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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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

1. First Sector
   COMMERCIAL BUSINESSES
   Non-statutory and established primarily to generate private profit for owners/shareholders

2. Second Sector:
   PUBLIC SECTOR BODIES
   Statutory organisations but not-for-profit

3. Third Sector Organisations:
   ALL OTHER ORGANISATIONS
   Non-statutory and not established primarily to generate private profit

3.1 COMMERCIAL ORGANISATIONS IN THE THIRD SECTOR
   (E.g. Co-operatives, credit unions, and other social enterprises where members or investors receive a share of profits)

3.2 NOT-FOR-PROFIT ORGANISATIONS (NPOs)
   Also known as Non-Governmental Organisations (NGOs)
   Non-profit-distributing organisations which are not part of government

   3.2.1 NPOs WITH NON-CHARITABLE PURPOSES
   (E.g. Private clubs and societies, trade associations, organisations with political or other non-charitable aims, trade unions, etc)

   3.2.2 CHARITABLE NPOs
   NPOs established for charitable purposes where that term has a specific meaning either in relation to protection of charitable assets or in terms of tax reliefs

   3.2.2.1 UNINCORPORATED CHARITIES
   Organisations without corporate status but governed under a structure which creates a reporting entity for accounting purposes

   3.2.2.2 CORPORATE CHARITIES
   Charitable organisations incorporated with legal personality in the jurisdiction concerned
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 all of these:**
  - Charities and Trustee Investment (Scotland) Act 2005
  - 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 **not** 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*

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

*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

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


