

**THE CHARITIES ACT (NORTHERN IRELAND) 2008
THE CHARITIES ACT (NORTHERN IRELAND) 2013
THE CHARITY TRIBUNAL RULES (NORTHERN IRELAND) 2010**

**IN THE CHARITY TRIBUNAL FOR NORTHERN IRELAND
IN THE MATTER OF A REFERENCE PURSUANT TO SCHEDULE 4
TO THE CHARITIES ACT (NORTHERN IRELAND) 2008**

NOTICE

1. A Reference, pursuant to paragraph 2(b) to Schedule 4 to the Charities Act (Northern Ireland) 2008 ('the Act') was made to the Charity Tribunal for Northern Ireland ('the Tribunal') by the Charity Commission for Northern Ireland ('the Commission') on 25 January 2025, the requisite consent of the Attorney-General for Northern Ireland ('the Attorney-General') having been granted on 28 November 2024, pursuant to paragraph 1(2) to Schedule 4 to the Act.
2. A copy of the Reference is attached hereto.
3. The Reference sets out a statement of the two questions being referred to the Tribunal; a statement of what is stated by the Commission, as Referrer, to be the relevant law and a list of other parties whom the Commission thinks may be affected by the Reference and why they may be affected.
4. The making of the Reference is hereby published pursuant to the imperative set down in Rule 38(5) of the Charity Tribunal Rules (Northern Ireland) 2010 ('the Rules').
5. The Commission, pursuant to paragraph 1(3) to Schedule 4 to the Act, shall be a respondent to these proceedings before the Tribunal.

6. The Attorney-General, pursuant to paragraph 1(4) to Schedule 4 to the Act, is entitled to be a respondent to these proceedings, together with, subject to the Tribunal's permission –
 - (i) the trustee(s) of any charity that is likely to be affected by the Tribunal's decision on the Reference;
 - (ii) any such charity that is a body corporate;
 - (iii) any other person who is likely to be so affected.
7. The powers of the Commission to act in respect of any particular state of affairs until the Reference proceedings have concluded and any relevant appeal period has ended, are set out in paragraphs 3-6, inclusive, to Schedule 4 to the Act.
8. The Attorney-General shall inform the Tribunal, in writing, within 28 days of the date of this Notice whether she intends to be a respondent to the determination of this Reference by the Tribunal, pursuant to Rule 38(5) of the Rules.
9. Initial Directions shall be issued, by way of publication in the same manner as publication of this Notice, no earlier than the expiry of 28 days from the date of this Notice, inviting applications in writing from any person who falls within the categories of persons set out in paragraph 2(3)(b)(i)-(iii) to Schedule 4 to the Act to be joined as respondents by a date to be specified, together with other Directions, if appropriate, to the Commission as the Referrer.

Signed: Damien McMahon,

President,

Charity Tribunal for Northern Ireland.

Date: 17 April 2025

IN THE CHARITY TRIBUNAL FOR NORTHERN IRELAND

Charities Act (Northern Ireland) 2008 Schedule 4, paragraph 1(1)

REFERENCE BY THE CHARITY COMMISSION FOR NORTHERN IRELAND

Questions arising in connection with the exercise of the Commission's functions and concerning the operation of charity law

1. By virtue of correspondence dated 28 November 2024, the Attorney General for Northern Ireland provided prior consent pursuant to Schedule 4, paragraph 1(2) of the Charities Act (NI) 2008 ("the 2008 Act") for the following questions to be referred to the Charity Tribunal by the Charity Commission for Northern Ireland ("the Commission"):
 - (i) What is the definition of "*office-holder*" for the purpose of section 24 of the Charities Act (NI) 2008?"
 - (ii) Are Members of Parliament (MPs), Members of the Legislative Assembly (MLAs), Ministers of the Northern Ireland Executive and local councillors 'office holders' for the purpose of sharing information under section 24 of the Charities Act (NI) 2008?

