THE WHEEL and CHARITIES INSTITUTE IRELAND

with legal input from MASON HAYES & CURRAN LLP

COLLABORATIVE SUBMISSION

To the Joint Committee on Social Protection, Community and Rural Development and the Islands in response to the *General Scheme of the Charities (Amendment) Bill 2022 (the "Bill")*

This submission on the Charities (Amendment) Bill 2022 is made co-operatively by Charities Institute Ireland and the Wheel, who together represent most of the registered charities & voluntary organisations in Ireland, with legal input by Mason Hayes & Curran LLP, solicitors, Ireland's largest and leading provider of legal services to the charity sector.

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1.0 INTRODUCTION

1.1 Submission Overview

This submission on the Charities (Amendment) Bill 2022 (the Bill) is made co-operatively by Charities Institute Ireland and the Wheel, who together represent a very significant proportion of the registered charities & voluntary organisations in Ireland and with legal input from Mason Hayes & Curran LLP, solicitors (MHC), Ireland's largest and leading provider of legal services to the charity sector.

Charities Institute Ireland, the Wheel and MHC support this Bill and its role in the further development of a first-class regulatory regime for registered charities in Ireland. The proposals, observations and commentary that follow are intended as constructive inputs into the development of the legislation. We are acutely aware that the Bill represents the sole opportunity for legislative development and amendment for the short and medium terms and our submission is therefore detailed and substantive. There will only be one opportunity to get this right for the Charities Regulator and the regulated.

The contributors to this submission are grateful for our working partnership, which has allowed us to make a single submission covering both policy and legal elements of the Bill. We are grateful to the 300+ contributors to a briefing webinar we held on 30 June for their contributions from a very wide variety of charities, which we have endeavoured to take account of in this submission. We wish to thank the Department of Rural & Community Development and the Joint Committee on Social Protection, Community and Rural Development & the Islands for considering the submission. We are willing to engage with the Department and the Committee in whatever manner would be most helpful as the Bill progresses, and we would very much welcome an opportunity to appear before the committee to expound on the key issues and our suggestions to ensure the best outcome in the public interest.

This legislation is long-awaited by our sector, and we are heartened by many of the positive proposals such as:

- The inclusion of the advancement of human rights as a charitable purpose.
- The alignment with the Companies Act 2014 for financial reporting along with the lifting of the audit threshold to €250,000.
- The release from liability of court appointed charity trustees from the consequences of decisions and actions that preceded their appointment.
- Ensuring company secretaries are not automatically regarded as trustees of a charity.

There are however several areas where significant concerns have arisen with the proposed provisions.

It would have been our strong preference to have engaged with the drafting process earlier, and in the limited time available to compile this submission, we have focussed on the key themes that have initially emerged as part of our review, which we believe could have a significant impact on how our sector is regulated and whether these changes are of public benefit. Our aim is to be constructive, identifying proposals that may have unintended consequences and providing suggestions to support the legislative review. We will use this opportunity to seek changes on issues that we believe are not in the best interests of the public, trustees and the sector.

We agree with Minister Joseph O'Brien when he says that it is important that the legislation "strikes the right balance between proportionate regulation and governance, ensuring that a

reasonable and fair approach is at its core". In its present form, this draft legislation does not, in our view, fully support this objective.

In the Policy Section of our submission, The Wheel and Cii have named the top **five** issues which we believe could adversely affect charities in their day to day work and our sector's ability to recruit and retain trustees to our boards, without whom charities cannot function.

In the Legal Section of our submission, MHC outline legal amendments which could be considered to address the major policy issues flagged as well as a series of standalone legal issues which are apparent from our review of the Bill.

Before setting out the Policy and Legal issues, we provide an overview of the profile of the submitting parties.

1.2 About the Wheel

The Wheel is Ireland's national association of charities, community groups and social enterprises. Our 2,150 members collectively account for 29% of the turnover of the entire sector (€4bn of €14bn). Our member organisations employ 35% (59,175 people) of the sector's total labour force. As a representative voice, we provide leadership in the charity and community sector, and we advocate with our members for a strong charity and community sector. As a supportive resource, we offer advice, training, and networking for people working or volunteering in the charity and community sector. Our vision is for a thriving charity and community sector at the heart of a fair, just and inclusive Ireland.

1.3 About Charities Institute Ireland

Charities Institute Ireland (Cii) is the representative body for Ireland's leading and high impact fundraising registered charities. Our 250 members employ c. 25,000 people and represent 40% of the overall public funding provision within the charity and voluntary sector. Demonstrating the strength and breadth of our sector, we advocate to ensure that both the public and decision makers recognise the essential role that charities play. Our aim is to promote greater transparency and impact for our sector through best practice in governance, fundraising and financial standards. Our Triple Lock quality mark is recognised across the charity and corporate donor sector as the symbol of best practice.

1.4 About Mason Hayes & Curran LLP

MHC is an Irish business law firm with 105 partners and total staff in excess of 550. Our legal services are grounded in deep expertise and informed by practical experience. We are the pre-eminent provider of legal services to the Charity and Not-for-Profit sector in Ireland. We have unparalleled knowledge and experience of the sector and a deep appreciation of the mission and vision of Ireland's charities. Our dedicated team of 7 charity lawyers work exclusively on legal issues facing the charities sector in Ireland. These most commonly relate to charity governance and regulatory matters which are the subject of the Bill. Our expertise extends to all types of organisations in the charity sector, including voluntary organisations, non-governmental organisations and social enterprises. We regularly assist our clients with the many complex and strategic issues faced by the sector.

2.0 POLICY SUBMISSION

2.1 Context

The charity sector is exceptionally diverse, with a long history of making an important and unique contribution to our economy, community life and civil society. Charities vary in their size, type, and scope, and they deliver a wide range of supports and services including the

relief of poverty, the promotion of education and health, protection of the environment and the support of our most vulnerable citizens.

There are almost 10,000 registered charities and a further 20,000+ organisations in Ireland's wider non-profit sector. Some key statistics for the sector include –

- Combined annual turnover of over €14.5bn.
- Employs over 190,000 staff.
- All registered charities are run by over 50,000 volunteer trustees/directors, supported by the work of over half a million "operational" volunteers, (valued by the Central Statistics Office at around €2bn per year).
- Indecon estimate (in a 2018 report published by the Charities Regulator) that total direct, indirect and induced value of the impact of the work of Ireland's charities exceeds €24bn.
- The same report found that over half of registered charities examined had income of less than €250,000, the majority with less than €50,000. A significant number have no employees and are volunteer led. The system of governance and regulatory oversight will need to be proportionate and support these grassroots charities.
- All work for the public benefit i.e., no gain or benefit to trustees/members.

Many of Ireland's charities are funded or part-funded by the State to provide health, social and community services, and ***they form a critical part of our social infrastructure,*** supporting people and communities the length and breadth of the country. Organisations in the sector make available people, assets, and facilities that our health, community and social services could simply not function without.

Many of these organisations also play a crucial role working with statutory partners in developing policy in the domains in which they work – and there are many formal statutory forums and processes (such as the Health Dialogue Forum; the Community and Voluntary Pillar; the Environment Pillar etc) where the sector and the State convene around policy development matters. The charity sector is an important element in our democracy and is the place where people come together to give expression to their active citizenship and to work together to tackle shared challenges – often in partnership with statutory partners.

It is this important sector of our economy and society that these legislative proposals will impact. The Wheel and Cii are tasked by our members to represent their views, amplify their voices, and ensure that proportionality, parity of esteem and respect are core tenets of engagement with policymakers and officials.

2.2 Changed Environment

We are now operating in a changed environment, with much progress having been made. The sector contributed to and welcomed the enactment of the Charities Act 2009 (Charities Act) and, in 2012, charities developed a voluntary governance code, which greatly informed the Charities Regulator's Governance Code. The sector takes its public benefit and interest remit with the utmost gravity and its safeguarding role of public money with equal importance.

There are currently almost 10,000 registered charities and, notwithstanding some high-profile cases of dishonesty, which are rightly deplored by all, or of poor governance, these incidents represent a tiny proportion of the overall sector, which is overwhelmingly compliant. This high rate of compliance is commendable, when one considers the time required to deliver good financial and governance standards and the attendant significant governance and compliance costs which are rarely funded by grantmakers, if at all. We are confident that the charity sector compares favourably on governance standards with the private and public sectors and is now a leader in this field.

2.3 Proportionate Regulation

Along with our members, the Wheel and Cii support balanced and proportionate regulation as essential both to protecting the people who benefit from the work of our charities, to protecting public money, and to upholding the integrity of the sector. Implementing balanced, proportionate regulation is also essential to ensure people see our sector as one where they have can have a viable, purposeful career, or to serve as a charity trustee.

The cost of implementing legislative requirements disproportionately impacts small charities and these costs very often mean less available resources to apply to the charity's main purpose. Our sector is committed to delivering quality service, advocacy and operational standards in which the public place their trust every day. We believe that a culture of **regulatory support (rather than regulatory adversariness),** which recognises the unique volunteer-led structure of charities, is the optimum model for best outcomes in the public interest.

