

CHARITY CONSULTATION

Final Draft responses

Consultation - Question 1

What in your opinion or that of your organisation (if you are responding on behalf of an organisation) should be the top three priority areas of activity for the Charities Regulatory Authority in the first three years of its existence and why.

This response is submitted by the Association of Irish Charity Lawyers. We welcome this consultation process and the commitment by the Department of Justice to the implementation of the Charities Act 1990.

We think there are three clear priorities for the Charities Regulatory Authority (“the Regulator”) which are of broadly equal importance. These are:

- **The Register:** The creation of an accurate register of charities in order to ensure that the Regulator understands and appreciates the breadth and scope of the sector it is responsible for regulating. The sector has proved notoriously difficult to map accurately with figures for the numbers of charities varying from 4,000 to 24,000 depending on where the person commenting draws their information from. In order to understand the sector and regulate it properly and in order to communicate with the sector with credibility in order to promote compliance with the law it is crucial that the register is accurate, up to date and fully captures the sector.
- **Planning the Transition:** Planning for the management of the interim, transitional period during which the Regulator assumes functions. Two key areas are; decisions taken in regarding the establishment of charities; and the activities currently carried out by the Commissioners for Charitable Donations and Bequests for Ireland. In particular, we would be concerned that charities may not be able to obtain a CHY number once the regulator comes into existence as the Revenue may defer to the regulator for a decision on charitable status under Section 39 before granting a CHY number. This would clearly have a detrimental effect. We note that there is such an administrative vacuum in Northern Ireland at the moment which is causing issues with obtaining decisions around the establishment of charities and charitable status. It would clearly be desirable to ensure that there is a clear handover of responsibility and that the regulatory authority has the resources and functionality to handle charitable purpose questions prior to the formal commencement of the Regulator’s activities. Similarly the transfer of the functions of the Commissioners for Charitable Donations and Bequests for Ireland needs to be carefully handled to ensure the smooth running of the current functions in relation to decisions made by that body is not affected by the transition. It would be helpful for there to be a clear statement that all applications for CHY status and queries regarding the establishment of charities during any administrative transitional period will continue to be handled by the Revenue Commissioners until the Regulator is in a position to carry out its full range of functions
- **A Public Timetable:** It is also vital that the sector is informed about the Regulator’s plans for regulations to enable timely management by the Charities to ensure that they are in a position to comply. In this regard, it would be very helpful for there to be a clear timetable for the introduction of annual reports, activity reports and financial reporting with at least twelve months advance notice of the content of these reports and returns in order that charities can prepare for completing them. The anticipated detail required is significant and will result in considerable planning on the part of the charities. Accordingly it will be important for the Regulator to focus initially on supporting and educating charities with regard to their compliance obligations. Detailed guidelines will be required before the Regulator’s functions

are fully commenced along the lines of the new Insolvency Service and the Mental Health Commission.

Consultation – Question 2

What are the main reasons you would consult the Register of Charities?

Our members would consult the register in order to verify accurate and up to date details of the data held for charities. We note that in particular as with the facilities in Scotland, England and Wales it would be helpful for the register to be searchable by reference to similar names, similar objects and similar addresses. It would also be helpful if a given entry also contained a link through to related entities.

Consultation – Question 3

How often do you think you would consult the published statutory register of charities?

This varies from member to member of our organisation. In our professional capacities, a small number of members would use it on a daily basis; most members would be likely to refer to the register at least once or twice a month.

However, we would note that as members of the public in our private capacities we would also expect to refer to the register when considering making donations or verifying the identify of charity fundraisers and organisations looking for donations of clothing or otherwise soliciting contributions or input from the public. We would anticipate that members of the public would also use the register for verification purposes and again this frequency is likely to be in the order of once or twice a month.

Consultation – Question 4

What, if any, information additional to that required under Section 39(7) of the Charities Act do you think should be included in the published register of charities?

In addition to the six statutory headings, we would suggest that it would be helpful to include the type of entity (i.e. Trust, company limited by guarantee, unincorporated association, friendly society etc.)

- Details of the governing instrument
- A link to the annual activity report and the annual report and accounts or at least an indication of the financial size of the organisation
- Confirmation of whether the organisation has adopted the fund-raising and governance codes and any other relevant codes of practice
- A reference to related entities that are part of the same organisation or which share the same address
- A brief statement of the mission statement or the key activities (in this regard we note that the legal objects of a charity are often broad and do not indicate the current activities)

- Details of whether a charity is an “eligible charity” or otherwise has “approved body” status for the purposes of s848A and Schedule 26A to the Taxes Consolidation Act 1997

We would also note that it would be important that the register is a one stop shop and so that it repeats CRO information rather than redirecting members of the public to a different website with different features. It may also be helpful to adopt the John Hopkins or a similar categorisation so that the area of charitable activity which the charity is most involved with is clearly available to the public rather than simply relying on the definitions contained in the Act.

We would also recommend that some items of information held by the Regulator for the register do not appear on the public register. In particular the addresses of properties supplied under s39(5)(e) where those addresses are primarily residential addresses (e.g. womens’ refuges, children’s residences, religious residences). We would also suggest that (as in both England & Wales and Scotland) that Trustees’ addresses be retained by the Regulator but that these do not appear on the public register.