Background to the reference

2. The Commission is the statutory regulator and registrar of charities in Northern Ireland and is governed by the provisions of the 2008 Act. The Commission has statutorily defined objectives (section 7 of the 2008 Act), general functions (section 8), general duties (section 9) and incidental powers (section 10). To that end, the powers conferred upon the Commission cover a range of matters including the regulation of charities

(such as registration), identifying and investigating mismanagement in the administration of charities and taking remedial action in connection with misconduct or mismanagement.

3. One such power is that contained in section 24 of the 2008 Act which makes express provision for information sharing by and to the Commission. The Commission regularly receives such requests from a range of actors and bodies. Such requests may include, but are not limited to, information pertaining to specific charity registration applications or the investigation of specific charities.

Section 24 of the Charities Act (NI) 2008

4. Section 24(1) of the 2008 Act confers a discretionary power on the Commission to disclose any information to any “*public body*” or “*office-holder*” for any purpose connected with the exercise of the Commission’s functions, or the purpose of enabling or assisting the public body or office-holder to exercise any functions. Section 24 provides:

“Disclosure of information by and to the Commission

24—(1) The Commission may disclose any information to any public body or office-holder (in Northern Ireland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom)—

(a) for any purpose connected with the exercise of the Commission’s functions, or

(b) for the purpose of enabling or assisting the public body or office-holder to exercise any functions.

(2) Any person to whom this subsection applies may disclose any information to the Commission for the purpose of enabling or assisting it to exercise any functions.

(3) Subsection (2) applies to—

- (a) any Northern Ireland authority,*
- (b) the Northern Ireland Assembly Commission,*
- (c) any district council,*
- (d) any constable, and*
- (e) any other public authority whose functions are exercisable only or mainly in or as regards Northern Ireland and relate only or mainly to transferred matters.*

(4) In subsection (3)(a) "Northern Ireland authority" means the First Minister, the deputy First Minister, a Northern Ireland Minister or a Northern Ireland department.

(5) A power to disclose information under subsection (1) or (2) is subject to any express restriction imposed by or under any other statutory provision.

(6) Where any information disclosed to the Commission under or for the purposes of any statutory provision is so disclosed subject to any express restriction on the disclosure of the information by the Commission, the Commission's power of disclosure under subsection (1) shall, in relation to the information, be exercisable subject to any such restriction."

5. It is clear from the wording of section 24(1) that any such disclosure is subject to two primary conditions. The first is that any such disclosure is made to a "*public body or office holder*" in Northern Ireland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom. The second is that such disclosure is to take place for any "*purpose*" connected with the exercise of the Commission's functions or for the purpose of enabling or assisting the public body/office-holder to exercise any functions.
6. The 2008 Act provides no specific definition of the term "*office-holder*."

7. The power contained in section 24 of the 2008 Act was partially addressed in the Explanatory Notes to the Act. The relevant entry provides:

"Part 5: Information Powers

Part 5 comprises sections 22 to 25 and empowers the Commission to institute inquiries into any aspect of the work of a particular charity or class of charities. The Commission will be able to call for the disclosure of documents and to disclose information in pursuit of its functions to other regulators, public bodies, the PSNI and HM Revenue and Customs."

8. The wording of section 24(1) of the 2008 Act is to be contrasted with that contained in section 24(2)-(4) concerning disclosure to the Commission. Section 24(3)-(4) provide for a defined cohort of bodies/persons who are empowered to disclose information to the Commission. Even the apparent catch-all provision contained in section 24(3)(e) is more narrowly defined than the wording found in section 24(1)(b). In that regard, the wording in section 24(3)(e) – *"any other public authority whose functions are exercisable only or mainly in or as regards Northern Ireland and relate only or mainly to transferred matters"* – is to be contrasted with the wording of section 24(1)(b) – *"for the purpose of enabling or assisting the public body or office-holder to exercise any functions"*. This difference in wording tends to suggest that the requirements concerning disclosure by the Commission in section 24(1) was designed to be of wider effect than that contained in section 24(2)-(4).