2.4 Regulatory Load & Duplication

When considering legislative changes, it is important that policymakers are aware of the manifold regulatory requirements and considerable reporting duplication to different oversight/regulatory bodies that requires significant time and investment, diverting resources from a charity's core work.

By way of example, a single charity may need to report to the HSE, Tusla, HIQA, the Approved Housing Body Regulator, the Charities Regulator, the Companies Registration Office, the Register of Beneficial Owners and the Revenue Commissioners. If the charity provides accommodation, it will need to comply with a raft of planning, housing, health & safety standards. It must comply with and have established processes for GDPR, Whistleblowing and Gender Pay Gap legislation, along with submitting reports to the Lobbying Regulator. If its income is over €250,000 (under the provisions of this new Bill) it must undertake an annual financial audit and comply with SORP standards. These responsibilities are separate to all the additional business legislation, such as HR, procurement, and health & safety.

Charities already undertake much of this work, but the strain on volunteer boards and small executive teams to manage the time and costs is considerable. The price of good governance and high regulatory standards requires specific funding and is generally not provided for within SLAs, service arrangements or other grant/funding agreements, and is very difficult to fundraise for. A recent survey of The Wheel's members found that two thirds of respondents were required to report the same compliance data to multiple sources, but only 30% of these respondents have dedicated compliance staff, demonstrating the significant challenge that these organisations face in meeting these requirements. **This is not a sustainable position, and, without dedicated funding resources for governance and compliance, additional legislative requirements will only exacerbate the situation**.

2.5 SME Test

In essence, many charities are also SMEs, and we support the government's recognition of the importance of the SME sector to the Irish economy. The 2020 Programme for Government outlined the intention to cut bureaucracy for SMEs and support the SME Test across Government to assess the potential for less-stringency in requirements and simplification of regulatory adherence. The SME Test and the "think small principle" must be applied whenever policymakers are reviewing or drafting regulation. We believe it to be

essential that the administrative and financial impact on small entities must be considered and mitigated at an early stage in the process.

2.6 Charity Trustees

Charity trusteeship is a public service, and one that is perhaps not acknowledged or understood as it should be. Charities provide public benefit. No doubt many people reading this submission have served as trustees on charitable boards and know first-hand the ever-expanding list of responsibilities and duties faced by charity trustees and boards. The Covid-19 pandemic threw the extent of these duties into stark relief, when many people who were struggling to save commercial businesses were also tasked with providing additional support and time as trustees of charities that faced a precipitous fall in fundraising income at a time when their services were in even greater need. The emerging economic challenges, coupled with increased governance and financial reporting responsibilities may combine to make serving as a charity trustee too onerous a commitment.

2.7 Inflation

We have no doubt that this Committee is already keenly aware of the impact of rampant inflation on our economy and the rising cost of living. There are three main ways in which inflation is likely to affect charities: rising costs – particularly for staff, depreciating income, and increases in demand due to the cost-of-living squeeze. The most deprived households' budgets are already under severe stress, driving high demand for charities supporting those living in poverty. For working households, we have seen steep increases in food and fuel prices, significantly lowering the discretionary income from which to make donations.

As higher rates of inflation are predicted to last until at least 2024, charity trustees and leadership teams will be tasked to factor higher than anticipated costs into any planning assumptions to ensure financial viability and service sustainability.

2.8 Impact of COVID-19 on the sector

Charities, like many other sectors, have been challenged by the pandemic. They have been at the forefront of providing lifesaving, frontline and community services, and helped to alleviate the strain that the pandemic placed on individuals and communities. Indeed, the sector has been rightly commended by government departments and statutory agencies for their commitment to their purpose and agility to respond. The crisis also accelerated innovation in the sector, with charities coming together to work in partnerships, and adopting digital approaches to both fundraising and service delivery. The state recognised and supported the charity sector to weather the storm of the Covid-related decline in income through the DRCD's much lauded Stability Fund which provided over €45m of vital financial assistance to over 800 organisations enabling them to continue their work supporting vulnerable people and communities during the crisis.

The impact of COVID-19 on charities has not been uniform and its full effect is yet to be seen. We have seen evidence that some of the sector's financial resilience has weakened, and this, along with inflationary pressures, will undoubtedly influence the retention and recruitment of charity trustees in the coming months and years.

2.9 One supportive approach to regulation

We believe that we need one supportive approach to regulation, and for greater resources to be made available to charities to support highest standards in governance and compliance.

We believe the current approach to regulation is becoming too adversarial. We need a more collegial and supportive approach, based on high levels of engagement between charities and the Charities Regulator. All stakeholders must also be aware of the need to support voluntary charities trustees in their work, acknowledging that all this work is being done voluntarily. It is vital that the provisions in the Bill do not put people off from serving as charity trustees and providing immeasurable benefit to the public.

2.10 Summary of Policy Issues

In summary, this legislation is long-awaited by our sector, and we are heartened by many of the positive proposals such as:

- The inclusion of the advancement of human rights as a charitable purpose.
- The alignment with the Companies Act 2014 for financial reporting along with the lifting of the audit threshold to €250,000.
- The release from liability of court appointed charity trustees from the consequences of decisions and actions that preceded their appointment.
- Ensuring company secretaries are not automatically regarded as trustees of a charity.

There are however several areas where significant concerns have arisen with the proposed provisions including:

1) The proposed extension of very significant additional powers of direction and sanction to the Charities Regulator: in particular the, in our view, disproportionate power to de-register charities for a range of minor non-compliances.
2) Insufficiently strong appeals processes and insufficient recognition of potential reputational damage to charities occurring prior to any finding of fact during an investigation.
3) The, in our view, unreasonable and likely unworkable requirement for charities to inform the Charities Regulator of "significant events" (where "significant" is not sufficiently defined) that have already, or might in future, negatively impact the charity.
4) The impact of the perceived / felt increase in the responsibilities of charities trustees (accepting that the proposed definition of the duties of charities trustees merely codifies what is already there in common law) and the perceived focusing of responsibility on individual charities trustees rather than on the body corporate or the board – and the effect these perceptions may have on deterring people from volunteering to be trustees.
5) The, in our view, unworkable requirement for any change, however minor, to a charity's constitution to be approved in advance by the Charities Regulator.

Further details on these and a range of other issues are addressed in the legal submission below.

2.11 Legislative Review

The Wheel and Cii would like to acknowledge our appreciation of the work undertaken by Mason Hayes & Curran LLP on a pro bono basis as part of this submission. Without this support, it would not have been possible to bring the clarity that their insightful expertise provides for us all to support the review of this proposed legislation.

3.0 LEGAL SUBMISSION

3.1 Introduction

In this legal submission we ask that the Department considers potential legal issues with certain sections of the Bill as currently drafted. Each issue raised is based on the experience of the MHC charity team in advising charities. A legal submission of this nature invariably focusses on areas where an amendment could be considered. This focus should not be taken to imply any criticism of the detailed and extensive work completed by the drafters and the Department or the very many positive provisions in the Bill.

We ask that the following observations be considered in this context. At 3.2 below we provide to commentary on those Heads where an amendment could be considered, and we provide our rationale in each case. At 3.3 below we flag a series of matters related to the Charities Act 2009 which are causing practical difficulties for charities, and which have not, so far, been considered in the Bill.

3.2 Commentary on the Bill

3.2.1 The definition of charitable organisation

Head 3(a), Section 2

To be a charitable organisation, an organisation must (i) promote only a charitable purpose, (ii) apply all its property towards that purpose, and (iii) prohibit payment of its property to its members.

The Bill deletes the third limb of the definition of “charitable organisation” for bodies corporate and unincorporated bodies (but not for charitable trusts). This has the effect of removing the statutory basis for the prohibition on payments to members of charitable organisations for these types of charitable organisations.

It is possible that this was an unintended consequence because the explanatory note explains that this amendment is intended to ensure that a payment to a member of a charity or a charity trustee can be dealt with under section 89 of the Bill instead. However, section 89 does not contain a prohibition on payments to members. It deals with a slightly different issue (payments to charity trustees and connected persons). The concept in charity law that charitable funds are not to be paid to the members of the charity stands alone and separately from any section 89 principles. This view is supported by the required “Income and Property” clause in the Charities Regulator’s Model Constitution. The amendment proposed by Head 3(a) removes the statutory basis for this prohibition on payments to members. This prohibition should, in our view, be underpinned by legislation and therefore retained in the definition.

3.2.2 The definition of charity trustee regarding secretaries

Head 3(c), Section 2

There has been confusion among charities in relation to whether a person acting as secretary is a charity trustee. Charity trustees are the group of people legally responsible for the charity (commonly known as the board). The secretary doesn’t sit on the board and should not be legally responsible for the charity’s management, but the Charities Act wording was ambiguous, and the proposed amendment is intended to correct this.

The amendment clarifies that, in the case of a charity that is a company, the company secretary is not a charity trustee. This is a welcome clarification.

However, the amendment wording used is that a charity trustee does not include a company secretary who holds no other office of the company. This is not quite the same as saying that a secretary is not a charity trustee. It is unclear what other “office of the company” applies here, which would bring the company secretary into “charity trustee” status. For example, if the company secretary also fulfils the role of data protection officer, will that trigger charity trustee status? We do not believe this would have been intended but the current wording could be interpreted in this way.

