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Experiences from the UK and Ireland**

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**Published version**

BREEN, Oonagh, B, FORD, Patrick and MORGAN, Gareth G (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.

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## **Cross-Border Issues in the Regulation of Charities: Experiences from the UK and Ireland**

**Oonagh B. Breen,<sup>\*</sup> Patrick Ford,<sup>\*\*</sup> and Gareth G. Morgan<sup>\*\*\*</sup>**

*Drawing on the specific experience of the three authors across the four jurisdictions of England and Wales, Scotland, Northern Ireland, and the Republic of Ireland, this article outlines the new legal-regulatory framework for charities in each jurisdiction, providing an overview of their respective treatments of external charities (i.e., non-domestic charities operating in a host jurisdiction) before assessing the operational challenges posed by these regimes for such cross-border charities. It shows that the treatment of external charities across the four jurisdictions is not the product of a fully coordinated and coherent joint approach by the four sets of legislators. The article concludes by offering some preliminary recommendations intended to address the burdens caused by these overlapping regulatory systems.*

### **1. INTRODUCTION**

#### **1.1 Regulation of the Third Sector**

The islands of Britain and Ireland share a common history of charity law dating back to the 1601 Statute of Charitable Uses. However, these islands now comprise four separate legal jurisdictions: (a) England and Wales, (b) Scotland, (c) Northern Ireland (which together comprise the United Kingdom), and (d) the Republic of Ireland. In recent years, all four have embarked on major changes to their respective regimes of charity law with the introduction of the Charities and Trustee Investment (Scotland) Act 2005, the Charities Act 2006 (for England and Wales) and the Charities Act (Northern Ireland) 2008 and the Irish Charities Act 2009, respectively. These four pieces of legislation, though not yet fully implemented, have much in common: they all seek to introduce modern systems of charity law, with new legal definitions of the term “charity,” compulsory registration of “charities,” and more precise requirements for charity accounting – with requirements at various levels based on the income of the charity.

Despite these apparent similarities, there are many differences, which have the potential to create great difficulties when charities are active in more than one jurisdiction – we refer to these as “cross-border charities.” For example, many charities established and registered in England and Wales are required in addition to register in Scotland if they have significant

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activities in Scotland. In some cases this requirement may force them to amend their governing documents to meet the Scottish definition of “charity.” They must then comply with the tighter accounting requirements for Scottish charities – even though their principal regulator is the Charity Commission for England and Wales.

Under the Irish Charities Act, which follows the Scottish approach, foreign charities operating in Ireland will also need to register with the proposed Charities Regulatory Authority. Similarly, the Charities Act (Northern Ireland) makes registration compulsory for any foreign charities operating in Northern Ireland (albeit on a separate register from domestic charities). The net effect of these new statutes is that charities operating throughout the United Kingdom and Ireland may soon find themselves required to register up to four times, and may face enormous obstacles in ensuring that their governing documents, their published accounts, and their fundraising procedures meet the various jurisdictional requirements. It is possible that some charities offering cross-border services may choose to withdraw services from beneficiaries outside their main jurisdiction rather than deal with the legal complexities of multiple registration. This article examines how the new legislative framework in each jurisdiction affects external or “foreign” charities and considers the practical implications for charities that operate within two or more of the four jurisdictions.

## **1.2 Charitable Status and Jurisdiction**

The ways in which countries and regions choose to regulate non-profit organizations (NPOs) can be revealing as to whether such organizations are viewed as entities to be valued and supported (in which case the regulatory focus is likely to be one that aims to engender trust and build confidence in NPOs) or whether they are seen as potentially high-risk organizations (requiring tight regulation to prevent abuse). By its nature, such regulation may be either *controlling* (one might think, for instance, of the requirement for permit approval in order to fundraise or the requirement to seek court or regulator approval before varying certain nonprofits’ mission objectives) or *facilitative* (for example, the granting of additional tax reliefs to or the imposition of modified filing or disclosure requirements on certain categories of nonprofit organizations that are less demanding than those applied to for-profit bodies).

A key aspect of nonprofit regulation relates to the granting of charitable status. The significance of charitable status can vary considerably between different countries and jurisdictions. In the past, with the exception of England and Wales – which has long had a well-established regulatory framework for charities overseen by a statutory regulator (the Charity Commission) – recognition of a nonprofit organization as a charity has been primarily a matter of tax law. To this end, the relevant tax authority may have awarded a nonprofit organization charitable tax-exempt status based on tax law criteria but no greater conclusions regarding the governance or operation of that organization could be drawn from its tax status other than to say that at the date of the award it had purely charitable purposes. In contrast, charitable status in England and Wales has, relatively speaking, indicated that the organization in question meets the higher governance and regulatory standards in the past imposed by the Westminster Parliament and enforced by the Charity Commission. In all cases, charitable status brings with it legal protection of charitable assets with the intervention of regulators or the courts, if necessary, to ensure that charitable property is not misapplied.

With the advent of the new charity legislation discussed below, the right to call one’s organization a ‘charity’ or ‘registered charity’ will be predicated upon nonprofit organizations

fulfilling certain mission, governance and financial reporting requirements.<sup>1</sup> In short, with perhaps the exception of small organizations in England and Wales with less than £5,000 income,<sup>2</sup> every domestic voluntary organization in the UK or Ireland that wishes to hold itself out as a “charity” or as having “charitable objectives” will before long either be required to register with the appropriate charity regulator<sup>3</sup> and be subject to the appropriate framework and protection of charity law – or it will be clearly non-charitable. Recognition of a non-profit as a charity will thus bring domestic nonprofit organizations within a regulatory framework that focuses as much on issues of governance as on taxation.

As between jurisdictions, the conditions under which charitable status is granted, however, vary by degree. It follows that a charity in one jurisdiction has no guarantee that it will necessarily satisfy the charity test in a neighboring jurisdiction in which it wishes to operate. For those external organizations eligible to register, the parity of treatment with domestic charities that such registration imposes will disregard, to a large extent, the fact that such external charities may already be subject to a charity supervisory regime operated by the charity regulator of their home jurisdiction.

### **1.3 What is a Charity?**

In the UK and Ireland, charitable status – even when previously recognized only in tax terms – has long been a matter not of registration, but about the nature of an organization in terms of its objects and the benefits it bestows.

Recent legislation, discussed below, has updated the definition of a “charity” – but does not alter the central principle of charitable status, which in all four jurisdictions is defined in terms of organizations with specific objects (falling within the so-called “heads of charity”) and meeting the test of public benefit. In England and Wales, for example, an organization subject to the law of England and Wales which meets the tests of charitable objects and public benefit *is* a charity, regardless of registration with the Charity Commission or HM Revenue and Customs or any other body. In Scotland, on the other hand, a body does not become a charity until registered, but in order to be registered must meet a “charity test” incorporating criteria broadly similar to those in England and Wales. Similar principles apply in the other jurisdictions under discussion – although there are variations in the precise heads of charity allowed, and in the definition of public benefit.

The legislative changes considered in this article make charity registration compulsory to a large extent. For example, in Scotland, as explained below, a body cannot normally make any claim to charitable status unless it is entered on the Scottish charity register, and only limited exceptions are made for charities established in other jurisdictions but with activities in Scotland.

