Jurisdictional Differences in Charity Regulation in the UK:

Implications for a Post-Brexit Third Sector

VSSN Seminar

Border Crossings: Implications for Civil Society in a 'Dis'-United Kingdom

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GARETH G MORGAN

gareth.morgan@shu.ac.uk

Emeritus Professor of Charity Studies, Sheffield Hallam University

Partner, The Kubernesis Partnership LLP – Yorkshire & East Lothian

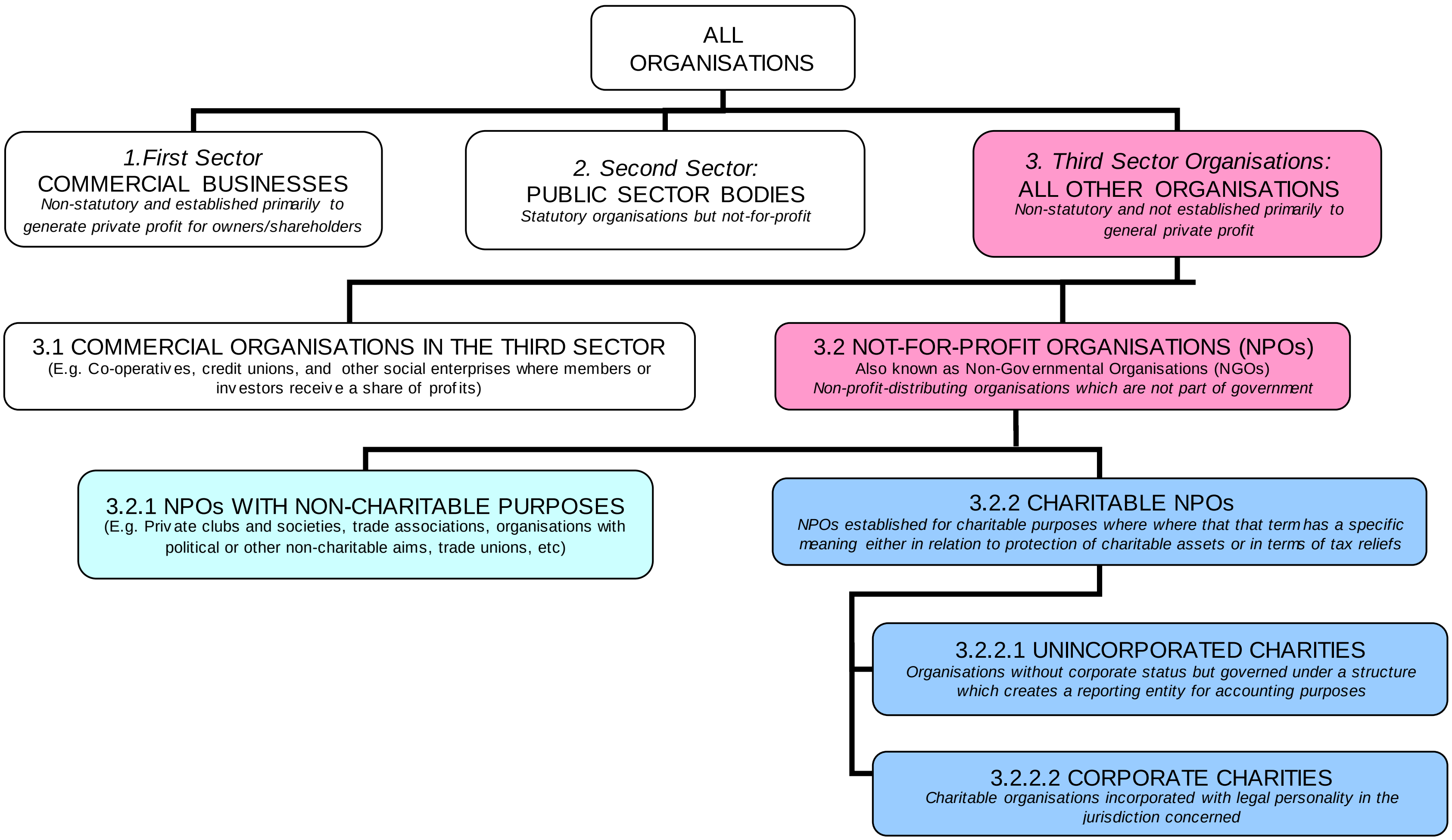
Sheffield Hallam University | Sheffield Business School