In the interests of clarity, the proposed amendment should be updated to state that a charity trustee does not include a company secretary who is not also a director of the company.

This amendment also contains an updated definition of charity trustee in the context of a charity that is an unincorporated body. It states that a charity trustee “does not include a person who performs the functions of a secretary to the board or other governing body…and performs no other functions relating to the management and control of the body”. It is unclear why the wording in this section is different to that referring to a charity that is a company.

We recommend that this definition be amended to align with the above recommendation relating to a charitable company, to state that, in the context of an unincorporated charity, a charity trustee does not include a company secretary who is not also a member of the board or other governing body of the organisation. Otherwise, a specific secretarial function related to management of the charity could (again inadvertently) bring the secretary into the definition of charity trustee, which was not the desired outcome of this amendment.

3.2.3 The definition of “member of a charitable organisation”

Head 3(e), Section 2

In addition to having charity trustees, many charities also have a second body of persons known commonly as “members”. Until now, members had not been defined in charity law.

This proposed amendment inserts a definition of a member of a charitable organisation. At (a), (in reference to a charity that is a company), it states that a member means “the subscribers or shareholders of the company”. The vast majority of charities that are companies are companies limited by guarantee (CLGs). A CLG does not have shareholders. Instead of shareholders, it has members. The definition should therefore include the words “or member”.

3.2.4 Disclosures of information by Charities Regulator re offences

Head 5, Section 28

This proposed amendment removes the obligation of the Charities Regulator to report a suspected offence under the Charities Act 2009 to an external authority, such as An Garda Síochána.

No explanation for this proposed change has been included in the explanatory note to Head 5. In our view, the introduction of this discretion concerning the reporting of suspected charity law offences to external authorities is sub-optimal for the sector. For example, the Charities Regulator could form the view that a charity trustee has breached their duties, and that that breach is a breach of the Charities Act 2009. Under the new proposal, if that breach of duty relates to a serious criminal matter, the Charities Regulator would not be obligated to share this information with An Garda Síochána.

In the interests of a co-operative and co-ordinated approach to regulation between State authorities, a positive obligation should be imposed on the Charities Regulator to share information with appropriate applicable authorities, where a suspected offence under the Charities Act 2009 has occurred.

3.2.5 Applications for charitable status by UK established charities

Head 7, Section 39(5)

The amendments proposed by this section require a charity which is established in the UK, (and which is applying for registration as a charity in Ireland), which has a principal place of business in the State, to specify its principal place of business in the State in its registration application.

It further requires a charity which is established in the UK, and which does not have a principal place of business in the State to specify its principal place of business in the UK.

It is positive that the Charities Regulator is considering the position of UK established charities and what information they need to provide in order to make an application for registration as a charity. It is also positive that the intention behind this proposed amendment is to facilitate registration by UK established charities which do not have a principal place of business in the State.

In the interests of bringing increased clarity to applications by this cohort of charitable organisations, which has increased substantially since Brexit and which we expect to increase further, we set out below three concerns in relation to this amendment as currently drafted.

1. There is explanation as to what is meant by "principal place of business". Therefore, there is uncertainty as to what the term means and how it is proven. Under the Companies Act 2014, section 1301(7)(h) provides that the principal place of business of an external company shall be deemed to be its registered office. However, in the context of this provision of the Charities Act 2009, we do not consider such a definition to be appropriate, because foreign charities will not have a registered office in the State. Therefore, greater clarity is required in relation to what is required by a charity to show it has a "principal place of business". Would a contact address in the State suffice, or must there be a degree of activity in the State before a place constitutes a "principal place of business"?

2. It is unclear whether an organisation may have only one, or various "principal places of business". From our reading of the explanatory note, and use of the words "a principal place of business" in the section, we consider it possible for a charitable organisation to have several principal places of business. This is positive. However, confirmation of this position would be helpful.

3. The UK provisions described above apply equally to every EEA established charity. The references to the EEA and the UK would seem to imply that charities which are neither Irish, EEA or UK established (such as, for example, US organisations), which operate or carry on activities in Ireland, cannot register as charities in Ireland (even if they have a principal place of business here). The position in relation to these jurisdictions should be clarified.

If the term "principal place of business" ultimately poses a difficulty, it may be that charities established in the UK could instead specify other particulars. In the case of companies, the requirement on incorporation is to furnish to the CRO particulars of:

- the address of the company's registered office; and
- the place (whether in the State or not) where the central administration of the company will normally be carried on.[1]

In the case of Irish branches of a non-Irish company, the requirement on registration in Ireland is to furnish, inter alia:

- the address of the branch;
- in the case of an EEA company, the place of registration of the company and the number under which it is registered;[2]
- in the case of a non-EEA company, if the law of the state in which the non-Irish company is incorporated requires entry in a register, the place of registration of the company and the number under which it is registered. [3]

We note that, in relation to Irish companies, there is no requirement for their initial principal place of business to be in the State. We consider that a broad prohibition of non EEA or non UK principal places of business is not in the public interest.

3.2.6 Information required when registering with Charities Regulator

Head 7, Section 39(5)(d)

Section 39(5)(d) sets out information which must be provided to the Charities Regulator in a registration application, including the PPS number of each charity trustee (or an alternative identification number) and the address at which each charity trustee ordinarily resides.

It would be helpful for the Bill to specify what information will or will not be published on the public register, as the publication of some information is sensitive.

In relation to the requirement to furnish a person's PPS number, we refer to the regulations governing the Central Register of Beneficial Ownership of Companies[4], which specify safeguards in relation to the use of a person's PPS number that could usefully be incorporated here as they protect the sharing of the PPS number, which is understandably very sensitive. They state:

(5) As respects a PPS number …

(a) the Registrar shall not disclose that number, and

(b) only a version, as provided for in paragraph (6), of that number shall be stored by the Registrar.

(6) The version mentioned in paragraph (5)(b) is a version that satisfies the following conditions:

(a) the version (a "hashed version") has been generated by the employment of a mathematical function; and

(b) the mathematical function, so employed, does not allow the PPS number to be determined from the hashed version.

[1] Companies Act 2014, section 22(2)(d), (e).
[2] Companies Act 2014, section 1302(2) (c), (e)
[3] Companies Act 2014, section 1304(2)(a).
[4] S.I. No. 110/2019 - European Union (Anti-Money Laundering: Beneficial Ownership Of Corporate Entities) Regulations 2019

3.2.7 Deemed withdrawal of a registration application

Head 7, Section 39(6D)

This section relates to applications for charitable status where a full application has been made to the Charities Regulator. It is important to note that the making of an application for charitable status is a major endeavour which requires a very significant investment of time and expense for the group of (volunteer) applicant charity trustees. The proposed new section in the Bill provides that, if, during the process where the Charities Regulator is considering the application, the applicant fails to provide additional documents or information, their application is deemed to have been withdrawn entirely.

We consider this provision to be too broad. The Charities Regulator generally takes circa 8-12 month to consider an application for registration, during which time a series of queries is received, usually with a 21-day time limit for a response. It is a significant undertaking to submit an application for charitable status and there can be many legitimate reasons for a delay in response by an applicant. We consider it disproportionate and unfair that an application would be deemed withdrawn entirely with no ability on the part of the Charities Regulator to evaluate any delay on its merits and without any possibility to keep an application "live".

We consider that it would be preferable if:

(i) The Charities Regulator would be obliged to notify the applicant that the application will be deemed withdrawn at a later date, if no reply is received within a reasonable period, rather than automatically deeming the application to be withdrawn, and

(ii) Specific provision is made for the discretion of the Charities Regulator to extend the timeline, such that the Charities Regulator may deem the application withdrawn unless there are reasons which the Charities Regulator deems appropriate to grant an extension of time.

3.2.8 Information to be published on the register

Head 7, Section 39(7)(a)

This section, like section 39(5) above, refers to the EEA. We think there may be a minor drafting error here because, unlike section 39(5) which refers to the EEA and then (separately) the UK, this section only refers to the EEA. We envisage that the UK should now be referenced here because it is no longer in the EEA post Brexit.

Please also see our comments above in relation to use of the "principal place of business" terminology.

3.2.9 Power of Charities Regulator to impose conditions

Head 7, Section 39(9)(b)

This section provides that, where the Charities Regulator grants a registration application, it shall notify the applicant of "any condition applicable to the registration with which the applicant is required to comply".

We are concerned about the broad and vague nature of the "conditions" which may be imposed on applicants pursuant to this amendment. This is of particular concern in circumstances where these conditions, if not met, may result in the withdrawal of charity

status pursuant to section 43(2)(A) of the Charities Act 2009. This is a very serious consequence.

Furthermore, we are concerned that, by virtue of amendment proposed to section 45(2), set out in Head 11(a), the Bill envisages that a charitable organisation removed from the Register of Charities for failure to comply with the "conditions" which may be imposed on applicants pursuant to section 39(9)(b) will not be entitled to appeal this removal to the Charity Appeals Tribunal.

We consider that it would be preferable if the ability to impose conditions was both specified and limited. Overly broad provisions are more likely to lead to challenge by way of judicial review and clearly delineating the Charities Regulator's power here would assist in setting out the limits of its power, thereby, reducing the risk that decisions are challenged. Furthermore, we recommend that an express statement be included in the section, to outline that a charity removed from the Register of Charities for failure to comply with the section 39(9)(b) "conditions" may appeal this decision to the Charity Appeals Tribunal.