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<sup>1</sup> See the Appendix for comparison of the charity accounting requirements. In each jurisdiction, the accounts of larger charities (over £500,000 income in the UK or a figure to be prescribed in Ireland but not exceeding €500,000) are (or will be) subject to professional audit, and below this a lesser regime of independent examination applies. For further discussion of the latter see Gareth G. Morgan, “Charities and Self-Regulation: Theory and Practice in the Role of Independent Examiners under s.43(3) of the Charities Act 1993” (2005) 8(3) *The Charity Law and Practice Review* 31-54.

<sup>2</sup> Charities Act 1993 ss. 3, 3A, 3B (as amended by ss. 8-9 of Charities Act 2006, implemented from 31 Jan 2009).

<sup>3</sup> *These are:* Charity Commission for England and Wales (CCEW), Office of the Scottish Charity Regulator (OSCR), Charity Commission for Northern Ireland (CCNI), and the Irish Charities Regulatory Authority (CRA).

This increased compulsion on charity registration can have unexpected consequences – for example, a single charity could be simultaneously subject to registration with a number of separate charity regulators, and could be subject at the same time to more than one charity accounting regime.

#### **1.4 Jurisdictions and Cross-Border Issues**

This article focuses on issues of charity regulation in two nation states – the UK and Ireland – but since the UK has three different legal systems (for England and Wales, Scotland, and Northern Ireland) this gives four separate jurisdictions in all, as shown in Table I.

**Table I: Legal jurisdictions in the UK and Ireland**

<i>Country</i>	<i>Jurisdictions</i>	<i>Geographical Terms</i>
United Kingdom (UK)	England and Wales (E&W)	Britain (or Great Britain)
	Scotland	
	Northern Ireland	Island of Ireland
Republic of Ireland	Ireland	

All references in this article to “Ireland” and “Irish,” unless otherwise qualified, relate to the Republic of Ireland. The primary aim of this article is to explore the consequences of subtle differences of charity law between different jurisdictions, using the four systems of charity law which apply across the UK and Ireland as specific cases. It focuses, in particular, on the issues for *cross-border charities* (that is charities, whose activities – whether in service provision or fundraising – operate across more than one jurisdiction). Because of the relatively high population density and close social and economic ties within the islands of Britain and Ireland, it is common for a single charity to be working in more than one of the four jurisdictions, so the issues for cross-border charities are sharply focused.<sup>4</sup>

#### **1.5 Terminology and Article Structure**

As explained above, a *cross-border charity* is defined as a charity whose activities extend across more than one jurisdiction – and which may, therefore, be accountable to more than one charity regulator.

In each jurisdiction, a distinction is made between *local charities* (or *domestic charities*) and *external charities*. For example, a charity established under the law of England and Wales is a local charity in the context of England and Wales. But if this charity starts to raise funds or to provide charitable activities from premises in Ireland it becomes liable to regulation as a charity in Ireland. In the context of Ireland, we describe it as an external charity. Formally, we define an

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<sup>4</sup> The Office of the Scottish Charity Regulator in its 2008 Consultation Paper on Monitoring of Cross Border Charities identified 450 cross-border charities on the Scottish Charity Register with roughly ten new cross-border applications being received each month: see OSCR, *Monitoring of Cross Border Charities: Proposals for Consultation* (2008), at 2. (The number has been updated to 530 in OSCR’s submission to the Calman Commission on Scottish devolution: see OSCR, *OSCR Response to the Calman Commission* (February 2009).)

“external charity” as a body established and recognized as a charity under a “foreign” jurisdiction but which has activities or a presence in the jurisdiction under discussion.

Where monetary limits are discussed, the relevant local currency is used as in the relevant legislation – so monetary limits applicable to the UK jurisdictions (England and Wales, Scotland, Northern Ireland) are expressed in pounds sterling (£) whereas monetary limits in the Irish jurisdiction are expressed in euro (€).

Sections 2 to 5 of the paper consider in turn each of the four jurisdictions under discussion, namely England and Wales, Scotland, Northern Ireland, and Ireland. In each of these sections, a brief summary is given of the main features of charity law in the jurisdiction concerned, followed by a description of how that system of charity law affects external charities operating in that jurisdiction (as defined above). Section 6 reports some early non-statutory arrangements for cooperation between charity regulators in these jurisdictions. Section 7 of the paper appraises the cumulative effect of these, at times, competing provisions, with the conclusion (section 8) offering, in light of this evaluation, some recommendations to policy makers.

## **2. ISSUES FOR EXTERNAL CHARITIES OPERATING IN ENGLAND AND WALES**

### **2.1 Outline of the Charity Legal Framework in England and Wales**

In England and Wales, the Charities Act 2006 (amending the Charities Act 1993) introduced a new definition of “charity,” which came into effect from 1 April 2008, updating the long-established common law definition. The face of the 2006 Act states what has been a matter of case law for centuries,<sup>5</sup> namely that a charity is an institution established exclusively for charitable purposes.<sup>6</sup> A charitable purpose must satisfy two tests:

- (a) the purpose must fall within the list of 13 possible “heads of charity”<sup>7</sup> (this is broadened extensively from the former four heads established in case law<sup>8</sup>); and
- (b) the purpose must be for the public benefit.<sup>9</sup>

Although this definition of “charity” only extends to England and Wales in terms of the protection of charitable property and the powers of the Charity Commission, it applies throughout the United Kingdom for the purposes of tax law.<sup>10</sup> This has consequences even for local charities established in Scotland and Northern Ireland: for example, most recently established Scottish charities have their objects worded in a way that ensures the organization will be charitable *both* under Scottish law (in terms of registration as a Scottish charity) and under English law (to ensure it gains the UK tax benefits of charitable status).

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<sup>5</sup> Peter Luxton, *The Law of Charities* (Oxford: OUP, 2001).

<sup>6</sup> 2006 Act, s.1.

<sup>7</sup> 2006 Act, s.2(2).

<sup>8</sup> The key case is the judgment of Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (hereafter *Pemsel*).

<sup>9</sup> 2006 Act, s.3.

<sup>10</sup> 2006 Act, s.80.

The Charity Commission (for England and Wales) (“CCEW”) is the government department charged with regulation of charities. In most cases, charities established under the laws of England and Wales are required to register with the Commission, but there are significant exceptions to the general principle. Whilst many voluntary organizations in England and Wales see charity registration as an optional badge, this is not the case in law: if an organization is a charity, registration is normally compulsory if its income is over £5000 pa.<sup>11</sup>

Some charities (for example, places of worship, armed forces charities) are for the time being excepted from this requirement up to a higher threshold of £100,000 income<sup>12</sup> – but these “excepted charities” are nevertheless subject to most of the requirements of the Charities Act 1993, even though not required to register with the Commission. Moreover, in due course this £100,000 limit will be reduced by Ministerial Orders.<sup>13</sup> There is also a category of “exempt charities,” which includes universities and charities constituted as community benefit societies.<sup>14</sup> These have the benefits of charitable status without direct oversight by the Charity Commission, but this category, too, is effectively removed by the 2006 Act except where there is a “principal regulator” that can take the place of the Charity Commission in regulating their use of charitable funds.<sup>15</sup>

All charities established in England and Wales are required to produce annual statements of accounts, which are public documents. Different thresholds are set, mainly according to the income of the charity, in terms of the presentation of the accounts and the level of external scrutiny required.<sup>16</sup> These requirements are summarized in Table II in the Appendix to this article. Although legislators have made some attempts to align thresholds between the three UK jurisdictions (England and Wales, Scotland, Northern Ireland), as discussed later, a number of the thresholds for England and Wales are higher (and so less demanding) than in Scotland and in Northern Ireland.