Consultation - Question 5

Do you agree with the proposed fee structure?

No.

It appears to us that the fee structure contains inherent unfairness and is inconsistent with other aspects of the proposed reporting structures. We would make the following observations;

Looking at the fee relative to the gross income, €75 for essentially the smaller charities is on its face disproportionately higher than any of the other categories of charity. This would appear to be inherently unfair and is likely to be challenged. It would be unfortunate for the Regulator to commence its activity with a dispute over fairness with the sector. We would also note that the basic annual filing fee for the CRO in the “for-profit” sector is €40 to file a paper return and €20 to file an on-line return.

It would be unfortunate if the first communication from the regulator was seen to have a disproportionate impact on the smallest charities.

We also note that the first two bands are inconsistent with the financial reporting. We would therefore suggest that the first band is €0-10,000 consistent with the financial reporting and that above that threshold where the regulatory structure applies in earnest is where the regulatory fees should apply.

Consultation – Question 6

If you answered “no” to question 5 above, what alternative fee structure to the one proposed above would you prefer to see put in place?

We also note that the first two bands are inconsistent with the financial reporting. We would therefore suggest that the first band is 0-10,000 consistent with the financial reporting and that above that threshold where the regulatory structure applies in earnest is where the regulatory fees should apply.

We believe that the administrative capability, credibility and reputation of the regulator will be significantly enhanced if the following structure is used: 0-10,000, €10; 10-50,000; €50 50– 100,000, €100; 100,000 – 500,000, €200; and 500,000 and above, €500.

In relation to the above, we would note that the €50 fee is not inconsistent in that it is a 1,000th of the top end of the band, as for the other higher categories. From a fairness perspective, the amounts themselves are not particularly an issue; it is the relativities of the amounts that are important. For example, these amounts could be 40, 80, 160 and 400.

We are in favour of all entities that are on the Register having to pay an annual fee to participate in the Register. We would consider it important that this is very much a participation fee rather than a levy to be collected. We would suggest that the Regulator’s scarce resources should not be directed to the collection of a large number of small payments. Rather the consequence of non-payment should be that entities which do not pay are no longer registered charities and therefore run the risk of the sanctions of operating as a charity outside the requirements of the law. We believe it would be important for the Regulator to have the discretion to waive the fee if it considers it appropriate to do so. Again education of charities and the dissemination of information about the obligation to register and to pay the fee will be required and should be a priority. It is important to note that many of the

very small charities (in particular those which do not have a CHY number) are not part of sector networks and it will be a challenge to make them aware of their obligations.

As a general caution, we would note that the fee structure is measured by reference to gross income but for most not-for-profit entities, income has no bearing on available cash or profit as in many cases the income is directly related to the expenses of the projects being run. It cannot be assumed that an organisation with significant gross income has any greater cash available to pay fees than a smaller organisation since a significant amount of the income is specifically restricted to the project to which it relates. It does not follow that as income significantly increases that there is a significant amount of money available to pay regulatory fees.

Finally, some of our members noted that it may be more appropriate to use an averaged income to avoid a particular spike in income for one year having a disproportionate impact in reporting.

Consultation – Question 7

Do you agree with the proposed income threshold for financial accounting and reporting by charities?

Yes.

Consultation – Question 8

Are there alternative income thresholds to those proposed that you prefer to see in place

No.

Consultation – Question 9

What information would you like to see included in the annual financial report provided by the registered charities regulatory authority

We would like to see these compliant with the SORP accounting standard in the bands where accrual accounts are being prepared. In particular we would suggest separate identification of; the total amount of income from fundraising, donations and grants. We would also suggest that the costs of administration and the costs of fundraising be separately identified. It would also be helpful to specify restricted funds or designated funds which are not available for general application. We also suggest separate identification of the income from government departments and which department is responsible for how much of that income.

We would also suggest that the level of external scrutiny of accounts for organisations with gross income of €10,000 or less should not be “none”. While we would agree that external scrutiny should not be a mandatory routine requirement for small organisations we would believe it is important that the accounts of such entities can be scrutinised by the Regulator. We appreciate that the table is a summary but felt it would be important to draw attention to the distinction between mandatory external scrutiny at the time of preparation of the accounts and a requirement that accounts of all organisations should be capable of being scrutinised by the Regulator at any point subsequently.

Consultation – Question 10

What information would you like to see included in the activity reports provided by registered charities to the charities regulatory authority?

- A statement of the current mission statement of the organisation and its main activities during the last year
- Main stakeholders and beneficiaries
- Changes to Trustees and Directors during the period
- Changes to the registered office
- Changes to the objects
- Statement of how the charitable purpose was achieved during the year
- Statement of any new activities started
- Statement of any existing activities that were ceased

Consultation – Question 11

For charitable organisations only. What type of report on accounts filing system would you most likely to use?

Not applicable.

Consultation – Question 12

Other comments

12.1 Charitable Commissioners for Donations and Bequests for Ireland: It is critical that the transition of functions of this office occurs smoothly and that none of the expertise is lost.