The Kubernesis Partnership

Outline

- Charitable status (and hence charity regulation) is fundamental to understanding the third sector
  - (Morgan 2010, 2015a – Voluntary Sector Review)
- Charity regulation has important differences across the three UK jurisdictions – often overlooked by researchers
  - England & Wales
  - Scotland
  - Northern Ireland
- Four distinctions considered:
  - (1) Definition of charity
  - (2) Charity registration
  - (3) Charity accounting
  - (4) Requirements for charitable incorporated organisations (CIOs)
- Compare to Community Interest Companies – not devolved
- What do these differences mean in a post-Brexit third sector?

Charitable Status in the UK



Charity Law: spanning the jurisdictions

- In the UK, charity law is devolved:
  - Always differences: England & Wales, Scotland, Northern Ireland
  - Charity regulation a devolved matter for Scottish Parliament / N Ireland Assembly
  - But tax law is not devolved: whole of UK, uses English definition of “charity”
- So across Britain and Ireland there are four separate systems of charity law and regulation – four jurisdictions:
  - England and Wales
  - Scotland
  - Northern Ireland
  - Republic of Ireland [Not considered today]
- Massive changes in last decade years in <u>all</u> of these:
  - Charities and Trustee Investment (Scotland) Act 2005
  - Charities Act 2006 (for England & Wales) Largely consolidated in Charities Act 2011
  - Charities Act (Northern Ireland) 2008 as amended by Charities Act (NI) 2013
  - Charities Act 2009 (Republic of Ireland)

England & Wales: Summary

- Long history of charity law:
  - 1601 Statute of Charitable Uses
  - 1853 Charity Commissioners becomes a permanent body
  - 1891 Pemsel case defines four heads of charity
  - 1960 Register of charities
  - 1993 Charities Act establishes accounting regulations and many new powers for Charity Commission and tightens rules on registration
  - 2006 Charities Act – massive amendments to 1993 Act, new provisions including CIOs and **complete new definition of "charity"** (for E&W + UK-wide for tax)
  - 2011 Charities Act 2011 – consolidates earlier legislation
  - 2016 Charities (Protection and Social Investment Act) – extends CCEW's powers

- Major features today:
  - Charity Commission (CCEW) well established: seen as the 'original' charity regulator
  - Accounting requirements – including SORP framework – generally accepted
  - Massive issues of limited resources: charities may be asked to pay

Scotland: Summary

- Brief history of Scottish charity law
  - Long system of “public trusts”
  - But English definition of “charity” applies for tax purposes, so recognition by Inland Revenue (now HMRC) often seen as the key issue
  - 1990 Law Reform (Miscellaneous Provisions) Scotland Act:
    - First statutory system of charity regulation included
    - Included accounting regulations – Charities Accounts (Scotland) Regulations 1992
    - But: No Scottish charity regulator and No new definition of “charity”
  - 2004 OSCR established on non-statutory basis
  - 2005 Charities and Trustee Investment (Scotland) Act: complete new framework of charity regulation, new accounting rules, SCIOs and new Scottish definition **of “charity”** (but E&W definition applies for tax purposes)
  - 2006 OSCR took on full powers and much of Act implemented
- Main features today
  - OSCR generally welcomed by Scottish charities
  - Accounting regulations from 2006: new to many charities
    - OSCR actively enforced from outset
    - Now generally accepted

