

Department of Community, Rural and Gaeltacht Affairs

**Consultation Paper - Establishing a Modern Statutory Framework for Charities
Submission by FLAC – Free Legal Advice Centres
13 Lower Dorset Street,
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Introduction

FLAC welcomes the publication of the consultation paper and the opportunity to make a submission to the Department of Community, Rural and Gaeltacht Affairs on the consultation document. FLAC, as a human rights organisation and as part of the community legal sector has a special interest in the development of Charities law in Ireland. FLAC also has a special interest in seeing the inclusion of human rights in the statutory definition and how the educational and campaigning functions of non-governmental organisations will be addressed so as to facilitate their inclusion within the statutory definition.

Overall policy aim

FLAC supports the proposal that a new statutory framework would enhance the sector and serve to deepen public confidence in it.

FLAC supports the objective outlined in the paper to achieve “the right balance between, on one hand, proper accountability and vigorous intervention when charity is abused and, on the other hand, appropriate support and guidance to promote best practice”^I.

As a non-governmental organisation in the community and voluntary sector FLAC would like to see organisations supported and enabled to work effectively and fulfil their aims and objectives. The State has an important role to play in creating the context where charities can flourish while ensuring that the public interest is served and public confidence is upheld.

The paper states that in practice the majority of charities are very small and managed entirely by volunteers. The sector derives dynamism from these small voluntary community groups and that inappropriate regulation would stifle this valuable aspect.^{II}

FLAC supports the proposals for Reform which consist of three elements –

- (a) A new definition of ‘charity’ to assist clarity.
- (b) An improved regulatory framework to ensure accountability.
- (c) An official register of all charities to maintain transparency.

Clarity

Proposal

The introduction of a statutory definition is sought; this would serve to enhance the current common law interpretation, setting out clear charitable purposes of public benefit. A clear statutory definition is critical to the establishment of a modern statutory framework. It should follow the definition that has been determined by four centuries of Common Law while at the same time providing greater clarity for prospective charitable organisations.

^I Page 6 “Establishing A Modern Framework For Charities” Consultation Paper, Department of Community, Rural and Gaeltacht Affairs, December 2003.

^{II} *Ibid* at page 6.

Certainty and flexibility are the key features of a new definition so as to ensure that it is readily adaptable to the changing needs of society. The presence of 'public benefit' should remain a prerequisite of a valid aid organisation; however, this concept should be updated in order to take account of developments in case-law.

FLAC agrees that the definition of charity needs to be reviewed to respond to a modern society.

FLAC also welcomes the proposal that all charities currently recognised by the Revenue Commissioners will be granted charitable status and that the proposed definition should keep in line with the interpretation of charitable purposes as determined by the Revenue Commissioners.

The proposed statutory definition has clarity and provides a more modern framework for the voluntary, community and charitable sector but there are two issues not specifically covered in the possible elements of the proposed definition which FLAC wishes to address.

a) Advocacy/Educational Role

The current system of approval for charities as administered by the Revenue Commissioners prohibits all campaigning.

The UK decision *IRC v Temperance Council of the Christian Churches of England and Wales* (1926)^{III} is the leading case deciding that a political purpose is not a charitable purpose. In that case, the Council had as its purpose 'united action to secure legislative and other temperance reform'. Whilst it was accepted that the promotion of temperance might be regarded as for the benefit of the community, it was held that the Council was instituted mainly to effect changes in the law not being a charitable purpose.

FLAC is examining the possibility of becoming an organisation which campaigns for law reform which would promote equal access to justice for all and the eradication of social and economic exclusion. Its objects would have to be amended accordingly and FLAC hopes that they would be given due consideration and be acceptable within the context of a new statutory definition.

FLAC also works with non-governmental organisations which are operating from a rights based approach to service delivery and supports the development of this model of good practice. The promotion of a rights based approach has become very popular among human rights and related organisations. At the core of this approach is the belief in positive rights of individuals and groups which are to be upheld by the State's positive duty towards them. This model inevitably will lead to advocacy by stakeholders and organisations of this nature will require recognition as charities.