3.2.10 Charities Regulator consent required for amendment of a charity's constitution

Head 7, Section 39(11B)

This proposed amendment inserts a new legal obligation that a charity shall not amend its constitution without the prior approval of the Charities Regulator.

This provision is not proportionate as it requires the prior approval of the Charities Regulator to <u>any</u> change to a charity's constitution, however minor or inconsequential. If this proposed amendment is adopted, charities will be required to seek and obtain the Charities Regulator's consent prior to making any amendment, however small, to their governing instrument. For example, a change to a constitution to allow notices to be sent by email rather than by post, would require the prior approval of the Charities Regulator.

In terms of charity law compliance, only changes which affect the nature of the organisation as a charity, its charitable purpose, or which impact on the standard clauses of the Charities Regulator, should be required to be approved of in advance by the Charities Regulator.

As currently drafted, this change is likely to lead to an unnecessary burden on both charities and the Charities Regulator alike. Currently, a review by the Charities Regulator takes circa 3-6 months to complete. We consider this provision, requiring <u>all</u> changes to receive the prior approval of the Charities Regulator, to be excessive, unnecessary and impractical. Often, changes to a charity's governing document are urgent, and require approval and adoption within a short space of time. This proposed change would make that process unduly burdensome and lengthy.

In addition, the Bill provides that a charity which fails to comply with this requirement, even if such failure arises out a mistake made in good faith, may face the ultimate sanction of removal from the register of charities (noted below). This is an extreme measure with far-reaching consequences and is disproportionate.

In respect of section 40(9) (Head 8), the explanatory note states that consent is required "to any proposed change <u>to the main object</u> provided for in the charity's constitution". It should be confirmed whether it is the intention that only changes to the main object of a charity must receive prior approval of the Charities Regulator. We consider that restricting the requirement to obtain consent to amendments of the main objects of a charity would be a more reasonable and proportionate approach. Head 8 should also be considered in this context.

We note that, by virtue of section 45(2), a charitable organisation that has been removed from the register of charities under section 43(4), i.e., for a contravention of the requirement set out in section 39(11), to seek approval to amend its constitution, may appeal this removal to the Charity Appeals Tribunal. We recommend that a clear statement be included in the section, highlighting that this right of appeal is available to a charitable organisation in these circumstances.

3.2.11 Publication of information in the register of charities

Head 8, Section 40(6)

This section, like section 39(5) above, refers to the EEA. We think there may be a minor drafting error here because, unlike section 39(5) which refers to the EEA and then (separately) the UK, this section only refers to the EEA. We envisage that the UK should now be referenced here because it is no longer in the EEA post Brexit.

Please see our comments above in relation to use of the "principal place of business" terminology.

3.2.12 Notifications to the Charities Regulator

Head 8, Section 40(7)

This section introduces a requirement to notify the Charities Regulator of certain information "forthwith".

We consider the term "forthwith" to be insufficiently precise and, separately, unduly onerous. We recommend that a specified number of days be inserted in this provision, in a manner similar to the timelines for filings with the Companies Registration Office. Any timeline inserted should take account of the fact that the charity trustees of charitable organisations act in a voluntary capacity.

Section 40(7)(a)(ii) imposes an obligation to notify the Charities Regulator if the charitable organisation proposes to wind down or "otherwise ceases its activities". Greater clarity could be brough to the term "otherwise ceases its activities". It is essential that the sector understands exactly when it is required to notify the Charities Regulator of matters such as this. As currently drafted, the section would appear to apply to a wind down event, but we are unsure if it applies to mergers, re-organisations and collaborations with other charities. It could also apply to a change from one charitable activity to another (if a particular charitable activity ceased, to be replaced by a different activity). We do not think the drafters would have intended to such an instance to have been caught by the notification requirement.

3.2.13 Power of Charities Regulator to amend charities' entries in the register

Head 8, Section 40(13)

The Charities Regulator maintains the register of charities which has a public entry for each registered charity. This entry contains information such as the charitable purpose of the charity, as well as financial information and information about the charity trustees.

Section 40(13) grants the Charities Regulator wide-ranging powers to make changes to the information in the register, without first consulting with the charitable organisation concerned. We consider the lack of any engagement obligation with the charity to be

problematic. It does not provide the charity trustees with an opportunity to comment on, object to, or agree to the changes to the register and the revised wording.

If this power is regarded as necessary, we request that you consider amending it so that the Charities Regulator firstly engages with the charity trustees in relation to any change it sees as necessary, and affords the charity trustees the opportunity to make the change. As a fallback, where engagement is not possible, the Charities Regulator could then be provided with the ability to make changes, but this should be specified by reference to factual matters requiring correction and should be followed by a written confirmation from the Charities Regulator to the charity trustees explaining why the changes were needed.

We note that section 39(12) contains a similar provision. We request that you also consider amending this section 39(12), as above.

3.2.14 Removal of charity from the register

Head 9, Sections 43(2) and 43(2B)

The proposed new subsection 43(2B), allows the Charities Regulator to remove a charity from the register of charities if that charity fails to obtain the prior approval of the Charities Regulator before making an amendment to its main object. We separately draw your attention to the current section 43(2) of the Charities Act 2009, which imposes an obligation on the Charities Regulator to remove a charity from the register of charities if that charity fails to obtain the prior approval of the Charities Regulator before changing its name in accordance with section 42(2). The former provision is new. The latter provision has not been changed. We are requesting that a change be considered for both sections, for the reasons set out below.

The basic tenet of the two provisions is that a charity which doesn't approach the Charities Regulator in advance for permission, faces the ultimate sanction – removal from the charities register. Removal from the register is an extraordinarily serious sanction, with far-reaching consequences. Charities are only permitted to operate in Ireland if they are on the charities register. The provision therefore, in layman's terms, has the effect of immediately shutting down the charity in question. It is very important to point out the impact of this sanction on the beneficiaries of a charity. If, for example, a large healthcare provider breached either provision and was consequently (either automatically or by positive action of the Charities Regulator) removed from the register of charities, this would lead to an abrupt shutdown of public health services overnight. It could likely also result in the immediate departure of the board of charity trustees, with disastrous consequences for service-users.

We think it is very unlikely that this would be the intended effect of these provisions, but, nevertheless, this is the impact on the basis of current wording. We do not believe that failing to obtain the prior approval of the Charities Regulator before making an amendment to a main object or the charity's name should result in removal from the register. We suggest that these sections be deleted.

We note that, by virtue of section 45(2), a charitable organisation that has been removed from the register of charities under section 43(2), i.e., if a charity fails to obtain the prior approval of the Charities Regulator before changing its name, or 43(2B), before making an amendment to its main object, that charity may appeal this removal to the Charity Appeals Tribunal. We recommend that a clear statement be included in these sections, highlighting that this right of appeal is available to a charitable organisation in either circumstance.

3.2.15 Removal of charity from the register (additional grounds)

Head 9, Section 43(4)(a)

This proposed amendment provides a further list of grounds upon which a charity can be removed from the register. The consequences are the same as those outlined above.

The additional circumstances in which it is proposed to afford this power to the Charities Regulator are as follows:

- Per section 39(11)(b – c), any breach of the requirement to notify the Charities Regulator if:
  - information entered in the register ceases to be correct;
  - the charity proposes to wind up or cease activities;
  - information entered in the register in respect of a charity trustee ceases to be correct; or
  - a person is appointed or ceases to be a charity trustee, including the date on which they are appointed or cease to be a charity trustee.

- Per section 54A, any contravention of the requirement to have at least three charity trustees, who:
  - are natural persons;
  - the majority of whom are resident in an EEA or the UK; and
  - the majority of whom have no personal connection to each other.

- Per section 54B, any breach of the general duties of charity trustees, any failure by the charity trustees of a charitable organisation to take steps to remedy a breach of a duty, or to remove a charity trustee who has been in serious or persistent breach of a duty.

- Per section 59A, any contravention of the requirement to disclose information to the Charities Regulator relating to a "significant event".

If the proposed amendment is adopted, the Charities Regulator will have the power, if it is satisfied that there has been a contravention of any of the above scenarios, to remove that charity from the register of charities. As outlined above, de-registration of a charity is an extreme sanction, with very severe potential impacts on all stakeholders concerned, including the charity's beneficiaries, the charity's staff and volunteers, as well as the charity trustees. It is submitted that this sanction is disproportionate to many of the above scenarios, such as, for example, if a contact detail for a charity trustee is incorrect on the register of charities, or if, due to a death or illness of a charity trustee, a charitable organisation temporarily has less than three charity trustees.

We strongly request that the wording of section 43(4)(a) be re-considered, as de-registration of a charity is not a proportionate response to many of the above potential breaches of the Charities Act 2009.

The same issue arises in respect of proposed amendment of section 43(5).