Northern Ireland: Summary

- Brief history of Northern Irish charity law
  - Until recently no formal system of charity regulation
  - 1964 Charities Act (Northern Ireland) extended some of principles of 1960 Act (E&W) to NI – but no charity regulator; no specific accounting requirements
  - English definition of "charity" applies for tax purposes, so recognition by Inland Revenue (now HMRC) seen in past as the key issue
  - 2008 Charities Act (Northern Ireland): complete new framework of charity regulation, new regulator – CCNI – and new Northern Irish definition of **"charity"** (but E&W definition applies for tax purposes)
  - 2013 Charities Act (Northern Ireland) amends 2008 Act
    - Public benefit requirement now v similar to England & Wales
- Main features today
  - Charity Commission for Northern Ireland (CCNI) is fully operational
  - NI definition of "charity" now has statutory effect and registration of NI charities well under way
  - For the first time: a statutory framework in NI for charity accounting
    - Effective for financial years starting on or after 1 Jan 2016
  - NI CIOs are enacted in the 2008 Act but not yet implemented

Differences: (1) What is a charity?

- **In each jurisdiction, the definition of "charity" is** <u>not</u> determined by registration
  - When an organisation is registered as a charity it does not mean it has "become" a charity: It was a charity already
    - Although it may have been operating illegally if not registered in a jurisdiction where charity registration is compulsory or if it used the term "charity" without being registered
    - A charity is not a certain structure: trusts, associations, companies, CIOs etc
- All three jurisdictions have recent new definitions **of "charity"**
- In each jurisdiction, a charity is an organisation which has
  - Exclusively charitable purposes (objects) AND
  - Established for public benefit
- BUT between the four jurisdictions
  - The definition of "charitable purposes" is slightly different in each case
  - The definition of "public benefit" is different in each case

The Different Definitions of "Charity"

- England & Wales
  - 13 heads of charitable purposes
  - Public benefit is not "presumed" but no detailed definition in Charities Acts 2006 & 2011
  - Charity Commission required to issue guidance on public benefit to which trustees must 'have regard' (revised 2013)
- Scotland
  - 16 heads of charitable purposes
  - Public benefit is not "presumed"
  - Public benefit test is defined in Charities & TI (Sc) Act 2005
  - Consideration of disbenefits and fee-charging is explicitly part of Scottish charity test
- Northern Ireland
  - 12 heads of charitable purposes
  - Public benefit is not "presumed"
  - CCNI required to issue guidance to which trustees must 'have regard'
- Tax Law
  - Finance Act 2010 Sch 6
  - Same as E&W definition except
  - Can be established in any EEA country [while UK in EU – could change]
  - Must be registered with a charity regulator where applicable
  - Managed by fit and proper persons

Differences (2): Charity Registration

- England & Wales:
  - Compulsory charity registration, but still many exceptions/exemptions:
    - No registration required for charities < £5,000 income (except CIOs)
    - Many excepted charities – e.g. many Churches and Armed Forces charities no registration with CCEW required < £100,000 income (though CCEW powers still apply)
    - Significant numbers of exempt charities – no registration or direct oversight from CCEW (some subject to other Principal Regulators) e.g. English Universities, Academy Schools, Community Benefit Societies
  - Registration requirement only applies to charities established under law of E&W
- Scotland:
  - Compulsory registration of ALL charities active in Scotland
    - Though OSCR's powers slightly less for Designated Religious Charities
  - Registration includes charities established elsewhere with premises or significant activities in Scotland
    - But external charities only appealing for funds do not have to register if status is made clear
- Northern Ireland:
  - Compulsory system of registration for charities now established in NI
    - CCNI inviting existing charities to apply for registration – now over 5000 registered
    - New charities must apply to CCNI (rather than HMRC) for recognition
  - Lighter s167 registration for external charities operating in NI (not yet in force)