FLAC concurs with the recommendation of the Law Society in this regard that a charity should be able to advocate a change in the law or public policy which can reasonably be expected to help it achieve its charitable purposes and be allowed to oppose a change in the law or public policy which can be reasonably expected to hinder its ability to do so.^{IV}

The UK Government's Strategy Unit publication 'Private Action, Public Benefit' highlighted the reasons why charities are well placed to play a campaigning and advocacy role, and the benefits of encouraging them to do so. They also recommended that the Charity Commissioner's guidance should be revised to reflect

^{III} (1926) KB 753

^{IV} Page 12, "Charity Law: The Case For Reform", Law Society's Law Reform Committee Report, July 2002.

these benefits by placing a greater emphasis on the campaigning and political activities that charities can undertake, as opposed to restrictions.^V

Article 46 of the draft EU Constitution acknowledges the advocacy role of representative organisations and civil society “The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”^{VI}

NGO's have very important role to play in advocating on behalf of and representing their constituent members in making submissions to and informing policy makers regarding legislation, social and economic policy and the operations of Statutory bodies. There is generally a positive reception by policy makers to submissions made by NGO's on issues where they have an expertise. This consultation process on Establishing a Modern Framework for Charities is a good example where the State invites the charities sector to participate in policy and legislative formulation of behalf of its constituency.

FLAC calls on the Department to include the advocacy and educational role of charities with in the statutory definition.

b) Human Rights, Equality, Conflict Resolution, Peace and Reconciliation

Human Rights

The area of human rights is not mentioned specifically in the proposed statutory definition. This is a constantly evolving area with an increasing number of charities responding to emerging needs. The consultation paper in the UK, “Private Action, Public Benefit: A review of Charities and the Wider Not-For-Profit Sector” published by the Strategy Unit in September 2002 recommended that the “promotion of human rights, conflict resolution and reconciliation”^{VII} should be included among the list of updated charitable purposes. FLAC recommends that the Irish legislation should specifically refer to organisations which promote human rights, conflict resolution and peace and reconciliation. The Charity Commissioners in their document RR12 – the Promotion of Human Rights – 04/03 have concluded that the promotion of human rights is a charitable purpose^{VIII}. Their guidance document explains the basis of that conclusion and examines the ways in which a charity can promote human rights.

FLAC welcomes the heading of the advancement of community welfare and the specific areas covered therein. As an organisation working on equality and human rights issues, FLAC notes with disappointment the absence of mention of human rights and equality in particular, given the equality infrastructure which has been put in place by Government and indeed the human rights infrastructure which has been established on foot of the Good Friday agreement and the incorporation of the European Convention on Human Rights into Irish Law.

FLAC endorses the Law Society recommendation that the definition proposed refers to “the promotion and protection of civil and human rights”.^{IX}

FLAC calls on the Department to include the promotion of equality and the protection of human rights in the definition of charitable purposes.

^V Page 46, “Public Action, Private Benefit”, Strategy Unit, September 2002.

^{VI} Article 46, Draft Treaty Establishing a Constitution for Europe, 18 July 2003.
Adopted by consensus by European Convention.

^{VII} Page 39, “Public Action, Private Benefit”, Strategy Unit, September 2002.

^{VIII} Page 2, Document RR12 – “The Promotion of Human Rights – 04/03” Charity Commissioners

^{IX} Page 6, “Charity Law: The Case For Reform”, Report by the Law Society’s Law Reform Committee, July 2002.

Conflict resolution – alternative dispute resolution

Alternative Dispute Resolution (ADR) may be defined as “a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and third party.”^x

ADR takes many forms, for instance, arbitration, mediation and conciliation are just a few examples of alternative dispute resolution mechanisms in operation in Ireland today.^{xi}

Mediation, for example it is becoming increasingly popular as a method of ADR.^{xii} The *Employment Equality Act 1998* provides for the referral of cases to mediation officers where it appears to the Director of Equality Investigations that the case could be resolved by mediation and neither party objects.^{xiii}

Mediation is also a growing part of family law proceedings, for example the *Children Act 1997*^{xiv}, Section 5 of the *Judicial Separation and Family Law Reform Act 1989* and the Section 6 of the *Family Law (Divorce) Act 1996* place an obligation on solicitors to try and resolve family disputes by mediation before having recourse to the courts. The *Children Act 2001*^{xv} provides for family welfare conferences in the case of young offenders. *Family Support Agency Act 2001*^{xvi} established the Family Support Service (FMS) which provides a family mediation service and promotes mediation in family disputes.