As noted above, Head 11(a) proposes to amend section 45(2), such that a charitable organisation removed from the Register of Charities for failure to comply with the "conditions" which may be imposed on applicants pursuant to section 39(9)(b) will not be entitled to appeal this removal to the Charity Appeals Tribunal. We recommend that appeal to the Charity Appeal Tribunal should be available to a charitable organisation de-registered for this reason. We recommend that an express statement be included in the section, confirming that a charity removed from the Register of Charities for failure to comply with the section 39(9)(b) "conditions" may appeal this decision to the Charity Appeals Tribunal.

We further note that, by virtue of section 45(2), a charitable organisation removed from the register of charities under section 43(4)(a) - i.e., for a contravention of the charity trustee requirements set out in section 54A and 54B, and the requirement set out in section 59A, to disclose information to the Charities Regulator relating to a “significant event”, may appeal this removal to the Charity Appeals Tribunal. We recommend that a clear statement be included in these sections, highlighting that this right of appeal is available to a charitable organisation in each of these circumstances.

3.2.16 Transfer of powers from High Court to Charities Regulator

Head 9, Sections 43(5A), 43(6) and 43(7)

The proposed insertion of section 43(5A) empowers the Charities Regulator to remove a charity from the register of charities, where it is of the opinion that that charity is a) not a charitable organisation or b) has wound up or otherwise ceased operation.

As previously outlined, removal of a charity from the register of charities is an extreme measure. Owing to the far-reaching consequences of this sanction, we query whether it is preferable for the Charities Regulator to have this measure available to it without Court oversight.

Under the current Charities Act, section 43(6) and 43(7) provide that, if the Charities Regulator is of the opinion that a registered charity is not a charitable organisation, it must apply to the High Court for a declaration to this effect. If the High Court grants such a declaration, only then will the charity cease to be registered. Head 9 proposes to remove these steps and to grant the Charities Regulator the power to de-register a charity as and when it is “of the opinion” that such charity is not a charitable organisation.

3.2.17 Offence of causing the public to believe that a body is a charity

Head 12, Section 46(6)(d)(ii)

Section 46(2) sets out that it shall be an offence for a person (who is not a registered charity) to, in any notice, advertisement, promotional literature or any other published material, describe the person or their activities in such terms as would cause members of the public to reasonably believe that the person is a registered charity. This is a positive and important provision to dissuade and sanction rogue operators masquerading as charities.

Section 46(6) goes on to provide defences (incidents in which it is not an offence to describe oneself as a charity). One of these is that it is a defence if the person does not carry on any activities in the State. This is another important provision because, without it, bodies with no link to Ireland could be found to be in breach of the legislation. For example, an English charity could otherwise be in breach because it had an online publication describing itself as charitable that was accessed on an Irish website.

We have a query as to whether the list of defences set out in section 46(6)(a-e) are intended to be alternative or cumulative. If these are cumulative, they are highly restrictive and unlikely to be capable of being met. If they are alternative criteria, the use of “and” could be replaced with “or” to make this clearer.

We recommend that this section (46(6)(d)(ii)) be considered for amendment to introduce a “de minimis” threshold, under which non- Irish charities who carry on a very minor activity, such as a single event, in the State, will not offend the prohibition outlined in section 46. For example, if an established arts or sporting charity, registered in another jurisdiction, wished to organise a single promotional event in Ireland, this is currently prohibited under the

Charities Act 2009. The introduction of a threshold of activities in the State which are too small or immaterial to be meaningful or taken into consideration would ameliorate this burden. Please see our comments below in relation to additional matters which could be addressed within the Bill (3.3 below) for greater context in this regard.

3.2.18 Provisions relating to accounting practice

Heads 13 – 18

These Heads concern proposed amendments to the Charities Act 2009 in relation to the duty to keep proper books of account, annual statements of account, annual returns under the Companies Act 2014, annual reports and the public inspection of annual reports. For the purposes of this submission, we have not dealt with these provisions in detail, as they principally relate to accounting rather than legal practice.

It is crucial that the Accounting and Reporting Regulations, which are integrally linked to several of the revised provisions in the Charities Amendment Bill, are signed into law at the same time that the Charities Amendment Bill becomes law. Both pieces of legislation are integrally linked and to publish one without the other will lead to confusion for charities and their advisors. It is imperative that both documents are mandated at the same time.

It will be equally important to give charities adequate time to comply once both the Charities Amendment Act and the Accounting and Reporting regulations come into force. The new accounting requirements, such as the need to prepare a set of accounts in accordance with the SORP, should only commence in the next full financial year. If the Bill is passed into law in January 2023 for example, charities would be expected to comply with SORP for their financial year ending in 2024.

3.2.19 New requirement for majority of charity trustees to have no "personal connection"

Head 19, Sections 54A(1)(c) and 54A(2)(c)

This new section requires that a majority of the charity trustees of a charity can have no "personal connection" to one another. We believe that the Department's intention was to ensure that charities are not controlled (for example) by a small number of members of the same family, as this would not be considered good governance.

However, the current drafting does not specify that the majority of trustees cannot be from the same family. Instead, it uses the term "personal connection". This was a concept already in the Charities Act, where it applies to rules around charities paying for services where the recipient of the payment had a personal connection to a charity trustee (the old section 89).

In the context of charities paying for services, a very expansive definition of "personal connection" was arguably appropriate. However, using this same definition to apply rules around how charity trustees can be related to each other, is, in our view, inadvisable and, for many charities, may be unworkable. A different (narrower) definition or term should be selected to achieve the desired aim.

Below are two examples which illustrate why we are concerned about practical implications.

There are certain circumstances, (notably but not exclusively those of religious charities), where you may have a board of charity trustees made up on individuals who are all members of (for example) one religious order. These individuals may well be considered to

have a personal connection to one another. For example, they could arguably be considered to be in partnership together, and this would be prohibited. They may also happen to be related by blood in certain coincidental incidences.

The definition of personal connection also refers to a trustee of a trust being personally connected to an individual who is a beneficiary of the trust. In the context of religious organisations, the members of the organisation could be considered to be so connected. The Charities Act 2009 expressly permits the care and accommodation of members of the religious organisation. This new requirement could therefore make it impossible for a religious organisation to have at least three unconnected charity trustees, unless they appointed lay persons as charity trustees. This is inappropriate for many religious organisations and would not accord with internal governance. More broadly, if a charity trustee or one of their family members received a service from a charity where they are a charity trustee, would this entail a personal connection? We have considered the possibility of charity trustees of hospitals, where they and family members could conceivably receive treatment from the charitable hospital.

A further example arises from the category of "personal connection" which states that any two or more persons acting together to exercise control of a body corporate are treated as personally connected with one another. In the context of a CLG, we consider this to refer to one or more members of the company who, together, "control" the company. The requirement to have at least three unconnected charity trustees would preclude the members of a company from also being the charity trustees, as all would be connected to each other under this definition.

As you will be aware, many charitable companies have the same body of persons acting as both members and directors. This would cause substantial governance issues for those charities, particularly in circumstances where the dual role of individuals as members and directors has been carefully chosen for governance reasons. It would also bring a very large cohort of Ireland's charities into immediate breach of the requirement, if implemented with the current drafting.

3.2.20 Avoiding conflicts of interest

Head 20, Section 54B(1)

This proposed amendment introduces a list of general duties which attach to charity trustees of charitable organisations.

One of these duties, listed at section 54B (1)(b) is "to avoid conflicts of interest and to act honestly and responsibly to advance the charitable purpose(s) of the charitable organisation".

The equivalent provision in the Companies Act 2014 outlines the director's fiduciary duty to avoid conflicts of interest at section 228(1)(f): "*avoid any conflict between the director's duties to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;".*

The Companies Act wording recognises that there may be circumstances in which conflicts of interest exist and that this can be managed within an organisation's governing document or by a vote of the members. We recommend that similar wording allowing charity trustees to manage conflicts be included in this provision, rather than solely introducing an absolute obligation to avoid conflicts. This is because it may be unclear in practice how the duty to avoid conflicts of interest may be fulfilled and documented.

3.2.21 Obligation to remove a charity trustee

Head 20, Section 54B(3)

The amendment proposed at section 54B(3) imposes an obligation on charity trustees to take such steps as are reasonably practicable for the purpose of ensuring that any breach of a charity trustee duty set out in 54B(1) is remedied immediately, and that any charity trustee who has been in serious or persistent breach of such a duty is removed as a charity trustee of the charitable organisation.

This proposed amendment is helpful in that it highlights the duty of charity trustees to govern the charitable organisation and to take steps where a breach of charity trustees has occurred and we favour this inclusion. However, the proposed wording is not clear as to whether the section actually grants the power to the charity trustees to positively act to remove a charity trustee who is in default. It should be clarified whether this is a step that the charity trustees will be permitted to take, based on this new provision, (notwithstanding that their constitution provides otherwise or is silent on the matter) or if this a step that the charity trustees can take only if their governing document permits such removal.

If it is the case that the section is intended to grant the power to the charity trustees to remove a charity trustee who is in default, then a procedure should be clearly set out within the legislation, to be followed by the charity trustees in exercising this power.

3.2.22 Requirement to disclose information relating to a significant event

Head 23, Section 59A

This proposed amendment inserts a new section 59A, which introduces an obligation for charity trustees to notify the Charities Regulator, as soon as is practicable, where there are reasonable grounds to believe that a "significant event" has occurred, or is likely to occur, in respect of that charitable organisation.