The CCEW has a very wide range of roles in the regulation of charities, some of which date back more than a century. A permanent body of Charity Commissioners was established in 1853 and a systematic register of charities was first created by the Charities Act 1960. The Charities Act 1992 (most of which was subsequently consolidated into the Charities Act 1993) gave the Charity Commission a wide range of powers and introduced the accounting arrangements. However, it was only with the 2006 Act that the Commission was given specific objectives, such as increasing public confidence in charities and promoting compliance by charity trustees with their legal obligations.<sup>17</sup>

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<sup>11</sup> Charities Act 1993, s.3 – as amended by the Charities Act 2006 (Interim Changes in threshold for registration of small charities) Order 2007 (SI 2007/789).

<sup>12</sup> 1993 Act, s. 3A(2) – as inserted by s.9 of the 2006 Act. The registration of excepted charities over £100,000 income became compulsory from 31 January 2009 – prior to that date, charities which fell within the exceptions could avoid registration regardless of income.

<sup>13</sup> 1993 Act, s. 3A(7).

<sup>14</sup> *I.e.*, Societies established for the benefit of the community under the Industrial and Provident Societies Acts – the new name arises from the Co-operative and Community Benefit Societies Act 2003, s.1(9).

<sup>15</sup> 2006 Act, ss.11-13.

<sup>16</sup> For further details, see Gareth G. Morgan, *The Charity Treasurer's Handbook: An Introduction to Voluntary Sector Finance and Accounting* (2<sup>nd</sup> ed., London: Directory of Social Change, 2008).

<sup>17</sup> 1993 Act, s. 1B, inserted by 2006 Act, s. 7.

Under the 1993 Act, the Commission is given extensive powers to institute inquiries into charities,<sup>18</sup> and, where it deems this necessary, it has powers to institute searches, to suspend trustees, to restrict the transactions which a charity can undertake, to direct the application of property *cy-près*, to appoint an interim manager to a charity, and to make directions on the application of charitable property.<sup>19</sup> Nevertheless, it is now possible to challenge most of the Commission's decisions without going to Court, by means of an appeal to the Charity Tribunal.<sup>20</sup>

## **2.2 Issues for External Charities Operating in England and Wales**

Despite being recently updated by the Charities Act 2006, the framework of charity legislation in England and Wales is almost completely silent on the issue of external charities. There are no circumstances in which external charities could be required to register with the CCEW – unless an external charity established a separate local charity under the laws of England and Wales. It follows that the requirements for registration of charities in England and Wales and the regulatory powers of the Charity Commission are almost entirely restricted to charities established under the law of England and Wales.

This issue of whether the English courts (and hence the Charity Commissioners<sup>21</sup>) had any jurisdiction within the Charities Act 1993 over a charity established elsewhere was tested in the case of *Gaudiya Mission v. Brachmachary*,<sup>22</sup> in which the plaintiff, an Indian charity, challenged the claims of an English charitable trust with similar objects. The key issue was whether or not the case constituted “charity proceedings” for the purposes of s.33 of the Charities Act 1993: if so, the plaintiff could only bring the case with the permission of the Charity Commissioners. On appeal by the Attorney General, this argument was rejected. The Court ruled that the definition of “charity” in s. 96(1) of the Charities Act 1993 did not extend to a charity established under the laws of another legal system.

The Charities Act 2006 takes account of this prevailing jurisprudence relating to English courts' jurisdiction over external charities. It follows that a charity established under Irish, Scottish, or Northern Irish law *will not* be a charity within the meaning of section 1 and will not therefore be eligible (or required) to register. The new definition of “charity”<sup>23</sup> refers to an institution which is established for charitable purposes only and which is subject to the control of the High Court<sup>24</sup> in the exercise of its jurisdiction with respect to charities. Virtually all references to the term “charity” in the Charities Act 1993, as amended, cross-refer to this definition.<sup>25</sup>

There is a very limited protection in England and Wales for the use of the term “registered charity,” as a result of the provisions of the Charities Act 1992 concerning

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<sup>18</sup> 1993 Act, s. 8.

<sup>19</sup> 1993 Act, ss. 9-19B – as amended.

<sup>20</sup> 1993 Act, ss. 2A-2D, inserted by Charities Act 2006.

<sup>21</sup> The Charity Commissioners only became incorporated as “The Charity Commission” under s1A of the 1993 Act inserted by s. 26 of the 2006 Act.

<sup>22</sup> *Gaudiya Mission v. Brachmachary* [1998] Ch 341 (C.A.) (hereafter *Gaudiya Mission*).

<sup>23</sup> 2006 Act, s. 1(1).

<sup>24</sup> *I.e.*, The High Court of England and Wales.

<sup>25</sup> 1993 Act, s. 96(1), as amended by the 2006 Act, s75, Sch 8, para. 173(2).



fundraising. Under s. 63 of the 1992 Act it is an offense to solicit money or property for an institution with a representation that it is a registered charity when it is not (and “registered charity” is defined as a charity registered with the CCEW). It follows that trustees and officers of external charities may not use this term in their fundraising materials without qualifying it in some way – such as “Scottish registered charity.” But this only applies to fundraising – no offense is created if the term “registered charity” is used by an external charity in the context of promoting its work to potential beneficiaries.

One small exception to this lies in sections 10 to 10C of the 1993 Act,<sup>26</sup> which relate to the powers of the Charity Commission to disclose information – these sections extend to the whole of the UK, although the impact may be wider still.<sup>27</sup> Under these sections, the CCEW may disclose information to other charity regulators and public authorities (including HM Revenue and Customs) and may receive disclosures from such bodies. The definition of “public authorities” includes any body discharging functions of a public nature, even if established *outside* the UK, though disclosures must comply with the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000.<sup>28</sup> On this basis, the CCEW could cooperate with other charity regulators anywhere in the world. But the only way in which the CCEW could act against an external charity operating in England and Wales would be by using these disclosure powers in order to persuade the relevant regulator in the charity’s home jurisdiction to take action.

The CCEW is also given specific powers<sup>29</sup> in relation to Scottish charities which are “managed or controlled wholly or mainly in or from England and Wales” and in relation to charitable property held by a person in England and Wales on behalf of a Scottish charity.

However, apart from these special cases, in most instances where a concern arises in England and Wales with regards to the activities of an external charity established in Scotland or Northern Ireland, the powers of the CCEW appear to be limited to drawing the matter to the attention of Office of the Scottish Charity Regulator (OSCR) or the Charity Commission for Northern Ireland (CCNI) as appropriate – or to other UK public authorities where appropriate.

Nevertheless, rather more extensive powers arise in England and Wales in the case of fundraising, which can affect external charities. Part 3 of the Charities Act 2006 introduces new regimes in England and Wales for the regulation of (1) public charitable collections; (2) disclosures to be made by professional fundraisers and commercial participators; and (3) reserve powers to regulate fundraising in general.<sup>30</sup> The definitions used in Part 3 of the Act extend to any collection or appeal made “in association with a representation that the whole or any part of

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<sup>26</sup> 1993 Act ss. 10, 10A, 10C, as amended and inserted s. 75(1) of 2006 Act: Sch 8 para. 104.