Differences (3): Charity Accounting

- All three regimes have many common features – but often triggered at different levels (see next slide)
- Major features in all three jurisdictions
  - Requirement to keep proper accounting records
  - Requirement to publish a statement of accounts
    - Available to anyone on request.
    - In most cases (but not all) accounts must be filed with regulator
  - Smaller charities can use Receipts and Payments Accounts
    - But Scotland has detailed rules on presentation (unlike E&W and NI)
  - Medium and larger charities must use Accruals Accounts following Charities SORP (Statement of Recommended Practice on Accounting and Reporting by Charities)
    - But jurisdictional differences on which SORP to use) See earlier presentation for E&W complications)
  - Accounts must be Externally Scrutinised
    - Full audit for larger charities (by a firm of registered auditors)
    - Smaller charities can have an independent examination – less demanding but still a statutory framework: IEs must have proper training and in some cases must hold qualifications (see table on next slide)
    - E&W no examination reqd if < £25,000 income - allows approval by trustees only

The Different Accounting Thresholds:
Income levels at which requirements become compulsory*

Requirement	***England & Wales***	***Scotland***	***Northern Ireland***
Must keep proper accounting records	£0	£0	£0
Must publish annual statement of accounts (can be on a receipts and payments basis).	£0	£0	£0
Must register with relevant regulator if not a CIO (local charities in jurisdiction concerned)	£5,000	£0	£0
Annual report and accounts must be filed with regulator	£25,000	£0	£0
Accounts must be independently examined (lay examiner)	£25,000	£0	£0
Accounts must be prepared on an accruals basis (as opposed to receipts and payments) complying in most respects with the SORP indicated.	£250,000 SORP 2005 (*unless* applying T&F override#)	£250,000 SORP 2015 (FRS102)	£250,000 SORP 2015 (FRS102)
Independent examiner must be professionally qualified	£250,000	All accruals accounts	£250,000
Full audit required (by a firm of registered auditors). Accounts must comply fully with Charities SORP (with any departures disclosed).	£1M	£500,000	£500,000

***Excluding charitable companies and non-company charities with £3.26m+ assets**

Requirements shown are for years starting in 2016 or later. #*See earlier presentation*

Differences (4): Charitable Incorporated Organisations

- Framework for charitable incorporated organisations (CIOs) is enacted in all three UK jurisdictions
  - But many differences of detail due to primary and secondary legislation
- England & Wales – E&W CIO (Formed by registration with CCEW)
  - Charities Act 2011: Sections 204 – 250 (Part 11 of the Act)
  - The Charitable Incorporated Organisations (General) Regulations 2012 SI 2012/3012
  - The Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 SI 2012/313
  - The Charities Act 2011 (Charitable Incorporated Organisations) (Constitutions) Regulations 2012 Charity Commission regulations
  - Model Constitutions issued by Charity Commission
- Scotland – SCIOs (Formed by registration with OSCR)
  - Charities and Trustee Investment (Scotland) Act 2005: Sections 49 – 64
  - The Scottish Charitable Incorporated Organisations Regulations 2011 SSI 2011/44
  - The Scottish Charitable Incorporated Organisations (Removal for the Register and Dissolution) Regulations 2011 SSI 2011/237
  - OSCR Guidance: SCIOs: A Guide - But no power for explicit regulations by OSCR
  - No Model Constitutions by OSCR
- Northern Ireland – NI CIOs (Registered with CCNI) when implemented
  - Charities Act (Northern Ireland) 2008: Sections 104-122 & Sch. 7

CIO implementation timescales in each jurisdiction

- Scottish CIOs – SCIOs
  - First SCIO registrations from 1 April 2011
  - Conversion of charitable companies and CBS charities from 1 Jan 2012
- CIOs in England and Wales
  - First CIO registrations from 2 January 2013
  - Over 500 CIOs registered in first seven months (Jan-Aug 2013)
  - 22% of charity registrations are now CIOs (July/Aug 2013)
  - Conversion of charitable companies and CICs to CIOs – Likely from late 2017
- CIOs in Northern Ireland
  - Likely implementation from 2018?
- Now over 13,000 CIOs in the UK – as at 23 April 2017:
  - 10,460 CIOs registered in England & Wales
  - 2,753 SCIOs on Scottish charity register
  - No CIOs registered as yet in N Ireland but primary legislation is in 2008 Act
  - CIOs now account for 59% of new charity registrations in E&W
- Of all registered charities:
  - CIOs now account more than 6% of E&W charity register (after 4 years)
  - SCIOs are now more than 10% of Scottish charity register (after 6 years)