The wording of section 59A is very broad. We are concerned that the duty arises where a person forms the opinion that there are reasonable grounds for believing that a significant event <u>is likely to occur</u>. We consider this some sometimes be very difficult to prove or evaluate. We note that, in the UK, the Charity Commission for England and Wales requires charities to report serious incidents that <u>have taken place</u> within the charity. Please see guidance available <u>here</u>. There is no equivalent obligation to report serious incidents that are <u>likely to occur</u>. Similarly, the Charity Commission for Northern Ireland also requires charity trustees to report serious incidents that <u>have taken place</u>, wherein the charity trustees must report what happened and explain how it is being managed.

In our view, introduction of an obligation to report potential serious incidents that may, in the future, occur, will place a disproportionate burden on charity trustees who must decide, in the abstract, whether a potential set of circumstances might qualify as a serious incident.

In practice, the broad reach of this section, as currently drafted, may lead to a large volume of notifications being made to the Charities Regulator, in circumstances where no "significant event" subsequently materialises, or where a very minor matter occurs which could be argued to constitute a remote risk to a charity's beneficiaries or reputation. This would be unworkable for both the Charities Regulator and charities alike and would create an inefficient drain of resources that should otherwise be committed to furthering the charitable purposes of the charity.

The severity of the potential consequences for charity trustees who, in the sole opinion of the Charities Regulator, have failed to comply with this section, underscore the need for absolute clarity as to the circumstances which will require reporting. Section 59A(3) provides that a charity trustee's failure to notify the Charities Regulator of a significant event, as outlined, will be treated as misconduct or mismanagement.

Furthermore, as noted above in relation to Head 9, the Bill proposes to amend section 43(4)(a) of the Charities Act 2009, empowering the Charities Regulator to de-register a charity if it is satisfied that there has been a contravention of the section 59A requirement to disclose information relating to a "significant event. As outlined above, de-registration of a charity is an extreme sanction, with very severe potential impacts on all stakeholders concerned, including the charity's beneficiaries, the charity's staff and volunteers, and the charity trustees.

We respectfully submit that, in line with the position in the UK, the requirement to report potential future events should be omitted. We further recommend that clear guidance be provided as to the circumstances which will constitute a "significant event", mandating notification to the Charities Regulator. We strongly favour the inclusion of "de minimis" provisions into the proposed section, to clarify that minor matters which may present only a remote risk to a charity's beneficiaries, property or reputation, will not trigger the notification obligation outlined.

We note that, by virtue of section 45(2), a charitable organisation removed from the register of charities for contravention of the requirement set out in section 59A, to disclose information to the Charities Regulator relating to a "significant event", may appeal this removal to the Charity Appeals Tribunal. We recommend that a clear statement be included in these sections, highlighting that this right of appeal is available to a charitable organisation in this instance.

3.2.23 Directions arising from an inspector's report and new offence of failure to comply

Head 24, Section 66A

This proposed amendment provides that, where the Charities Regulator receives an inspector's report, as provided for under section 66, it may direct the charity that is the subject of the report, to address any concerns referred to therein. The Charities Regulator may also require the charity to present a plan, setting out a proposed course of action to address any concerns raised, within the timelines specified by the Charities Regulator.

As noted above, the Charities Regulator may then de-register a charity on the basis of its failure to comply with a direction given under this section.

We do not believe that the removal of a registered charity from the register of charities, without any input or submissions from the charity constitutes a fair procedure. We recommend that this provision be amended to facilitate engagement by the Charities Regulator with the charity prior to any decision in relation to removal from the register.

We note that, by virtue of section 45(2), a charitable organisation removed from the register of charities under section 43(4)(a) i.e., for a contravention of the requirement to comply with a direction of the Authority under 66A, may appeal this removal to the Charity Appeals Tribunal. We recommend that a clear statement be included in this section, highlighting that this right of appeal is available to a charitable organisation in this instance.

3.2.24 Agreements between a charity and its charity trustees (or connected persons)

Head 29, Section 89

This amendment proposes a complete new text for section 89, in substitution for what currently appears in the Charities Act 2009. The "new" section extends to some 20 subsections. The content of the section is to address payments made to charity trustees, (we assume) other than for fulfilling their role as trustees (which is a voluntary role).

This is a provision of very significant concern to the charitable sector and, following review, we have a series of concerns about elements of the current proposal.

Our first concern is that the section is forward looking. It appears to take the position that no such arrangements would already be in place with charity trustees and it sets rules from that vantage point, as if this is a "clean slate" issue for the sector.

However, this belies the factual situation. Many charities already have provisions in their constitution that permit, (or oblige), for instance, the CEO to be a charity trustee. This is most prevalent in the healthcare sector where, for clinical governance reasons, medics/ managers are recommended to be charity trustees. The said CEO will have an employment contract noting the requirement of the CEO to also sit on the board as a charity trustee and will provide for the remuneration of the CEO. The CEO is not being paid extra for also sitting as a charity trustee. In the education sector, remunerated employees of charities are sometimes mandated by legislation to sit on the governing bodies of education institutes, as charity trustees (in addition to carrying out their executive "day job").

The new section 89 does not address these "existing circumstances" and if imposed on charities, would oblige charities to breach the terms of employment already in place with these individuals. We feel it is extremely important that consideration be given to this scenario, otherwise charities could face claims from such employees regarding the change to their employment terms. Subsection 18 of the section is also of relevance here. The charity trustees would either be in breach of the contract, or guilty of an offence under the Charities Act – it is a catch 22, which is, in our view, unacceptable.

Our second concern is the proposal to require advance approval of the Charities Regulator, to any arrangement between a charity and either its charity trustee, or any person "personally connected" to that charity trustee. As referred to above, the definition of "personal connection" is extremely broad and has the ability to encompass a very wide variety of persons. We fully appreciate the governance rationale for controlling the entering into of "arrangements" with a charity trustee for the provision of services for payment. Our concerns are:

1. that contracts without any real "link" between the charity trustee and the charity could be caught inadvertently by the very broad definition of personal connection; and

2. that there will be circumstances in which it is good governance practice, and represents the best outcome for the charity, to enter into an arrangement, in which case the advance approval requirement could jeopardise the ability of the charity to carry out the action (most likely because of the time lag between the charity requesting approval and receiving approval). We would refer the Department to the reality whereby some charities in Ireland manage procure services by reason of the goodwill and efforts of relevant persons. For instance, if a charity is in need of some building work to be carried out and it has a charity trustee who is willing and able to provide that service and has offered to do it at a very favourable rate, while also understanding the needs of the charitable organisation better than any third party, and the other charity trustees have approved this as being in the best interests of the charity, why should that not be a

good thing for the charity? Why should it require the advance approval of the Charities Regulator? And why should the delivery of the service be delayed until the Charities Regulator has time to consider and approve of it? In our view the charity trustees should be trusted with this decision of deciding what is in the best interests of their charity within the confines of charity law and best practice. If the Charities Regulator wishes to have a final say in this regard, then we would strongly recommend that their approval is only needed if the value of the service being delivered is stated in and is at a significant level. The impact of this proposed new language could otherwise be to increase costs for charitable organisations.

3.3 Commentary on additional matters which could be addressed in the Bill

As noted above, we are conscious that the Bill represents the sole opportunity for legislative development and amendment for the short and medium terms. As legal practitioners with a specialism in charity law, we work with charities, and engage with the Charities Regulator, on a daily basis in relation to the interpretation of, and compliance with, the Charities Act 2009. In the course of our day-to-day work, there are a small number of anomalies and omissions in the Charities Act 2009 that repeatedly arise for charities which lead to genuine, practical difficulties for them, were most likely unintended by the drafters of the Charities Act 2009.

We have set out a summary of these issues below, which we consider could very usefully be addressed within the Bill. We consider this to be an opportune time to address these matters, the resolution of which would be of huge practical benefit to the sector.

3.3.1 Meaning of operating/ carrying on activities in the State

Section 39(3)

Section 39(3) is the core provision which deals with the requirement to register as a charity with the Charities Regulator. Registration is required if a charity meets the test set out in this section. This section states that a charitable organisation which “intends to operate or carry on activities in the State” must apply to be registered.

The practical difficulty that we wish to highlight is that there is no definition of the words “operate” or “carry on activities”. While, in the majority of cases, it will be clear that a charity “operates” or “carries on activities” in Ireland, there are some situations where the lack of a definition causes difficulties.

The main difficulty is that there is no minimum threshold of activity set out. We sometimes refer to this as there being no “de minimis” in relation to the level of activity which triggers a registration requirement. This means that a one-off, or very small scale activity, could require a body to register. For example, a Northern Irish charity, which relieves poverty, may decide to provide hardship funds to people in need of funds. If it receives applications from 2 or 3 people who are resident over the border, in the Republic of Ireland, and grants them a one-off payment of €500 each, does this constitute “carrying on activities” in the Republic of Ireland? If it does, this would require that Northern Irish charity to go through the charity registration process in Ireland and to meet all of the annual and ongoing compliance obligations of Irish charities (even if it does not carry out any further activities in the Republic of Ireland).