<sup>27</sup> 1993 Act, s. 100(3), as amended.

<sup>28</sup> 1993 Act s. 10C, as amended.

<sup>29</sup> 1993 Act, s. 80, as amended by 2006 Act s. 75(1) Sch 8, para 96 and by Charities and Trustee Investment (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2006 (SI 2006/242) art. 5, Sch, Part I, para. 6.

<sup>30</sup> Apart from the new disclosures by professional fundraisers, etc (which took effect from 1 April 2008) these provisions are yet to be implemented. According to bulletins from the Government’s Office of the Third Sector, the new regime on public collections is due to be implemented from 2009/10. The reserve powers to regulate fundraising more generally will only be implemented if the Government judges that the self-regulatory scheme established by the Fundraising Standards Board ([see www.frsb.org.uk](http://www.frsb.org.uk)) is not working effectively after five years.

the proceeds is to be applied for charitable, benevolent or philanthropic purposes”<sup>31</sup> and to charitable institutions and persons or bodies connected to them.<sup>32</sup> The terms are defined to include any institution established for such purposes<sup>33</sup> – there is no requirement for it to be subject to the High Court of England and Wales. Indeed, even a non-charitable entity, such as a fundraising business, is caught by these requirements.

So, external charities operating in England and Wales are clearly caught by the arrangements for regulation of fundraising – but no more so than a commercial business would be caught if it sought to raise funds with a representation that the funds would be applied for charitable purposes. There is, however, no power in England and Wales to require external charities to prepare financial statements or to account to the Charity Commission in respect of their charitable funds.

### **3. ISSUES FOR EXTERNAL CHARITIES OPERATING IN SCOTLAND**

#### **3.1 Outline of Scottish Charities System**

Scotland has its own common law of “charities” or “public trusts,”<sup>34</sup> but this indigenous law is often lost sight of because the technical English definition of charity has long been the criterion for the concession of “charitable” tax reliefs in Scotland under United Kingdom taxation statutes.<sup>35</sup> When the United Kingdom Parliament, in Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, provided for the first statutory system of charities regulation in Scotland,<sup>36</sup> the English definition, already familiar for tax purposes, was used to define “Scottish charities” for regulatory purposes also. Under that Act a “Scottish charity” was a body established under the law of Scotland (or managed or controlled from Scotland) and recognized by the United Kingdom tax authorities as eligible for charitable tax relief.<sup>37</sup>

By comparison with the long-established system of charities supervision in England and Wales, the system for the supervision of Scottish charities under the 1990 Act was an unsophisticated one, with no true equivalent of the CCEW as a registrar-regulator and no definitive register of charities.<sup>38</sup> The Charities and Trustee Investment (Scotland) Act 2005 cured

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<sup>31</sup> 2006 Act, s. 45(2).

<sup>32</sup> 2006 Act, s. 69.

<sup>33</sup> 2006 Act, s. 47(1) and the future s. 64A(7)(b) of the Charities Act 1992, which will be inserted by s. 69 of the Charities Act 2006.

<sup>34</sup> See generally Lord Ross and others, “Trusts, Trustees and Judicial Factors” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 24 (1989), paras 85-111.

<sup>35</sup> See *Pemsel*, *supra* n. 8. This arrangement has been continued by the Charities Act 2006, s. 80(3) and (4), so that the adjusted definition of charity provided for in ss.1 to 3 and 5 of that Act applies in Scotland for tax relief purposes.

<sup>36</sup> Scottish public trusts are supervised at common law by the Court of Session. The Court of Session, of which the Outer House judges hear cases at first instance and the Divisions of the Inner House hear appeals, is a civil court with functions broadly equivalent to those of the High Court and Court of Appeal in England and Wales.

<sup>37</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s. 1(7).

<sup>38</sup> The Lord Advocate had powers of investigation and very limited powers of intervention, which were transferred at devolution to the Scottish Ministers and exercised by them through OSCR as an executive agency: *see* 1990 Act, s.7; Scotland Act 1998, s.53; and Transfer of Functions (Lord Advocate and Secretary of State) Order

these deficiencies by setting up a full-fledged statutory regulator of charities in Scotland, OSCR,<sup>39</sup> modeled broadly on the CCEW, one of whose principal functions is to keep a public register of charities.<sup>40</sup>

In one important respect, however, the new Scottish system departs significantly from both its English model and its predecessor under the 1990 Act. The devolved Scottish Parliament chose to sever the connection between the United Kingdom tax system and the regulation of charities in Scotland,<sup>41</sup> abandoning the tax definition of “charity” – that is, the English definition – as the touchstone of Scottish charitable status for regulatory purposes, and devising instead a new “charity test,”<sup>42</sup> adapted from the English definition but different from it. Thus, while a body becomes entitled to call itself a “charity” in Scotland (and is correspondingly subject to regulation) only by meeting the charity test and being entered by OSCR in the new register, the body is granted “charitable” relief under United Kingdom taxation statutes by reference to the English definition of charity, as now revised by the Charities Act 2006.<sup>43</sup>

The charity test is similar to the revised English definition in that to meet it a body must have purposes drawn exclusively from a statutory list of “charitable purposes”<sup>44</sup> and must provide “public benefit.”<sup>45</sup> The test is different from the English definition, however, in that the list of charitable purposes in the 2005 Act is by no means identical to the parallel list in the 2006 Act,<sup>46</sup> and in that the public benefit element requires OSCR to take an overview of the activities of the applicant body, and not merely to consider whether each of its purposes is individually for the public benefit as a matter of law.<sup>47</sup> A further difference is that the accumulated case law on “charity,” while it may have some value as an interpretive guide to the application of the charity test, has no binding status under the 2005 Act, whereas it is expressly preserved by the 2006 Act, though subject to adjustment, as part of the revised English definition.<sup>48</sup> More concretely, notable differences of detail between the charity test and the updated English definition are to be found in their treatment of sports organizations,<sup>49</sup> of organizations campaigning for changes in the law

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1999 (SI 1999/678). An “index” of Scottish charities was improvised from the Inland Revenue’s records of bodies entitled to charitable tax relief: 1990 Act, s.1(1).

<sup>39</sup> 2005 Act, s.1. “OSCR” stands for “Office of the Scottish Charity Regulator.”

<sup>40</sup> 2005 Act, s.3. See 2005 Act, s.1(5) for the other general functions of OSCR; and generally Stuart Cross and Patrick Ford, *Greens Annotated Acts: Charities and Trustee Investment (Scotland) Act 2005* (Edinburgh, Thomson/W Green, 2006) (hereafter “Cross and Ford”), 6-8.

<sup>41</sup> The Parliament, set up under the Scotland Act 1998, first sat in 1999.

<sup>42</sup> Charities and Trustee Investment (Scotland) Act 2005, s.7.

<sup>43</sup> See *supra*, n. 35. Charitable tax relief at United Kingdom-level is granted on application to H M Revenue & Customs.

<sup>44</sup> 2005 Act, s.7(1)(a), (2).