Mediation is also becoming increasingly important in land law disputes. Under section 144 of the *Residential Tenancies Bill 2003*, the Private Residential Tenancies Board (PRTB) which has been in existence since 2001, will be placed on a statutory basis^{xvii}. The PRTB is under an obligation to attempt to broker a resolution to tenancy disputes by mediation or before the matter is referred to the Tenancy Tribunal. Mediation is also an integral part of the Personal Injuries Assessment Board (PIAB) which was established pursuant to the *Personal Injuries Assessment Board Act 2003*^{xviii}.

Conciliation is also becoming more mainstream as a management tool. The Labour Relations Commission (LRC) utilises conciliation with a high degree of success. According to statistics published by the LRC over 80% of the industrial disputes referred to conciliation are settled.^{xix}

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- x Page 12, Brown & Marriott *ADR Principles and Practice* (2nd ed Sweet & Maxwell 1999).
- xi For a brief guide to ADR see Mackie, Miles, Marsh & Allen, *The ADR Practice Guide* (2nd ed. Butterworths 2000) pp. 3-57.
- xii See generally Gilvary “It’s good to talk” 96(1) *Law Society Gazette* (Jan / Feb 2002) 18.
- xiii Section 78 of the *Employment Equality Act 1998*. See generally Reid, *Office of the Director of Equality Investigations 2001 – Legal Review and Case Summaries* (ODEI) ; *Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002* (S.I. 78/2002)
- xiv Section 20(2) (b) *Children Act 1997*.
- xv Sections 7 and 8 of the *Children Act 2001*, dealing with the Family Welfare Conference.
- xvi Section 3 *Family Support Agency Act 2001*.
- xvii The PRTB was established in October 2001, on foot of the recommendations contained in the *Report of the Commission on the Private Rented Residential Sector 2000* to provide a dispute resolution service between landlords and tenants.
- xviii Part 2 of the *Personal Injuries Assessment Board Act 2003* provides for the Mandatory Assessment Procedures In Respect Of Certain Civil Actions.
- xix Labour Relations Commission, *Annual Report 2002* at page 21. See also “Art of Compromise can keep Industrial Relations Sweet”, *Irish Times*, February 6, 2004.

There has been significant development in the ADR option in Ireland. The new Commercial Court^{xx} can only add to the impetus to resolve disputes by this method with ADR acting as an essential element of the new court.

In light of this developing trend and that new NGO's will be established to operate family mediation and community mediation services to complement statutory provision, it may be that this area should be acknowledged in the possible statutory definition. The document 'Private Action Public Benefit' specifically mentions the promotion of conflict resolution amongst 10 proposed headings for charitable purposes^{xxi}.

Accountability

Irish organisations are subject to intervention by a multiplicity of agencies which is inefficient. England has had for the past forty years the Charity Commission to regulate its charities. In Ireland there is no one body which has the specific aim of supervising charities, no body which maintains a complete register of charities and none which requires charities (which are not companies) to provide regular accounts to any supervisory authority. In addition, there is no requirement for the registration of professional fund-raisers employed by charities. There is no suitable regulation of charitable organisations.

Proposal

Positioning an independent statutory body as the centrepiece of a modern framework for charities.

FLAC welcomes the proposal that there should be a statutory body for the regulation of charities. The intention of the new regulatory framework would be to address the deficiencies in the current institutional arrangements and FLAC welcomes this.

The paper states that if an entirely new body were to be created it would operate independently under the Department of Community, Rural and Gaeltacht Affairs. The proposed name for the new body is **Caradas**, which is the Irish term for proactive friendship or alliance.

