 3 parts (preliminary and general; amendment of the 2009 Act; amendment of other Acts), with 27 of the 32 heads concerned with the amendment of the Charities Act 2009, the Bill is long awaited. Many of its provisions first appeared as part of the Courts and Civil Law (Miscellaneous Provisions) Bill 2017 when charity regulation fell within the remit of the Department of Justice and Equality. With the establishment of the Dept of Rural and Community Development (DRCD) in July 2017, oversight of charities moved from Justice to DRCD and so too did responsibility for legislative amendment.

The Quick Wins

Advancement of Human Rights to be charitable

Advancement of Human Rights is finally set to become a charitable purpose under Head 4 of the Bill. The Irish Government deliberately excluded the advancement of human rights from the statutory definition of a charitable purpose in the 2009 Act – a narrow-minded exclusion that set Ireland apart from our common law neighbours.[1] In its 2015 Report on the Review of the Charities Act 2009, following expert evidence, the Joint Committee on Justice, Defence and Equality expressly recommended the amendment of the 2009 Act to include human rights as a charitable purpose. This amendment will mean that organisations with specific references to human rights purposes in their objects clause will now be able (and required) to register as charities. Transition periods will operate to enable organisations working in the human rights space who are not registered as charities to register.

Company Secretaries not "Charity Trustees"

The definition of "charity trustee" will be amended to exclude company secretaries or secretaries to the board who hold no other office in the charity. This is a welcome change which clarifies a problem previously identified in the 2009 Act.

[1] Oonagh B. Breen, 'Too Political to be Charitable? The Charities Act 2009 and the Future of Human Rights Organisations in Ireland' (2012) 2 *Public Law,* 268-287.

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Clarity about "members" for unincorporated organisations

A new definition of "member" is inserted which brings clarity to who is a 'member' of a charitable organisation which is not a charitable trust. For companies it is the subscribers or shareholders (consistent with Company law and the current position). For unincorporated associations (and bodies corporate that are not companies) it is the persons (excluding charity trustees) who are entitled to appoint, nominate or vote for the appointment of an individual as a charity trustee.

Similarly there is now clarity for the basis for there being a minimum of three charity trustees (Head 19) which has long been a practice without a legal authority behind it.

The Long-Expected Changes

Accounting and Reporting amendments

There are big changes to the existing accounting and reporting provisions found in ss.47 and 48 of the 2009 Act. The financial thresholds to allow for simplified accounts will be increased from €100,000 to €250,000. Above the €250,000 threshold, all charities – both unincorporated and incorporated charities – will be required to prepare their accounts in line with the Charities' Statement of Recommended Practice ('Charity SORP'). So, for the first time charitable companies will be subject to CRA regulation when it comes to the preparation of their financial statement of accounts and additional obligations may now be imposed on charitable organisations regardless of whether they are companies entitled to avail of exemptions under the Companies Act 2014 or not. Similarly, s.50 of the 2009 Act will be amended to ensure that all charities' financial statements (over a specified threshold) are subject to statutory audit, regardless of the legal form of that charity.

In an interesting twist, while educational bodies will remain exempt from the accounting and reporting requirements of the Charities Act, university foundations will no longer be so exempted.

A collection of other tweaks and amendments

Many of the provisions in Part 2 of the Amendment Bill relate to tweaks to the 2009 Act either sought from the Regulator's experience of administering the Act or are required as a result of Brexit to clarify that future treatment of UK charities in Ireland will be equivalent to the treatment of EEA charities in Ireland, as previously provided in the 2009 Act. Thus, we see new powers for the CRA to refuse to make a decision on a registration application where the application is incomplete or otherwise deficient (Head 7); increased powers to attend at a charity's premises to examine certain information as part of the CRA's general monitoring and compliance programme (Head 17); and a requirement that in all public communications charities cite their registered charity number ('RCN') (Head 12).

General duties of Charity Trustees

Head 20 introduces a new statutory fiduciary duty for all charity trustees to act in good faith, to avoid conflicts of interest and to exercise an objective standard of care, skill and diligence when advancing the charitable purposes of their organisation. This provision mirrors the similar duties placed on company directors under the Companies Act 2014 and on charity

trustees under the Scottish charities legislation. Breach of this statutory duty can form the basis for specific CRA compliance and enforcement action.