12.2 Resourcing: We would have a major concern that the Regulator is going to have a limited ability to carry out functions without additional resources (which would appear to be unavailable). There is clearly a significant marketing and education campaign to be implemented along with maintenance of the existing functions of the CCDB and taking on responsibility for determining charitable status from the Revenue. These tasks all involve resources and it would appear that it is not immediately obvious that the Regulator will have sufficient resources to continue the current activity in addition to planning for and implementing the initial implementation of the Act referred to under our priorities in consultation question 1. It is key to ensure that the Department of Justice fully appreciates necessary levels of resourcing required. In particular, if the regulator is going to work well with the sector in establishing compliance with its requirements under the Act and to create a properly functioning register to the benefit of all concerned, it will need to spend resources in both planning for and communicating its plan for change in order that the sector can itself make the necessary plans and engage in the necessary investigative activities in order to be able to properly respond to the Regulator's questions.

12.3 Timetable for implementation - It would be important that the reporting requirements are phased in and we would suggest that they are phased in by reference to size of entities. The reality is that the larger charities will be able to find the resources to obtain professional assistance with completing statements of activity and the annual reporting requirements. However, at the smaller end, the reality is that organisations will find these burdens challenging and again an information and education role must be an initial priority for the Regulator. We note that a phased introduction will ensure that the processes are better understood and more efficient by the time they apply to smaller entities. It would also be helpful to have clear guidance. There are examples of guidance materials from various statutory bodies including the offices of the various ombudsmen, the CRO, the Pensions Board and the UK charity regulators. In particular, we would recommend the long lead - in time for the smaller charities in relation to the financial reporting and the annual activity reports.

12.4 Accounting requirements: We note that there appears to be some confusion over the requirement for income and expenditure accounts as required by Section 47(3). There appears to be some concern that this requires “accrual” accounting rather than “payment and receipts” accounting. We note that “payment and receipt” accounting is permitted in England and Wales up to a threshold of £250,000. We are not sure whether the intention is to prohibit receipts and payments forms of accounting below €100,000 but there is some concern that the language of the legislation requires this. It may be that Section 47(4) could be a means to resolve this potential ambiguity if the Regulator issues guidance that receipts and payments accounts will be deemed to give a true and fair view of the state of the affairs of the organisation to explain its transactions for entities below the €100,000 threshold. We recommend that the accounting organisations be consulted in relation to this aspect.

12.5 Registration of connected charities: By virtue of the provisions of section 40 many charitable organisations which, though in greater and lesser respects separate, operate under a common CHY number will be deemed registered without recognition of their separate characteristics. Also, some charitable organisations which operate a number of CHY numbers (for example, obtained for particular branches or specific trusts) will find themselves with multiple registrations and potentially duplicative reporting obligations. Put simply, many charitable organisations have multiple CHY numbers and some CHY numbers have multiple charitable organisations.

We suggest that the Regulator embarks upon a consultation process to establish a means by which the registration and reporting requirements of such “connected charities” may be rationalised.

We note, for example, that section 12 of the England and Wales Charities Act 2011 permits the Charity Commission for England and Wales to direct that two or more charities having the same charity trustees are to be treated as a single charity. In addition, section 12 provides that the Charity Commission may direct that an institution established for any special purposes of, or in connection with a charity is to be treated (a) as forming part of the charity; or (b) as forming a distinct charity. This concept of “linking charities” permits the Charity Commission to link charities for both registration and accounting purposes. Linking charities reduces the administrative burden on charity trustees and the Charity Commission by allowing the charities to:

- (a) prepare only one set of aggregated accounts;
- (b) produce only one activity report, referring to all of the activities of the linked charitable organisations.

The policy of the Charity Commission is that it will link charities on request as long as it is satisfied that the trustees are fully aware of the benefits and limitations of linking. The concept also, importantly, permits a charitable organisation to identify and respect restricted funds within its linked registration, such that the linking of the said restricted trust funds would not permit the distribution of those restricted trust funds in circumstances other than as permitted in the terms of the particular trust. Alternatively, the trustees can register a restricted trust fund separately (ie not “linked”) and can refer to it as a “connected organisation” in the annual return and activity report of the main charity.

This concept of “linking” charities is in keeping with the concept of group VAT registration provisions long in operation in Ireland.

We recognise that this may require amendment to the existing Act but would draw to the Regulator’s attention that this is a significant issue given the number of linked entities potentially affected and it merits consideration of facilitating amendments prior to implementation.

12.6 Money-laundering: We would suggest that if additional resources could be provided to support an initial investigative function this would enable the Regulator to address the issue of money-laundering providing increased confidence in the sector. While this would not be one of the three top priorities it is an important area which has a significant impact on public confidence, transparency and accountability.

12.7 CONTACT DETAILS:

If we can be of assistance in providing further detail on any of the points above please do not hesitate to contact us at the Association of Irish Charity Lawyers c/o Philip Smith, Arthur Cox, Earlsfort Terrace, Dublin 2 or by email to philip.smith@arthurcox.com