Roger Acton, then CEO of Disability Federation of Ireland, in a Paper to the National Conference on Fundraising Legislation, 8 June 1995, spoke about 'a new agency, with its own ethos and modern and vibrant management system. It needs to be headed by a Charity Commissioner who not only has a clear understanding of the sector but which also has the support of the sector.'^{xxii}

In his paper he also suggested that 'rather like the Office of the Ombudsman, the new registry of charities would report directly to the Dail.'^{xxiii}

FLAC supports the views set out above or indeed would also support proposal as set out in the paper for an independent statutory body operating under the aegis of the Department of Community, Rural and Gaeltacht Affairs.

FLAC would be supportive of a charge for annual returns which might operate on a sliding scale, if this was required. FLAC suggests that part of the proceeds of the National Lottery allocation for voluntary and community groups could be used to fund the majority of the core costs of the new body.

^{xx} Established 12th January 2004 on foot of the recommendations of the Company Law Review Group and the Committee on Court Practice and Procedure, 27th Report 2002. See Order 63A RSC.

^{xxi} Page 39, "Public Action, Private Benefit", Strategy Unit, September 2002.

^{xxii} Page 7, Presentation by Roger Acton, CEO Disability Federation of Ireland, National Conference on Fundraising Legislation, June 1995.

^{xxiii} *Ibid.* at page 7.

FLAC also endorses the Law Society recommendation that the main cost of running the Charities office should be borne out of Central Funds. And their recommendation that a registration fee, if any, should be set by the charities office or by ministerial order from time to time after consultation with the charities office. (Law Society report 2002, page 138).

The statutory functions of the regulatory body, however constituted, might include ...

FLAC supports the 11 statutory provisions of the proposed body and would agree with the statement that they could be complemented by agreed administrative arrangements.

Fundraising by charities

Another key feature of this regulatory body would be to ensure public confidence in the methods used for **fundraising**. A balance should be struck between assuring the public that their charitable donations are being used to support the work of the charity and also giving charities the freedom to be dynamic, innovative and to function without undue bureaucracy. At present, charities are not required to obtain a permit for charitable street trading and it is unclear what percentage of the money collected goes directly to the charity.

Reformed legislation would deal with these issues. For example, annual returns would disclose permits applied for and the funds subsequently raised. Regulations could be drafted under the legislation to address the administrative aspects of fund-raising.

The body formed could monitor the conduct of fund-raising programmes and deter potential abuses by liaising with the Gardaí with regard to the policing and issue of permits. Self-regulatory initiatives should also be encouraged - for example a code of conduct could serve to promote good practice in charitable fund-raising. This non-statutory code could allow for greater flexibility and speedier adaptation to changes in fund-raising methods. In time, this code could be given statutory recognition.

The DFI submission to the Advisory group on Charities/Fundraising Legislation suggested that the registration authority should be responsible for the issuing of all licenses and permits^{xxiv}. FLAC acknowledges that this area is outside of the remit of the Department. However, FLAC would be of the view that all charitable street trading should be subject to regulation by the Gardaí.

FLAC also concurs with the recommendation that the legislation should also include the collection of promises of money, (for example, standing order forms), as well as money (*Ibid*, pages 173, 174).

Finally, FLAC concurs with recommendation that the issues involved in charitable fundraising over the internet should also be identified and monitored in the context of the Internet Advisory Board structure. (Law Society report 2002, page 185).

Proposal:

Fundraising: The legislation would deal with charitable street trading and collection of promises of money.

At present in Ireland there is insufficient regulation of charitable street trading and collection of promises of money, FLAC therefore welcomes the proposal for the more stringent regulation of such methods of fundraising. As was noted by the Report of the Advisory Group^{xxv} at page 8 the main problems identified with such methods of fundraising were nuisance callers and doubts as to the bona fides of collectors.

^{xxiv} Page 9, DFI Position Paper on Fundraising Legislation 1996.

^{xxv} Report of the Advisory Group on Charities/Fundraising Legislation, November 1996 (Dail Library)

In response to this the report recommended in section 3.1 that “the gross proceeds of fundraising should always go directly to the fundraising body”, it also recommended in section 3.3 that “permits for local collections should be provided by the Chief Superintendent of the local division and permits for national collection provided by the registration authority, an application for the latter having been made six months in advance”

The Law Society in its report *Charity Law: A Case for Reform* at page 172 felt that it was not appropriate for the fine detail of the administration of controls to be included in primary legislation it recommended that the Minister should make regulations from time to time on the advice of the Charities Office in consultation with the sector. FLAC endorses this approach as well as the various other recommendations made on pages 172 and 173 of the report. We believe that such measures would enhance the accountability of charities by making them more transparent which would in turn address any misgivings that the public may have.