<sup>45</sup> 2005 Act, ss.7(1)(b), and 8.

<sup>46</sup> Cf. 2005 Act, s.7(2) with Charities Act 2006, s.2(2).

<sup>47</sup> Cf. 2005 Act, s.7(1)(b) and 8 with Charities Act 2006, s.2(1)(b) and 3. For a full discussion of the English provisions see Peter Luxton, “A Three-part Invention: Public Benefit under the Charity Commission” (2009) 11(2) *Charity Law & Practice Review* 19-33.

<sup>48</sup> Charities Act 2006, ss.1, 2(5), 3 and 4; for the Scottish position see generally Cross and Ford, *supra* n. 40 at 24 -33.

<sup>49</sup> Cf. 2005 Act, s.7(2)(h) and 7(3)(c) with Charities Act 2006, ss.2(2)(h) and (3)(d).

or government policy,<sup>50</sup> and of organizations subject to a greater or lesser degree of ministerial control.<sup>51</sup> These and other differences mean that a body which meets one test or definition may not necessarily meet the other.<sup>52</sup>

OSCR enters in the Scottish charity register those bodies which apply for registration and meet the charity test.<sup>53</sup> In contrast to the position in England and Wales, a body only becomes a charity in Scotland on being entered in the register.<sup>54</sup> In contrast, again, with the position in England and Wales, it is not a requirement of registration with OSCR that a body has a pre-existing territorial connection with Scotland.<sup>55</sup> Registration is voluntary, but there are strong incentives to register in the foundational principle of the 2005 Act that only bodies entered in the register may represent themselves as charities in Scotland,<sup>56</sup> and in the subsidiary provision that only bodies entered in the register are entitled to automatic “charitable” relief from non-domestic rates.<sup>57</sup> A body which represents itself as a charity without being registered – unless it falls within the one exception to the foundational principle to be mentioned below – is subject to enforcement action by direction of OSCR or, on the application of OSCR, by order of the Court of Session.<sup>58</sup>

The requirement to register in order to use the designation “charity” applies regardless of the size of the body in question: there are no equivalents of the exceptions and exemptions from registration found in the charities system in England and Wales.<sup>59</sup> A further distinctive feature of the new Scottish system is that in the event of a body being removed from the register – whether at its own request or because it no longer meets the charity test<sup>60</sup> – an “asset lock” applies, to the effect that on removal the body is bound to administer its whole pre-removal assets for its charitable purposes as recorded in the register immediately before removal, and to submit on an ongoing basis to a modified version of the normal compliance regime in respect of those assets.<sup>61</sup>

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<sup>50</sup> Cf. 2005 Act s.7(4)(c) with *McGovern v Attorney-General* [1982] Ch 321, the force of which is preserved by Charities Act 2006, s.3(2).

<sup>51</sup> Cf. 2005 Act, s.7(4)(b) with *Construction Training Board v Attorney-General* [1973] Ch 173. Doubts about the charitable status under the 2005 Act of Further Education colleges led the Scottish Ministers to adjust the establishing legislation for such institutions to remove the right of Ministers to close them without the consent of the governing body: see Further Education (Scotland) Act 1992 Modification Order 2008 (SSI 262/2008), made under 2005 Act, s.102(a). Such institutions have long been regarded as charitable for United Kingdom tax purposes.

<sup>52</sup> For a fuller comparison of test and definition see Patrick Ford, “A statute of unintended consequences? The impact of the Charities and Trustee Investment (Scotland) Act 2005 on non-Scottish charities operating in Scotland” (2008) 59(2) NILQ 201-222 (hereafter “Ford, ‘A statute of unintended consequences’”), at 209-214.

<sup>53</sup> 2005 Act, s.3.

<sup>54</sup> 2005 Act, s.106.

<sup>55</sup> Cf. Charities Act 2006, s. 1(1): also *Gaudiya Mission, supra* n. 22.

<sup>56</sup> 2005 Act, s.13.

<sup>57</sup> Local Government (Financial Provisions etc) (Scotland) Act 1962, s.4 as amended by 2005 Act, s.104 and sched 4, para 2. Previously, charitable tax relief from non-domestic rates was granted by reference to the English definition in the same way as under United Kingdom-level taxation statutes.

<sup>58</sup> 2005 Act, ss.28, 31, 32 and 34.

<sup>59</sup> See section 2.1 above.

<sup>60</sup> 2005 Act, ss.18 and 30.

<sup>61</sup> 2005 Act, s.19.

The normal compliance regime for bodies entered in the register as charities involves, in particular, keeping accounts and reporting annually to OSCR.<sup>62</sup> To assist it in monitoring and enforcing the regime, OSCR has powers of investigation, and short-term powers of intervention of its own,<sup>63</sup> such as the power to suspend charity trustees.<sup>64</sup> OSCR may also apply to the Court of Session for exercise of the court's fuller powers of intervention,<sup>65</sup> such as power to remove charity trustees.<sup>66</sup> As in the case of England and Wales, there is an intermediate appeals tribunal, the Scottish Charities Appeals Panel, before which decisions of the regulator can be challenged without the expense of a full court action.<sup>67</sup>

The 2005 Act also updates the control of fundraising in Scotland by provisions which apply, not only to charities in the sense of bodies registered with OSCR, but more broadly to "benevolent bodies," that is, bodies established for charitable, benevolent, or philanthropic purposes.<sup>68</sup> The controls deal, among other issues, with the relationship between benevolent bodies and professional fundraisers, with the prevention of unauthorized fundraising, and with collections of money or goods from the public.<sup>69</sup>

### **3.2 Application to External Charities Operating in Scotland**

There is one exception to the principle that no body may call itself a charity in Scotland unless it is registered with OSCR: by section 14 of the 2005 Act a body established and managed outside Scotland may refer to itself as a charity if entitled to do so in its jurisdiction of establishment, if it neither occupies land or premises in Scotland nor carries out activities in any office, shop, or similar premises in Scotland, and if when referring to itself as a charity it makes clear that it is established outside Scotland.

The Act envisages two options, therefore, for an "external charity" – a body established in a jurisdiction other than Scotland and entitled to call itself a charity there – which intends to carry out activities of any significance in Scotland.<sup>70</sup> First, an external charity may operate within the constraints of the section 14 exception by carrying out its activities in Scotland without the benefit of anything more than a minimal base in the territory. A body established as a charity in England and Wales could, for instance, mount a fundraising campaign from across the border

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<sup>62</sup> 2005 Act, s.44 and Charities Accounts (Scotland) Regulations 2006 (SSI 2008/218) as amended by Charities Accounts (Scotland) Amendment Regulations 2007 (SSI 2007/136).

<sup>63</sup> 2005 Act, ss.28, 31, 32.

<sup>64</sup> 2005 Act, 31(4).

<sup>65</sup> 2005 Act, s.34.

<sup>66</sup> 2005 Act, s.34(5)(c).

<sup>67</sup> 2005 Act, ss.75-78. The Scottish Government has proposed that the panel should be dissolved and its functions transferred elsewhere as part of a general simplification of public administration in Scotland.

<sup>68</sup> 2005 Act, s.79.

<sup>69</sup> 2005 Act, Part 2. Provisions for a revised regime of "public benevolent collections" to be overseen by local authorities (ss.84-92) are not yet in force and a similar but outdated regime under Civic Government (Scotland) Act 1982, s.119, still applies.