Reason for the Reference

9. The term *"office-holder"* is not expressly defined in the 2008 Act. This necessarily creates uncertainty in terms of who may be viewed as an *"officer-holder"* for the purposes of sharing information pursuant to section 24 of the 2008 Act.
10. Such uncertainty is also to be viewed alongside the existing uncertainty that relates to the term *"office-holder"* itself. Such uncertainty is specifically

recognised by authors of *Wade and Forsyth on Administrative Law* (10th Edition, 2009)(Oxford University Press) who note that:

"... A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other, a mere employment under a contract of service. Offices used in old times to be looked upon as a form of property which could be held and recovered in specie: if the holder was wrongfully removed he could obtain restoration by mandamus; or he might be granted prohibition or an injunction. Nowadays he can also obtain a declaration that his removal was void, and that he is therefore still in office, as was done in Ridge v Baldwin, since this remedy likewise operates specifically. In other words, he is removable only by a due and lawful exercise of the power of removal, failing which he remains legally in office. A servant under a mere contract of service enjoys no such protection, according to a long established rule of law: whatever his contractual rights, he can always be dismissed and his remedy lies in damages for breach of contract. In other words, there is always a power to dismiss him, even though under the contract there is no right to do so. The principle is that one man will not be compelled to employ another against his will. By contrast, the law will give specific protection to a status such as membership or office in a trade union, association or club, even though it is merely contractual; this is a less personal relationship, and an injunction or declaration may be granted so as to preserve the status. A statutory status such as that of a registered dock worker will be protected similarly, subject always to the discretion of the court in awarding remedies.

...

Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes 'office' has long been defined as a 'subsisting, permanent substantive position which has an existence independent of the person who fills it, but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public

offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office holders." (pages 460-461)

11. In *Gilham v Ministry of Justice* [2019] UKSC 44, the Supreme Court noted at [12] in respect of the concept of "office-holders" that:

*"Nor is it in dispute that judges hold a statutory office. In broad terms, an office has been defined (by Lord Atkin in *McMillan v Guest* [1942] AC 561, 564) as a "subsisting, permanent, substantive position which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders". Office-holders do not necessarily hold office pursuant to any kind of contract. As Lord Hoffmann explained in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73; [2006] 2 AC 28, para 54:*

"The distinction in law between an employee, who enters into a contract with an employer, and an office-holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the terms of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood. One of the oldest offices known to law is that of constable. It is notorious that a constable has no employer. It required special provision in [section 17 of the Sex Discrimination Act 1975] to bring the office of constable within the terms of the Act and to deem the chief constable to be his employer. But there are many other examples of offices; public, ecclesiastical and private."

12. The unique status of office-holders finds specific expression in the legal system of Northern Ireland. Thus, for instance, section 24 of the Judicature (Northern Ireland) Act 1978 makes specific provision for the granting of injunctions concerning public offices. In that regard, section 24 of the 1978 Act provides that:

“(1) Where a person is acting or has acted in an office to which this section applies without being entitled so to act, the High Court, on an application under this section, may—

- (a) grant an injunction restraining him from so acting;*
- (b) declare the office to be vacant.*

(2) This section applies to any substantive office of a public nature and permanent character which is held under the Crown or has been created by or under a statutory provision or royal charter.”

13. A range of public actors would appear to fall neatly within the definition of public office contained within section 24 of the 1978 Act and the wider definition referenced in *Wade and Forsyth*. This would include:

- Judicial office holders as defined by Schedule 1 of the Justice (NI) Act 2002 and sections 7, 12C, 14 and 15 of the Judicature (NI) Act 1978 (see also section 7 of the Justice (NI) Act 2002);
- The Lord/Lady Chief Justice and Lord Justices of Appeal (see sections 11, 12, 12B, 14 and 15 of the Judicature (NI) Act 1978);
- Statutory officers appointed pursuant to section 70, 71 and Schedule 3 of the Judicature (NI) Act 1978 (see also Section 7 and Schedule 1 of the Justice (NI) Act 2002);
- The Attorney General (see sections 23 and 24 of the Justice (NI) Act 2002)¹;
- The Director of Public Prosecutions (see sections 30, 40 and 43 of the Justice (NI) Act 2002)²;
- The Crown Solicitor (section 35 of the Northern Ireland Constitution Act 1973).