The Street and House to House Collections Act, 1962 is very outdated and requires very little information to be given by the charity collecting and is therefore open to fraud and or deception by those collecting. It is suggested that the recommendations in Part II of the Costello report in relation to the Act, sections 5.17 and 5.18, should be considered when drafting any new legislation^{xxvi}.

FLAC concurs with the recommendation of the Law Society that the current exclusion from regulation of fundraising by means of charitable street trading should be reviewed.... Such fundraising should be brought under the same controls as to dates and locations in the public interest.^{xxvii}

Proposal:

Fundraising: The legislation would deal with transparency regarding the cost of using professional fundraisers.

As was pointed out in the consultation paper the current position that a professional fundraiser is not under a duty to disclose the percentage of money collected which goes to charity is unsatisfactory. How the public perceives a charity is fundamental to its ability to fundraise, so where there is a question mark over the amount of money which actually goes to the purpose of the charity itself this can severely dent its credibility.

The Law Society in its report of July 2002 at page 182 made a number of recommendations which FLAC supports. It is important to be bear in mind that any legislation with respect to external fundraisers should not be too onerous or it could result in the reduction of such fundraising which would severely impact smaller charities that do not have the resources to employ in-house fundraisers.

The approach in England and Wales may also be a useful guideline. Both professional fundraisers and commercial participators are required to enter into an agreement in a form prescribed by regulations with a charity before they can solicit funds for the charity or make any representations that contributions will be made to the charity. The fundraiser is not entitled to retain any commission or other benefit for himself except where the donor has been informed that this is intended. It is the duty of the charity trustees to negotiate reasonable terms and to ensure that the professional fundraiser accounts fully to the charity for the funds raised^{xxviii}.

Fundraising: Gaming and lotteries, fundraising permits

As is stated in the consultation paper, it does not deal with the issues of fundraising permits and gaming and lotteries, although we are aware that these areas fall under the remit of the

^{xxvi} Page 82-85, Report of the Committee on Fundraising Activities For Charitable and Other Purposes, ‘Costello Report’, 1990.

^{xxvii} Page 173, “Charity Law: The Case for Reform”, Report by the Law Society’s Law Reform Committee, July 2002.

^{xxviii} Page 7, UK Charity Commission, Document CC-20.

Department of Justice, Equality, and Law Reform, various reports have made recommendations which may be of assistance to the Department.

The Law Society in its report, *Charity Law: The Case for Law Reform* summarised and developed on the recommendations of the Costello Report, 1990 and the Burton Report, 1996 from pages 174 – 180. We would endorse these recommendations and reiterate the emphasis that was placed on the need to avoid the potential for double accountability of charities in deciding which body, either the Charities Office or the Gaming and Lotteries Authority

The area of fundraising permits is in need of reform but without the input of the Department of Justice, Equality and Law Reform this is not possible. The Consultation Paper states that “the end result would be that there would be on the statute book one comprehensive piece of legislation, in stand alone form, governing charities”^{xxix} This aim however is simply not achievable without inter-departmental consultation.

Transparency

There is no official register of charities currently in existence within the State. Hence, there is a lack of accurate information on active charities, their objectives and the extent of their financial worth. Clearer information on these issues would enhance trust in the charities sector.

Proposal

It is proposed that a Register of Charities be created. This register would be compiled, maintained and published by the statutory body mentioned above. FLAC supports this proposal and agrees with the consultation paper and the Report of the Advisory Group that all organisations should be required to register.

FLAC supports the concept that registered charities would be required to file returns with the regulatory body and that the register information would be accessible over the internet by the public. FLAC supports the proposal that the disclosure would be proportionate to the size of the charity and its financial situation.

FLAC believes that all registered charities in receipt of funds of €10,000 plus should be obliged to submit a financial statement showing income and expenditure and those with substantial income should be required to submit independently audited accounts. The threshold limits should be adjusted in line with inflation.