<sup>70</sup> OSCR regards the s.14 exception as covering bodies with "only an occasional connection" with Scotland that does not amount to a "significant operation": OSCR, *Guidance on Registration*, Section 2; see also Section 4.2.a.

electronically or by post without using premises in Scotland – provided that any references to charitable status refer to the jurisdiction in which it is established.

Second, an external charity may register with OSCR and become entitled to call itself a charity in Scotland in the same way as a body established in Scotland that registers with OSCR.<sup>71</sup> This entitlement, which, as mentioned, would bring with it entitlement to “charitable” relief from non-domestic rates in Scotland, involves satisfying two potentially onerous requirements. The first is a requirement to meet the Scottish charity test as part of the registration process – a requirement which, in the case of English and Welsh charities in particular, may necessitate an alteration of the charity’s governing instrument because of the differences between the charity test and the English definition of charity.<sup>72</sup> The second is a requirement of dual regulation: that is, of meeting the demands of the Scottish compliance regime as well as those of the charity’s home charities regime. Where the demands are different in detail, for instance in relation to references to charitable status on documents,<sup>73</sup> or to accounting and reporting,<sup>74</sup> dual compliance is likely to lead to additional if not double devotion of resources to compliance.<sup>75</sup>

An external charity contemplating activity in Scotland under the banner of “charity” has, therefore, three clear options: to squeeze into the section 14 exception; to go the whole hog of registration with OSCR and dual compliance, in the knowledge that the asset lock will make opting out of the Scottish system much more difficult than opting into it;<sup>76</sup> or not to be active in Scotland after all.

In practice, of the external charities which have registered with OSCR so far, the vast majority have been charities established in England and Wales and registered with CCEW.<sup>77</sup> Most of these are large or very large charities by Scottish standards.<sup>78</sup> At least a proportion of these dual-registered charities have had to adjust their constitutions in order to meet the charity

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<sup>71</sup> On the face of it, the Act appears to allow for a third possibility, namely to operate in Scotland as a non-charity benevolent body. Such a body could fund-raise and confer benefit in Scotland but would have to avoid calling itself a charity there. No doubt there would be practical difficulties, but in any event OSCR does not regard this as a real option: OSCR, *Guidance on Registration*, Section 4.2.a.

<sup>72</sup> See Charity Commission, *Guidance for English and Welsh charities that have been asked to amend their governing documents before they can register in Scotland* (London, Charity Commission, 2007).

<sup>73</sup> Cf. 2005 Act s.15 and Charities References in Documents (Scotland) Regulations 2007 (SSI 2007/203), as amended by Charities References in Documents (Scotland) Amendment Regulations 2009 (SSI 2008/58) with Charities Act 1993, ss.5, 67 and 68.

<sup>74</sup> See further, below.

<sup>75</sup> For other aspects of dual compliance likely to be irksome see Ford, “A statute of unintended consequences,” *supra* n. 52 at 205.

<sup>76</sup> See 2005 Act, s.19. Arguably the asset lock operates in the case of an external charity only over its Scottish assets: see Scotland Act 1998, s. 29(2)(a) and 101(2).

<sup>77</sup> See OSCR, *Monitoring of cross border charities: Proposals for consultation* (September 2008), 2, and table at 15. By February 2008 there were 530 cross-border charities registered with OSCR – see n. 4 *supra*.

<sup>78</sup> Of 450 cross-border charities registered with OSCR as at September 2008, 93% had an annual income in excess of £25,000 and 60% an income in excess of £1m. Of the 22,850 local charities registered with OSCR, 67% had an annual income of less than £25,000 and only 3% an income of over £1m. See OSCR, *Monitoring of cross border charities: Proposals for consultation* (September 2008), table at 15.

test,<sup>79</sup> but the principal concern otherwise has been dual compliance in the area of annual accounting and reporting.<sup>80</sup> OSCR, pursuing the strategic objective of reducing “the burden of regulation on charities wherever possible, with particular emphasis on reducing multiple reporting,” has recently consulted on a “modified reporting regime for cross border charities.”<sup>81</sup> OSCR proposes to “place considerable reliance on the Charity Commission as a lead regulator,” with a view to avoiding duplication of monitoring material submitted to CCEW.<sup>82</sup> OSCR’s proposals set out to mitigate, but because of the differing regulatory requirements cannot remove altogether, the burdens of dual compliance in accounting and reporting.<sup>83</sup>

The 2005 Act contains further provision of significance to external charities in the form of authority to OSCR to coordinate with other regulators on both the sharing of information and cross-border enforcement. OSCR is expressly bound to cooperate with equivalent regulators, in the United Kingdom and elsewhere,<sup>84</sup> and is authorized to disclose information to those regulators in the exercise of its functions.<sup>85</sup> OSCR may also, on a reference from the CCEW, apply to the Court of Session for measures to protect movable property held in Scotland on behalf of a charity established in England and Wales where there is an allegation of misconduct in the administration of the charity.<sup>86</sup>

#### **4. ISSUES FOR EXTERNAL CHARITIES OPERATING IN NORTHERN IRELAND**

##### **4.1 Outline of the New Framework of Charity Law for Northern Ireland**

The Charities Act (Northern Ireland) 2008 introduces a new regulatory framework for charities in Northern Ireland with the establishment of the Charity Commission for Northern Ireland (CCNI),<sup>87</sup> a new register of charities, the adoption of a statutory definition of charitable

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<sup>79</sup> See OSCR, *OSCR Response to the Calman Commission* (February 2008), 4; also Ford, “A statute of unintended consequences,” *supra* n. 52 at 221, note 167.

<sup>80</sup> In particular, for small and medium-sized charities, the accounting requirements are in many respects more onerous under the Charities Accounts (Scotland) Regulations 2006 than under their equivalents in England and Wales. For example, in England and Wales, charities with an annual income of up to £25,000 are not obliged to have their accounts independently examined, or even to submit them to the CCEW, but these concessions do not apply in Scotland. Also, in England and Wales, the independent examiner (IE) only has to be professionally qualified if the charity’s income is over £250,000, but in Scotland a qualified IE is mandatory whenever “fully accrued accounts” are prepared, which is compulsory at an income of £100,000 and above. See further Appendix below.

<sup>81</sup> OSCR, *Monitoring of cross border charities: Proposals for consultation* (September 2008), 3.

<sup>82</sup> *Ibid.*

<sup>83</sup> OSCR’s proposals are in essence that a cross-border charity must submit (1) accounts which conform with the Scottish accounting regulations but which may be UK consolidated accounts without differentiation of Scottish activities; (2) an Annual Return Form which will be largely pre-populated with information already held by OSCR; and (3) an Information Return for Dual-Registration Charities which seeks to elicit financial and other data specific to the charity’s Scottish activities.

<sup>84</sup> 2005 Act, s.20.

<sup>85</sup> 2005 Act, ss.24 and 25.

<sup>86</sup> 2005 Act, s.36. Charities Act 1993, s.80, contains reciprocal provisions. See also section 2.2, above.