As it takes a substantial amount of time, commitment and cost to submit a registration application, there should be greater clarity in relation to the meaning of the term “operate or carry on activities” and, in particular, any minimum threshold of activity.

We recommend that this provision be amended to introduce a meaningful minimum level of activity that must be carried out by a charity, in Ireland, to trigger a requirement to register.

3.3.2 Applying for registration as a new charity

Section 39(3)

As mentioned above, section 39(3) is the core provision which specifies when a charity is required to register with the Charities Regulator. Section 39(3) requires charities which intend to operate or carry on activities in Ireland to "*apply to be registered*". In order to comply with this requirement, an organisation must submit a registration application to the Charities Regulator.

The difficulty with this wording is that it is not clear whether an organisation can carry out any activities before its registration is complete, but after it has submitted a registration application. For example, can an organisation rent premises, hire an employee, or open a bank account, before its registration is complete?

We recommend that:

(i) The wording of this section be changed to state that a charitable organisation which is obliged to register must register with the Charities Regulator (rather than requiring it only to apply to be registered); and

(ii) The Charities Act 2009 specify the activities that may be carried out prior to registration being complete.

3.3.3 Meaning of the prohibition on "advertising"

Section 41(1)

Section 41(1) makes it an offence for any person to advertise on behalf of a charity if that charity is not registered with the Charities Regulator.

Two practical difficulties are arising in our experience.

The first issue is that "advertising" is a very general term. Charities do not know what activity could count as advertising. We know that a conventional radio or TV ad would be "advertising". However, it is not clear whether any of the following activities would count as advertising: speaking publicly on behalf of a charity; having a website; issuing a flyer. The absence of a definition of the word "advertises" causes concern to charities, as they are worried about committing a criminal offence.

The second issue is that international charities, which do not have a charity registration in Ireland (because they do not operate or carry on activities in Ireland), are worried about committing an offence by "advertising" in Ireland. Often, this worry arises when an international charity's name or logo appears on a website, or on a Facebook page, in Ireland. This could even happen without that international charity's knowledge. It also could arise if the charity is running an event abroad and that event is promoted to Irish individuals. Similarly, we are aware of "product spillover" in relation to UK charities, where a product bearing a UK-charity's branding arrives (sometimes accidentally) in Ireland. Those UK charities are worried about committing an offence in Ireland when this happens, as they do not know whether their name and logo appearing in Ireland amounts to "advertising".

We have two proposals which we think would alleviate these difficulties:

Firstly, we recommend that there be a definition of the word "advertising". This would give international charities clarity as to whether they can use their name and logo in Ireland.

Secondly, there is another section of the Charities Act 2009 which deals with misleading the public in respect of charitable activities. That section is section 46. Section 46(6) says that if a charity is brought to court for describing itself in a way that would make people think that it is a registered charity in Ireland (when it is not), it is a defence for that charity to show that it is a registered charity in a country other than Ireland. This defence is only allowed if the charity does not carry on activities in Ireland. We recommend that a similar defence should be introduced for section 41(1). That defence would say that if an organisation is registered as a charity elsewhere, and does not carry on activities in Ireland, it is ok for its name and logo to appear in Ireland. This would ensure that international charities do not accidentally commit an offence in Ireland by "advertising".

3.3.4 Offences

Section 41

Section 41 sets out the activities which are offences if they are carried out by an organisation that is not registered as a charity in Ireland. It says that it is an offence for any person to:

(i) advertise on behalf of an unregistered charity;
(ii) invite people to give money or property to an unregistered charity; or
(iii) accept money on behalf of an unregistered charity.

We completely understand why there is a need for offence provisions in the Charities Act 2009. However, committing an offence is very serious. Therefore, it is important that charities do not inadvertently commit these offences.

The offence provisions are not linked to section 39 (which requires organisations to register as charities if they operate or carry on activities in Ireland). This means that an organisation which does not carry on any activities in Ireland could still commit an offence.

For example, section 41(3) says that it is an offence to accept a gift of money on behalf of a charitable organisation that is not registered. This would apply to a legacy or gift donated to a foreign charity. This means that it is an offence for that foreign charity to accept the legacy or donation without a registration in Ireland.

Similarly, each of the three offence provisions could, for example, apply to an individual who sets up a "GoFundMe" or similar page to raise funds for a Northern Irish / UK charity which is not registered in Ireland and does not carry on activities in Ireland. If the individual who is fundraising copies the foreign charity's name and / or logo onto their fundraising page, asks people to give money to that foreign charity, and then transfers the money to that charity, each of the three offences above would be committed by the foreign charity. This is very serious, especially as a foreign charity might not even be aware that people are fundraising in Ireland on its behalf.

This issue became very relevant in recent months, where many employers and businesses recommended to employees to donate to charities assisting with efforts in relation to the war in Ukraine. Many of these charities were not Irish-registered charities and do not operate in Ireland. However, it was unclear whether the recommendation of a foreign charity by an employer and / or the acceptance by that foreign charity of funds amounted to offences under section 41 (in relation to (i) advertising, (ii) inviting members of the public to give money to foreign registered charities and (iii) accepting gifts of money).

We recommend that the section 41 offences be reconsidered in light of the above or restricted so that these offence provisions are only applicable to charitable organisations which are required to register under the provisions of section 39 (or are deemed registered under section 40 of the Charities Act 2009).

3.3.5 The offence of "Holding out" a body as being a registered charity

Section 46

Section 46(2) says that it is an offence for an organisation (which is not a registered charity) to describe itself (in any notice, advertisement, promotional literature or any other published material) in a way that would make members of the public think that it is a registered charity.

There is a concern that offences could be committed through inadvertence. This is particularly the case in relation to online databases, or websites, which allow organisations to call themselves "charitable organisations". It is unclear whether a third party (such as a website operator) would be guilty of an offence if a foreign charity sets up a webpage on the website and calls itself a charity.

Therefore, we recommend that this section only apply to a person who is a trustee of, or "involved in" an organisation which "holds itself out" as being registered, but is not. In this way, a person who represents an organisation and holds that organisation out as a registered charity will be guilty of an offence. However, the website operator will not be.

Section 46(6) provides a defence to this offence of "holding out". This defence applies where the body is established in another jurisdiction, is entitled to describe itself as a charity in that jurisdiction and does not carry on any activities in the State. We have two recommendations in relation to this defence provision.

Firstly, it is not clear whether foreign charities must meet all of the defence criteria at section 46(6). Does an organisation have to provide that it is established in another jurisdiction and that it is entitled to be described as a charity in that jurisdiction and that it does not carry on any activities in the State? We describe this as a "cumulative" requirement. Or, does a foreign charity just have to prove one of these things. If it is a cumulative requirement, we consider this to be very restrictive, and we do not come across many foreign charities that meet all of these requirements. We recommend that this be clarified and that the word "or" be used, instead of "and", if the defence is not a cumulative requirement.

Similarly, we recommend that a foreign registered charity be permitted to rely on this defence even if it carries out a small amount of activity in Ireland. This would allow a foreign registered charity to carry on a one-off event, or provide services to a small handful of people in Ireland, without committing an offence.

Secondly, this defence is available to the "holding out" offence, but not to the other offences mentioned above in section 41. As "advertisements" are part of both sections, this leads to an unusual situation where:

- A foreign registered charity (which does not carry on activities in Ireland) has a defence open to it if it describes itself in an advertisement in a way that would cause members of the public to reasonably believe that it is a registered charity; but

- A foreign registered charity (which does not carry on activities in Ireland), but "advertises" (not necessarily in a way which causes members of the public to believe

that it is registered in Ireland), is guilty of an offence under section 41(1) with no defence.

It does not make sense that a foreign charity would have a defence in one circumstance (which is arguably more harmful to the public) and not in the other circumstance.

Therefore, we recommend that the defence under section 46(6) be extended to the offence provisions under section 41, so that a foreign registered charity does not risk the commission of an offence under section 41.

3.3.6 Disqualification as a charity trustee

Section 55

Section 55 states that a person shall not be qualified for the position of charity trustee, and shall stop holding the position of charity trustee, if that person is adjudicated bankrupt.

Bankruptcy typically lasts for one year (but can be shortened or extended). Certain restrictions are imposed upon the person during that time. After that time, a person's name remains on the Bankruptcy Register, but it is noted that the person is a "discharged" bankrupt.

It is not clear whether section 55 continues to apply when a person is discharged from bankruptcy.

Section 148 of the Companies Act 2014 contains a similar provision which is worded as follows: "The office of director shall be vacated if the director is adjudicated bankrupt or being a bankrupt has not obtained a certificate of discharge in the relevant jurisdiction".

We recommend that section 55 be amended to state that a person shall cease to be qualified for, and shall cease to hold, the position of charity trustee of a charitable organisation if that person "is adjudicated bankrupt or being a bankrupt has not obtained a certificate of discharge in the relevant jurisdiction".

3.3.7 Dissolution of a charitable organisation

Section 92

Section 92 states that when a charity is dissolved, it is prohibited from paying any property or proceeds of sale to its members, without the consent of the Charities Regulator.

We completely understand the rationale for this section. It is a principle tenet of charity law that members should not be entitled to receive any of the funds of a charity. Therefore, this general restriction is positive. However, upon the dissolution of a charity, any remaining property or funds have to go somewhere. The standard "winding up" clause of a charity states that the property or funds will go to another charity with similar main objects.