¹ See also section 10 of the Northern Ireland Constitution Act 1973 prior to repeal.

² See also section 34 of the Northern Ireland Constitution Act 1973 prior to repeal.

14. Taking these issues into account, the Commission considers it desirable for the identified questions to be raised with the Tribunal by way of a reference.

Ministers of the Northern Ireland Executive

15. Sections 16A-21A of the Northern Ireland Act 1998 identifies Ministers of the Northern Ireland Executive as '*holding Ministerial Office*' and specific provision is made for the appointment, disqualification and the functions to be undertaken by Members of the Northern Ireland Assembly who hold such Ministerial Office.

Members of the Legislative Assembly

16. The Northern Ireland Act 1998 does not specifically identify Members of the Legislative Assembly as "*office-holders*". Notwithstanding this, the following statutory provisions may be seen as suggesting that Members of the Northern Ireland Assembly may be an office-holder for the purposes of section 24(1):

- Schedule 1 paragraph 9(3)(a) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 *inter alia* identifies MLAs as holding a "*relevant office*" such as to disqualify them from becoming members of the Independent Commission for Reconciliation and Information Recovery.
- Section 7 of the Elected Authorities (Northern Ireland) Act 1989 identified members of the predecessor of the NI Assembly as holding "*office*".
- Section 37(1)(c) of the Elections Act 2022 identifies MLAs as holding a "*relevant elective office*" for the purposes of that Act.

Local Councillors

17. Sections 11(4)(b) and 11(6) the Electoral Law Act (NI) 1962 (the 1962 Act), which concerns elections and terms of office of district councils, specifically references the holding of offices by elected persons. Further, Part IX of the

1962 Act makes provision for the questioning of elections and makes specific reference to the holding of “*corporate office*” or the holding of “*elective office*”.

18. Section 130 of the 1962 Act adopts a particularly expansive definition of the term “*corporate office*” as meaning “...*the office of lord mayor, mayor, chairman, ..., councillor or member of a local authority, ..., or member (whether elected or not) of any committee appointed by a local authority for the purpose of the performance of their functions under any enactment*”. Section 130 also provides the following definitions: “*elective office means any office to which a local election is held in Northern Ireland; ... judicial office includes the office of justice of the peace, local authority means a district council; (3) In Parts VI, IX and X and in the Eighth and Ninth Schedules the expression candidate... (b) in relation to a local election means a person elected or having been nominated or having been declared by himself or by others to be a candidate for election, to the office to be filled at the election*”.

19. Schedule 1 paragraph 9(3)(b) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 also identifies councillors within the meaning of the Local Government Act (Northern Ireland) 2014 as holding a relevant office so as to disqualify them from becoming members of the Independent Commission for Reconciliation and Information Recovery.

20. Sections 7 and 37 of Elected Authorities (Northern Ireland) Act 1989 identifies members of a District Council as holding “office” and members of a local authority in NI as holding a “*relevant elective office*” for the purposes of that Act.

Members of Parliament

21. By extension the Commission queries whether members of Parliament are also properly to be considered as an “*office holder*” for the purposes of section 24(1) of the 2008 Act. The Commission notes that:

- Section 37(1)(a) of the Elections Act 2022 identifies MPs as holding a “*relevant elective office*” for the purposes of that Act;
- Schedule 1 paragraph 9(3)(c) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 *inter alia* identifies MPs as holding a “*relevant office*” such as to disqualify them from becoming members of the Independent Commission for Reconciliation and Information Recovery.

Those affected by the reference

22. Those who may be affected by the reference include Members of Parliament, Members of the Legislative Assembly, Ministers of the Northern Ireland Executive and local councillors, as the requesters of information from the Commission. Charity trustees of any charity and any charity which is a body corporate may also be affected by the reference where they are the subject of information disclosed by the Commission to the office-holder.

Colleen Gallagher, Solicitor to the Charity Commission for NI
Marlborough House, Central Way, Craigavon
23 January 2025