<sup>87</sup> The Northern Ireland Department of Social Development expects to establish the Charity Commission of Northern Ireland in April 2009 with the appointment of the first Charity Commissioners. See the Department’s draft timetable at [http://www.dsdni.gov.uk/charities\\_draft\\_time\\_table.htm](http://www.dsdni.gov.uk/charities_draft_time_table.htm) (last accessed March 20, 2009).

purposes (broadly reminiscent of the English statutory definition)<sup>88</sup> coupled with a public benefit test that draws inspiration from the Scottish test.<sup>89</sup> To be charitable under the 2008 Act, a body must fall within one of the twelve heads of charitable purpose set out in s. 2 and satisfy the public benefit test laid down in s. 3. Like Scotland, Northern Ireland has chosen to sever the link between the UK tax definition of “charitable purpose” (which continues to be governed by the 2006 Act and applies throughout the United Kingdom for tax purposes<sup>90</sup>) and the controlling definition for the regulation of charities by developing its own parameters for “charitable purpose.” The result is a charity test that is similar but not identical to the 2006 Act definition.<sup>91</sup>

The 2008 Act requires every institution that is a charity under the law of Northern Ireland to be registered, without exception. Presence on the register provides a conclusive presumption that an institution is charitable.<sup>92</sup> Once registered, a charity is required to file annual accounts with the CCNI within 10 months of the charity’s year end. In particular, the accounts of unincorporated charities with an annual income of over £100,000 require independent examination by a qualified person whereas an audit is required for those charities with an annual income in excess of £500,000.<sup>93</sup> All registered charities must also provide an Annual Report, detailing the charities’ activities for the previous year.

Responsibility for the regulatory oversight of charities shifts from the Department of Social Development to the CCNI which, apart from its role in maintaining the register,<sup>94</sup> will enjoy wide powers to investigate apparent misconduct in the administration of charities, to suspend or remove trustees,<sup>95</sup> freeze charitable assets,<sup>96</sup> and determine applications for public collection permits.<sup>97</sup> All of these powers are subject to the right of appeal to both the new Charity Tribunal for Northern Ireland and the High Court of Northern Ireland.<sup>98</sup>

#### **4.2 Application to External Charities Operating in Northern Ireland**

Section 1 of the Charities Act (Northern Ireland) 2008 defines “charity” as limited to an institution that is established for charitable purposes only and falls subject to the control of the

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<sup>88</sup> *Cf.* Charities Act (Northern Ireland) 2008, s.2 with 2006 Act, s. 2.

<sup>89</sup> *Cf.* 2008 Act, s. 3 with 2005 Act, s.8.

<sup>90</sup> 2006 Act ss. 80(5) and (6) – *see supra* n. 29 and n. 35.

<sup>91</sup> For further discussion of the differences in the concept and scope of charitable purpose introduced by the 2008 Act, *see* Oonagh B. Breen, “Neighbouring perspectives: legal and practical implications of charity regulatory reform in Ireland and Northern Ireland” (2008) 59(2) *Northern Ireland Legal Quarterly* 223–43.

<sup>92</sup> 2008 Act, s. 18. The Department of Social Development envisages the creation of the charities register by a commencement order in September 2009 with the first charity registrations occurring in April 2010 (*see* [http://www.dsdni.gov.uk/charities\\_draft\\_time\\_table.htm](http://www.dsdni.gov.uk/charities_draft_time_table.htm)).

<sup>93</sup> 2008 Act, ss. 64-65. Unincorporated charities with an annual income of less than £100,000 require external scrutiny from an independent person with the requisite skills. Charitable companies will continue to prepare their accounts in line with Part 15 of the Companies Act 2006 (c.46) – *see* 2008 Act, s. 68(5). *See* the Appendix for further details of the accounting arrangements under the 2008 Act.

<sup>94</sup> 2008 Act, Part 4, ss. 16-21.

<sup>95</sup> 2008 Act, s. 34.

<sup>96</sup> 2008 Act, s.33.

<sup>97</sup> 2008 Act, Part 13.

<sup>98</sup> 2008 Act, Part 3, ss. 12-15.



Court in the exercise of its jurisdiction with respect to charities. It is clear from the outset, therefore, that external charities that are not subject to the power of the High Court of Northern Ireland will not be subject to the provisions of the Act requiring charity registration<sup>99</sup> and the concomitant disclosure<sup>100</sup> and reporting requirements<sup>101</sup> that flow from there. Section 1 finds its origins in section 1 of the English Charities Act 2006 and takes account of the prevailing jurisprudence relating to English courts' jurisdiction over external charities.<sup>102</sup> It follows that a charity established under Irish, Scottish, or English law will not be a charity within the meaning of section 1 and will not therefore be eligible (or required) to register with the CCNI under section 16 of the Act.

It would be wrong to assume, however, that external charities are therefore to be left entirely unregulated in Northern Ireland. Section 167, which deals expressly with such entities, applies to any institution which is not a charity under the law of Northern Ireland but which operates for charitable purposes in or from Northern Ireland. These "s.167 institutions," although not required to register under section 16, nonetheless will be required to prepare financial and activity statements with regards to their Northern Ireland operations. The Department of Social Development can require the CCNI to keep a special register of such organizations and the Department will also have the power to apply or disapply any of the provisions of the 2008 Act to these organizations, as it sees fit. The only proviso governing all of the foregoing is that any Departmental order relating to the treatment of external charities must be laid before the Northern Ireland Assembly and be approved by resolution before it can be implemented.

Section 167 of the 2008 Act has no comparative provision amongst its English, Scottish, or Irish neighbors. In drafting this provision, Northern Ireland officials learnt from the experiences of their Scottish and English counterparts. The requirement in the 2005 Scottish Act that all charities operating in Scotland must register with OSCR resulted in some English charities having to amend their constitutions in order to do so.<sup>103</sup> Such amendments caused difficulties for the CCEW,<sup>104</sup> which resulted in its representations to Northern Ireland not to replicate this procedure. The underlying purpose of section 167 seems to be to recognize as "charitable" organizations that are already registered charities in Great Britain without querying their validity in this regard but still requiring them to meet Northern Ireland accountability requirements.<sup>105</sup>

The practical effect of this provision will allow for organizations approved under the broader charitable purposes lists of another jurisdiction to be accepted as charitable in Northern Ireland even if such a charitable purpose would have been outside the scope of those that could

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<sup>99</sup> 2008 Act, s. 16.

<sup>100</sup> 2008 Act, ss. 19 and 70.

<sup>101</sup> 2008 Act, ss. 66 and 69.

<sup>102</sup> See *Gaudiya Mission*, *supra* n. 22.

<sup>103</sup> See Charity Commission for England and Wales, *Guidance for English and Welsh charities that have been asked to amend their governing documents before they can register in Scotland*, available at <http://www.charity-commission.gov.uk/supportingcharities/oscrguide2.asp> (last accessed January 22, 2009).

<sup>104</sup> See n. 72 *supra*.