Compliance

The current situation is that other than the Gardai there is no statutory body about which a complaint can be made.

Proposal

Statutory powers are proposed for the regulatory body where it finds evidence of fraud, maladministration or other misconduct. Sanctions could involve –

- Striking the charity off the Register
- Prosecution summarily on its own initiative
- It could forward a file to the DPP where an indictable offence has been committed

^{xxix} Page 18, “Establishing A Modern Statutory Framework For Charities” Consultation Paper, Department of Community, Rural and Gaeltacht Affairs, December 2003.

The regulatory body would also have the option of exercising intermediate sanctions which would act as a deterrent, however the legitimacy of an enforcement regime requires acceptance that the sanction is appropriate to the act of non-compliance.

FLAC supports the proposals in the paper to investigate alleged wrongdoing and indeed to strike a charity off the register where there is malpractice or fraud.

FLAC notes that the consultation paper does not provide details regarding the statutory powers which will be necessary to ensure compliance. FLAC also has questions around how a regulatory body will manage its functions of regulating the charitable sector while providing support and information for organisations to comply with regulatory requirements

FLAC believes that representation by stakeholders in the management of the regulatory body is essential to ensure its smooth functioning and thus FLAC would like to see representation from the charitable sector on the board of the regulatory body.

Governance

With regard to misdemeanours committed by charity trustees and directors themselves, it is evident that the law governing this area lacks coherence. Both trustees and directors of charities are subject to different standards.

Proposal

It is proposed that the law be codified so that the role, duty of care and responsibilities of these positions be confirmed as being the same^{xxx}. Once a clear standard of care is outlined it would be easier to determine whether a person in either of these positions has fallen below the required standard. FLAC welcomes this proposal.

FLAC welcomes the proposal that a statutory exoneration would be provided for lay trustees against liabilities arising out of acts committed honestly, reasonably and in good faith.

The establishment of a clear outline of the roles and responsibilities of charitable staff would promote good governance and enable enhanced engagement with stakeholders. FLAC supports this initiative and believes that it would have a positive impact on all engaged in voluntary and charitable activity.

FLAC agrees with the statement of the Consultation Paper that it is “inappropriate that different standards... *common law and statutory*...should apply depending on the legal vehicle used to establish a charity” and that “new legislation could present an opportunity to consolidate both the statutory and common law standards relating to charity trustees”.

Currently charities that are also companies limited by guarantee are regulated under Company Law, and by the Revenue Commissioners. Other organisations which have charitable tax exemption are regulated solely by the Revenue Commissioners. The proposal of the Consultation Paper is that all charities should be registered and regulated by a new independent statutory body.

There is a danger here that a new statutory body could add to the complexity and bureaucracy that some charities have to deal with.

FLAC would agree that the establishment of a new form of incorporation solely for charities should be considered. All existing charities whether unincorporated associations, trusts or

^{xxx} Page 16, “Establishing a Modern Statutory Framework for Charities” Consultation Paper, Department of Community, Rural and Gaeltacht Affairs, December 2003.

companies limited by guarantee, could convert to this form of legal structure, if they wished, and all new charities which wished to avail of the advantages of incorporation would in future be required to adopt this legal structure.

FLAC would also agree that the registration body for this new form of incorporation should be the proposed new regulatory body and not the Companies Registration Office.

A separate legal vehicle specifically geared towards the non-commercial needs and aims of charities and operated by the new regulatory body would have several advantages:

- It would do away with the need for multiple registration, regulation and reporting, for charities (to the Companies Registration Office/Director of Corporate Enforcement, Revenue Commissioners and the proposed new body) thereby cutting costs and administration.
- All trustees/directors etc of bodies adopting this form of legal structure would be subject to the same statutory standard.
- All charities incorporated under the new vehicle would have separate legal personality.
- All trustees/directors would have limited liability.

FLAC agrees that there should be full liaison with the Company Law Review Group on development of such a form of incorporation. FLAC also notes that proposals for such a form of incorporation, called, charitable incorporated organisation, are well developed by the Department of Trade and Industry in the UK and have been welcomed by the UK Charity Commission.

Review

FLAC welcomes the proposal that the legislation be reviewed after 5 years.