Power to remove registration for unapproved amendment of main objects

Head 9 provides that where the main object of a charity is amended without CRA consent the Authority may remove the organisation from the register in a manner similar to the removal applicable to not being a charitable organisation or where an entity has wound up or ceased to operate.

More use of intermediate sanctions

Head 26 amends s73 of the 2009 Act which provides for intermediate sanctions. At present where an organisation is uncooperative a prosecution appears to be mandatory but is often not optimal as a regulatory response (given the intermediate nature of the intended sanction). The Authority will in future have greater flexibility which may result in intermediate sanctions (e.g. issue of directions, publication of contravention details) being used more frequently than previously.

Some hidden pitfalls

Advance CRA approval required for all constitutional changes

Head 7 of the General Scheme introduces a new subsection to s39 of the 2009 Act. Subsection (11B) provides that a charitable organisation registered under s.39 "shall not amend its constitution without the prior approval of the Authority …" . Head 8 includes a similar provision in respect of deemed charities subject to s.40 of the 2009 Act. This future requirement to have every change to a charity's constitution approved in advance by the CRA is a recipe for disaster and goes beyond what is required for good charity regulation. It also flies in the face of charity law reform in other jurisdictions where 'regulatory red tape' is being cut and greater allowances are being made to allow charities to run their organisations in an effective and efficient manner (see, e.g., the provisions of the recent English Charities Act 2022 which make it easier for unincorporated charities to amend their governing documents). While the regulator has a very strong interest in ensuring that certain constitutional changes are approved in advance – e.g., proposed changes to charitable objects clauses, dissolution clauses etc, not every other change to a constitution should require advance regulatory approval.

It is notable that the explanatory note to Head 8 states that: *"The new subsection (9) regarding the requirement for [CRA] consent to any proposed change to the main object provided for in a charitable organisation's constitution is intended to align with a similar amendment [in Head 7] proposed in respect of section 39"*. Such an amendment would make sense but it would appear that as part of the finalising of the Bill it was decided to widen the CRA's oversight to the entirety of all charities' constitutions in both Heads 7 and 8. This is unnecessary, impracticable and likely to create an unworkable and distracting burden on the CRA while acting as an unnecessary restriction on the sector to respond to (for example) changes to constitutions required to facilitate virtual meetings.

Amendment to 2009 Act provisions regarding remuneration of trustees

Head 29 (along with parts of Head 3) seeks to tackles the unresolved issue of remunerating trustees under contracts for services unrelated to trusteeship and current challenges of

interpreting the cross-references to section 89 in the definitions of Charitable Organisation and Charitable Trust.

The Bill provides a framework for dealing with Trustee remuneration which is consistent with the main prevailing legal premises. However, despite the best efforts of the Bill there would appear to be some residual ambiguities.

What happens to existing paid employees who are charity trustees?
As the notes to the Bill make clear, while it is rare, there are occasions where employees are charity trustees. While the framework is clear about how this will operate in future it is not clear how existing arrangements previously approved by the Revenue for existing registered entities will be addressed.

Different treatment of charity trustees depending on legal form of organisation
The removal of the reference to paying property to "members" in the definition of 'charitable organisation' (with appropriate clarifying amendments) is a welcome clarification. However, the fact that it was not replaced with a corresponding prohibition on payments to either directors or charity trustees is not. Without a corresponding amended definition to the new cross-reference to court orders and section 89 in the revised definition of "charitable trust" there is a material difference in the treatment of charity trustees with regard to remuneration depending on the legal form of the charitable organisation. This contradicts a basic premise of both the original Act and the new Bill (see e.g., explanatory note to Head 20).

A similar issue arises in that the Bill's amendments do not envisage that a charitable trust might engage employees – who might themselves also be charity trustees. At present while the overall direction of travel of the amendments is welcome there appears to be an inadvertent asymmetry in their implementation which is going to give rise to a further series of ambiguities in this admittedly complex area. Further amendments in Head 3 are likely to be required to address these issues.

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