Comparison of CIOs in each jurisdiction

Legal form:	**E&W CIO**	**SCIO**	**NI CIO**
Central feature:	Corporate body with limited liability and registered as a charity under the English definition	Corporate body with limited liability and registered as a charity under the Scottish definition	Corporate body with limited liability and registered as a charity under the Northern Irish definition
Primary legislation:	Charities Act 2011	Charities & TI (Scotland) Act 2005	Charities Act (Northern Ireland) 2008
Secondary legislation:	CIO General Regulations 2012 CIO I&D Regulations 2012 *(Total: 83 pages)*	SCIO Regulations 2012 SCIO RR&D Regulations 2012 *(Total: 10 pages excluding sample forms)*	*Not yet made*
First established	2 January 2013	1 April 2011	*Awaited*
Minimum number of members:	One	Two	One
Insolvency framework	Follows Insolvency Act 1986 (adapted for CIOs)	As for personal bankruptcy in Scotland under AIB	*To be confirmed*
Agree constitutional amendments at a meeting of members	75%	Two thirds	75%
Process of implementing constitutional amendments	Do not take effect until registered with CCEW	Must be advised to OSCR, but amendments take effect immediately	Do not take effect until registered with CCNI
Access to register of members	Any member can request *names and addresses* of all members – though members can use service addresses	Any member can request *names* of all members, but addresses can be limited to trustees	*To be confirmed*
Retention of past information in registers	Formers members' details kept for 10 years. Former trustees' details kept indefinitely	Details of former members and trustees kept for 6 years	*To be confirmed*

Compare: CICs (Community Interest Companies)

- The Background: Growth of social enterprise
  - Long-standing concern that the various legal forms available in the UK were not well suited to free-standing social enterprises
  - In particular, there was no means of providing an asset lock in a company that cannot be removed by the members (except through charitable status)
  - Industrial and provident societies (now Community Benefit Societies) allowed asset lock, but limited investment opportunities
  - Hence the case for a new form of company with a statutory focus on community benefit and asset lock for non-charitable social enterprises
- Government Consideration and Implementation
  - Private Action, Public Benefit (Cabinet Office 2002) recommended various updating of charity and not-for-profit law including: the creation of Community Interest Companies
  - Legislation enacted: Companies (Audit, Investigations and Community Enterprise Act 2004. Included provision for a CIC Regulator
  - July 2005: CIC Regulator in post (based at Companies House) and first CICs were registered
  - Since 1 Oct 2014, no cap on individual share dividends – just the existing cap on overall profits distributed of 35% of profits CIC (Amendment) Regulations 2014
- By summer 2017, CICs will have been available for 12 years
  - Well established part of the sector: no longer new
  - 11,922 CICs at 31 March 2016
- CICs sit within company law and so available UK-wide (incl NI)
  - No substantial differences E&W/Scotland/NI

Analysis (1): Implications for Cross-Border Charities

- **A "cross-border charity" is a charity established in one** jurisdiction which also operates in another jurisdiction
  - Issues already apply for E&W charities operating in Scotland: many are now dual registered with CC and OSCR and subject to two systems of charity regulation
  - Will become more complex as NI s.167 register takes effect
- Cross-border charities need:
  - To meet the charity test for each jurisdiction where they operate (otherwise they cannot call themselves charities)
    - This may mean changing governing documents, especially where they use general phrases such as "for any purpose which is charitable in law"
  - To register with each regulator where required
  - To meet charity tax requirements wherever concessions required
  - To meet the accounting requirements of each regime
    - Focus on the most demanding regime – normally the Scottish rules