In Ireland, a charity can be a subsidiary (of a "parent" charity). From a legal perspective, this means that the parent charity is the only member of the subsidiary company. The restriction in section 92 prevents a subsidiary from transferring any of its remaining property and funds, on a winding up, to its parent company. This prohibition is in place even if that parent is itself a registered charity. We consider that the distribution of property to a parent charity on dissolution is often the most appropriate way of continuing the dissolving charity's purpose to the greatest possible extent.

We recommend that section 92 be amended by adding the following words at the start of the section "*Save where one of the members of a charitable organisation is a registered charitable organisation in the State, or in another State (in which case, the transfer of property or proceeds of sale to that parent member shall be permitted)…*".

3.3.8 Amendments to the Street and House to House Collections Act 1962

Section 93

Section 93 of the Charities Act 2009 proposed very useful, practical amendments to the Street and House to House Collections Act 1962, which broadened the definitions of "money" and "non-cash collection". These sections were never commenced and therefore are not currently law.

In an era where electronic or "tap" donations are increasingly frequent, we recommend that these provisions of the Charities Act 2009 be commenced (brought into law) as soon as possible.

3.3.9 Restructure of a charitable organisation

Many charities, over their lifetime, will find a need, for good governance and effective operation, to change the type of legal entity they operate through. For example, many charities initially operate through informal unincorporated associations. As they grow, they may find it more appropriate to change their legal form or structure into a company. Equally, historically, many charities were established as trusts, but they now feel that a company structure is more suitable for them. The important point to make in terms of these types of changes, which we generally call "internal restructures" is that the charitable activities do not change and the charitable beneficiaries continue to receive the same service or care.

At present, the Charities Regulator is obliged to require a full new charity application for internal restructures (as if the charity was brand new), because there is no provision for internal restructures in the Charities Act.

This poses the following practical difficulties for charities:

Time and resources: A new charity registration application takes a significant amount of time, cost and resources to complete. We consider it unnecessary and disproportionate for an existing charity to have to spend that time and cost when the Charities Regulator already holds the information and documentation about that charity (albeit in its current legal form). The timeline (9-12 months) often delays a restructure process.

Denying them availability of donations relief: Because the charity is not able to continue to hold its charity number, it also has to go to the Revenue Commissioners for a new CHY number (for charitable tax status). This means the Revenue Commissioners also treat the charity as a brand-new charity. Such new charities are not entitled to donations relief for 2 years. Therefore, the current restructure process, which requires charities to seek and obtain a new RCN, means charities lose their donations relief for a 2-year period. It also risks invalidating CHY3 forms which have been filled out by donors (for a 5-year period). Requiring a charity to go back to those donors to seek new forms, upon a restructure, is burdensome, time-consuming and an inefficient use of resources.

History and heritage of the charity: being treated as a brand new charity by the Charities Regulator means that a charity has to have a full new entry in the register of charities. This makes the charity look like a new venture, because the entry doesn't show their years of records and returns. Charities are often very disappointed by this and think it has a negative impact on their reputation and their ability to engage with and fundraise from the public.

For that reason, we recommend that a provision be inserted in the Bill which provides that a charitable organisation which changes its legal structure shall not be required to seek or obtain a new registered charity number from the Charities Regulator. In practice, we anticipate that the Charities Regulator could simply update the register of charities to note the change in legal form, any change to the name (for which we note the consent of the Charities Regulator would be required) and any ancillary changes (such as changes to the charity trustees, which are submitted using the correct online form).

3.3.10 Register of merged charities

At present, if a charity restructures, or merges with another charity, there is no formal, public record of this having occurred. If someone leaves a legacy to a charity, which has changed its legal structure or merged with another charity, it is not certain (from a legal perspective) that this legacy can automatically be received by the new or merged charity. This means that a charity could miss out on a legacy that was intended to be put to good use for its charitable purpose. Charities which are considering merging with another organisation see this as a big disadvantage, particularly if they rely heavily on donations and legacies.

We recommend that the Bill provide for the establishment of a register of merged charities. This register could be maintained by the Charities Regulator. It would act as a formal process which would allow legacies to be transferred to a charity which has merged with another charity or restructured.

This type of system is currently operated by the Charity Commission5. We recommend that the Bill provide that a register of merged charities may be established and maintained by the Charities Regulator so that it is clear that the Charities Regulator has the power to set up this system.

3.3.11 Incorporation of a company prior to registration as a charity

As has been explained elsewhere in this submission, the process (for new charities) of registering for charitable status, is a major undertaking which takes several months to process. The application is robust and detailed (as it should be) and it includes submitting the proposed constitution (or other governing document) of the applicant to the Charities Regulator for advance approval. This is the rulebook according to which the prospective charity must operate, if it successfully achieves registration with the Charities Regulator.

Applicants therefore prepare and draft their constitution and present it to the Charities Regulator as a "final draft". The Charities Regulator may ask, during the application process, that the charity makes changes to the constitution. Applicants do not generally wish to bring their constitutions into force while in the application phase, because they don't yet know if they are going to be granted charitable status and they cannot begin charitable activities until their application is granted.

Historically, applicant charities assisted by MHC did not therefore declare their trust, adopt their association rules or incorporate their company until their charitable status had been

[5] https://www.gov.uk/government/publications/register-of-merged-charities

granted. Recently the Charities Regulator has changed approach based on its interpretation of the Charities Act 2009 and it now requires applicants to have taken the final step of formal incorporation of their company (or equivalent) before they submit an application to the Charities Regulator.

There are various reasons why we consider that the full formal incorporation of a company (or equivalent), prior to commencing a 9 – 12 month charity registration application, is causing practical difficulties for charities:

- As mentioned above, it is an offence for a charitable organisation to carry out certain activities (including accepting a gift of money or property) if it is not registered. If a company is required to incorporate before its registration is complete, it will inevitably need to accept money in order to fund its costs. Its constitution, which will include all of the mandatory "charity" clauses, will make the company look like a charity before it actually is one, risking commission of the "holding out as a charity" offence;

- The incorporation of a company requires a board of charity trustees, who will be subject to the full remit of company law, who will have to meet to discuss filing obligations (with the Companies Registration Office and Register of Beneficial Ownership) and prepare financial statements. We do not consider that the charity trustees should be meeting, commencing discussions about filings, and undertaking legal company law obligations until the company has charitable status;

- The time and cost of submitting filings to the Companies Registration Office and Register of Beneficial Ownership, preparing the first set of financial statements and holding the first board meetings and general meetings, will be significant. The use of funds to make statutory filings is not the most efficient and effective use of resources for an organisation which is seeking charitable status. Our experience is that an application for registration to the Charities Regulator is taking on average 9-12 months. This is a long time for a company to be in existence, and will result in filings, meetings and cost;

- If the incorporation of a company is required at the outset of an application, and then the Charities Regulator requests amendments to the constitution, this will require a second set of filings in the CRO. It will also require a general meeting / written resolution of the members (because this is how a revised constitution is brought into effect), all of which will incur unnecessary costs and public filings for the organisation. In addition, this would require the members to meet/engage in circumstances where no charitable activity should be undertaken because the applicant is not yet a registered charity. This is a difficult line for charity trustees and members to tread;

- If charitable status is not granted by the Charities Regulator, the company will have to be dissolved. This would result in further unnecessary time and cost; and

- As a charity cannot carry out activities until it is registered, all documentation submitted to the Charities Regulator as part of the registration application is in the form of a proposal (final draft), until registration is granted and the charity trustees can formally meet, deliberate and adopt documentation. We do not consider that submission of a draft constitution is any different to all the other documents, policies etc that are sent to the Charities Regulator in draft.

We are strongly of the opinion that the fairest process, the most efficient use of charitable resources and the protection of individuals from being in breach of the Charities Act 2009 by reason of carrying out activities, would be achieved by implementing a process whereby

all applicants must wait to incorporate (or establish a trust, or establish an unincorporated association) until the Charities Regulator has carried out its assessment of the application.

We recommend that text be included in the Bill which confirms that, in relation to the information and documentation to be submitted to the Charities Regulator for a registration application, that information about the proposed legal structure be provided. We also recommend that it be confirmed in the Bill that, in relation to any proposed new charitable organisation (rather than an existing organisation, such as a foreign registered charity), it should not be formally established until the Charities Regulator has carried out its assessment of its registration application.

4.0 CONCLUSION

It is the view of the parties to this submission that the Bill presents a critical opportunity to enhance our legal framework, to strengthen its effectiveness and to ensure that it is transparent, fair, and proportionate. Our suggested inputs reflect the need to achieve a balanced regulatory regime that considers the practical reality of the limited resources of both the Charities Regulator and the charities that make up this vibrant sector. Many Irish charities are small, and all are governed and led by volunteers. We need a system of regulation that works for all charities, many of whom have limited access to legal advice. To the greatest extent possible, our regulatory framework should provide absolute clarity as to the legal obligations applicable to charity trustees. We look forward to further opportunities to engage with the Joint Committee on developing this important project for our charities sector which provides such a wide range of vital services and supports across Ireland. We are available should any clarification be required on any element of the submission.