Cross-Border Charities: Examples

- Charity A:
  - Established in England
  - Operates with premises throughout UK
  - Structured as a charitable company
- It must:
  - Incorporate through Companies House and keep up to date
  - Register with CCEW
  - Register with OSCR
  - Register as a s167 body with CCNI
  - Produce accounts which meet:
    - E&W charity accounting rules
    - Scotland charity accounting rules (including info on work in Scotland)
    - Separate info on N Ireland activities for s167 NI requirements (once implemented)
  - TOTAL: 3.5 Regulators

- Charity B:
  - Established in Scotland
  - Operates with premises throughout UK
  - Structured as a SCIO
- It must:
  - Incorporate/register with OSCR
  - Register as a s.167 body with CCNI (once implemented)
  - Produce accounts which meet:
    - Scottish charity accounting rules
    - Separate info on N Ireland activities for s.167 NI requirements
  - BUT
    - No requirement to register with CCEW No requirement to follow E&W charity accounting (but Scottish rules tougher)
  - TOTAL: 1.5 Regulators

Analysis (2): Brexit Implications

- Many values of the third sector close to EU
  - NCVO research found charity staff and trustees strongly supported "Remain"
- Company law heavily regulated/standardised by EU directives
  - Even CICs sit within framework of EU company law directives
- Charity/third sector law is largely outside EU directives
  - Attempts to standardise charity/non-profit law across member states has only progressed very slowly – e.g. still no European Association although European Co-operative Society (SCE) is available
  - Even when structured as companies, non-profits often excepted from EU directives - .e.g. charitable companies in UK not allowed to do IFRS accounts
  - UK charity legislation has relatively little in common with other EU member states (apart from Ireland)
  - Even within the UK, charity law is devolved to three separate jurisdictions
- Very different support for Brexit across the 3 UK jurisdictions:
  - England: 53.4% Leave
  - Wales: 52.5% Leave
  - Scotland: 62.0% Remain
  - Northern Ireland: 55.8% Remain

Impact of on charity regulation in the event of a re-configuration of UK nations and EU

- Case for independent Scotland propelled by different attitudes to Brexit – Key question:
  - Would an Independent Scotland be able to remain in the EU or seek re-admission to the EU? (Possibly Northern Ireland change, too)
- Answer in terms of charitable status and regulation
  - Charity regulation already heavily devolved in Scotland and NI
  - No major consequences for charity regulation vis-à-vis EU legislation of Scotland in EU and England/Wales outside EU
  - Hence no major changes of charity regulation would be necessitated by Scottish independence (slightly more work to merge frameworks in NI and Ireland – but both are new and already good liaison)
- Cross-border charities
  - There would be some consequences for cross-border charities, but in terms of charity regulation most of these issues already apply
  - Tax issues more challenging, e.g. gift aid donations across border

Jurisdictional Differences in Charity Regulation in the UK: Implications for a Post-Brexit Third Sector

References

Breen, OB; Ford, P & Morgan GG (2009). Cross-Border Issues in the Regulation of Charities: Experiences from the UK and Ireland (International Journal of Not-for-Profit Law 11(3) 5-41). www.ijnl.org

Morgan, GG (2010). The Use of Charitable Status as a Basis for Regulation of Nonprofit Accounting (Voluntary Sector Review 1(2) - 213-237, 2010). http://doi.org/10.1332/204080510X511256

Morgan, GG. (2015a). Charitable Incorporated Organisations: An Analysis of the Three UK Jurisdictions (Nonprofit Policy Forum 6(1) 25-44) http://doi.org/10.1515/npf-2014-0035).

Morgan,GG (2015b). The End of Charity? (Valedictory lecture at Sheffield Hallam University). www.tinyurl.com/endchtxt