<sup>105</sup> Testimony of Mr. Seamus Murray, Department of Social Development, Committee for Social Development, Charities Bill, NORTHERN IRELAND ASSEMBLY HANSARD, February 28, 2008.

be approved by the CCNI if registration had first been sought in Northern Ireland. In this regard, there will be no need for such external charities to amend their governing instruments for recognition in Northern Ireland to occur. Although conceived of in the context of the United Kingdom and existing regional variations in definition of charitable purpose, it will prove difficult to limit the scope of this provision to charities registered in Great Britain, since Irish or, indeed, French or German charities, if operating in Northern Ireland, equally will fall outside the definition of “charity” in section 1 and will thus arise for consideration under section 167 too. Indications are that where states have rigorous charity regulation regimes in place, the NI Department of Social Development will direct the CCNI to recognize external charities from these states in a similar manner to those from Great Britain. In cases where a state does not have a comprehensive regulatory scheme in place for oversight of its domestic charities, section 167 gives the Department of Social Development freedom to be more demanding in the requirements that such external charities must satisfy before recognition is granted.

The full implications of section 167 for external charities are hard to tease out at present since the all-important detail remains to be spelt out by way of Departmental Order and regulations. Notwithstanding first impressions, the Charities Act (Northern Ireland) does not give external charities registered in another jurisdiction an unconditional passport to operate in Northern Ireland. Section 167 institutions will be required to register on a separate register – described in Committee stage as a “parallel register” – and obliged to report and make financial returns to the CCNI in order to fulfil the public accountability aspect of that legislation.<sup>106</sup> The Northern Ireland accounting requirements are exacting insofar as it is clear on the face of the legislation<sup>107</sup> that the CCNI is interested solely in financial accounts and performance reports relating to Northern Ireland activities. As noted elsewhere, the legislation of other jurisdictions may be implicitly construed to the same effect but they lack the clarity inherent in section 167 of the Charities Act (Northern Ireland) 2008.<sup>108</sup>

A further consequence of Northern Ireland’s direct approach to dealing with external charities appears to be that there will be no *de minimis* exemption that will enable these bodies to “opt out” of registration and accountability. Section 167 leaves no escape door for an external charity to carry out activities in or from Northern Ireland and not be registered with the CCNI. In this respect, Irish charities that operate on an all-island basis would thus be required to register as s.167 institutions even if only engaged in ad hoc charity fundraising ventures north of the border. Fundraising, service provision, and physical presence are all likely to require registration. Grant-making by external charities, however, may be possible without a separate registration required.

Section 167 gives the NI Department of Social Development some leeway to set lower levels of financial reporting for external charities that already file full accounts in another state and the higher audit thresholds that apply in Northern Ireland may relieve some Irish cross-border charities of the need for audited accounts.<sup>109</sup> Yet challenges will exist for external

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<sup>106</sup> *Ibid.*

<sup>107</sup> 2008 Act, s. 167(3).

<sup>108</sup> Ireland: *see* n. 147 *infra* and accompanying text; Scotland: *see* Ford, *supra* n. 52.

<sup>109</sup> 2008 Act, s.65.

charities since separate accounts for Northern Ireland operations are required (a factor likely to impact Irish charities operating on a cross-border basis).<sup>110</sup>

In terms of broader international cooperative powers, section 24 of the Charities Act (Northern Ireland) 2008 provides a right of disclosure by or to the CCNI that extends to public bodies beyond the territory of the United Kingdom.<sup>111</sup> The definition of “public body” is not limited to other charity regulators but could encompass the police or revenue authorities in Ireland or further afield in an appropriate case. As in England, the purpose of disclosure is stated as being twofold: a) for any purpose connected with the exercise of the Commission’s functions or b) to enable or assist the public body or officeholder to exercise any functions. Whereas the latter rationale will probably arise with a request initiated by another public body, the first rationale might occur in a situation in which the CCNI needs to give information to a public body to enable it to assist the CCNI in its inquiries. In common with the English Act 2006, there is no general provision in the Charities Act (Northern Ireland) expressly providing for cooperation between the CCNI and other public bodies or officeholders, whether based in Northern Ireland or outside of the UK.<sup>112</sup> This omission may be an oversight on the part of the Northern Ireland administration, which borrowed heavily from the English legislation. The latter was unlikely to have an external cooperation provision in its 2006 Act given the vacuum in which the Charity Commission for England and Wales has operated for many years – up until recently, neighboring jurisdictions have not had modern charity regulatory regimes much less comparative charity regulators with which the Charity Commission could conceivably have cooperated.

The only provision relating to cross-border cooperation in the Charities Act (Northern Ireland) is to be found in section 56 and it is limited to cooperation within the UK.<sup>113</sup> The CCNI may, on a reference from either OSCR or the CCEW, apply to the High Court for Northern Ireland for measures to protect movable property held in Northern Ireland on behalf of a charity established in England and Wales or Scotland where there is an allegation of misconduct in the administration of the charity.<sup>114</sup> This generosity of asset protection does not extend to charities established in the Republic of Ireland.<sup>115</sup> Neither Scotland nor England and Wales affords a

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<sup>110</sup> Most of the thresholds in ss. 65-66 of the Northern Ireland Act were originally the same as for England and Wales, but are now considerably lower as a result of the increased thresholds in E&W from April 2009 – see table II in the Appendix below. But there are also more fundamental differences since, unlike E&W, there is no lower limit for charity registration, nor is there is a level below which a charity is exempt from any external scrutiny of its accounts – so in these respects the Northern Ireland requirements are closer to those in Scotland.

<sup>111</sup> 2008 Act, s. 24(1).

<sup>112</sup> By contrast, s.20 of the Charities Trustee and Investment (Scotland) Act, 2005 and ss. 33 & 34 of the Irish Charities Act 2009 provide for such external regulatory cooperation.

<sup>113</sup> In this regard, s. 56 of the Charities Act (Northern Ireland) 2008 can be compared with s.36 of the Charities Trustee and Investment (Scotland) Act 2005 and with s.80 of the English Charities Act 1993.

<sup>114</sup> 2008 Act, s. 56.

<sup>115</sup> Thus, if an Irish charity, guilty of misconduct in the administration of its assets, were to move those assets to Northern Ireland, the CRA or the affected claimants would be forced to make out a civil case for a Mareva injunction, relying on the Brussels Convention to secure enforcement. The Brussels Convention, officially the “Convention on the Enforcement of Judgments in Civil and Commercial Matters,” agreed in 1968 by the member states of the EU, has the goal of increasing economic efficiency and promoting the single market by harmonizing the rules on jurisdiction and preventing parallel litigation. The Convention, as now interpreted by Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil

similar reciprocity of asset protection to Northern Ireland in its charity legislation.<sup>116</sup> This oversight most likely is due to the order of the statutes' respective enactment but the absence of full reciprocity is nonetheless unfortunate.

## **5. ISSUES FOR EXTERNAL CHARITIES OPERATING IN THE REPUBLIC OF IRELAND**

### **5.1 The New Legislative Framework of Charity Law in Ireland**

The Irish Charities Act, 2009 introduces a new regulatory framework for charities in Ireland, thereby amending the existing Charities Acts 1961-1973.<sup>117</sup> The Act provides for a new statutory definition of "charitable purpose" that is similar but not identical to those statutory definitions currently in place in Scotland, England and Wales, and Northern Ireland.<sup>118</sup> A register of charities is established under the Act<sup>119</sup> and registered charities are subject to certain annual reporting requirements<sup>120</sup> as well as to the supervisory oversight of a new statutory regulator, the Charities Regulatory Authority (hereafter the "CRA"). The CRA takes over both the protective responsibilities of the Attorney General<sup>121</sup> and the supportive role of the Commissioners of Charitable Bequests and Donations towards charities.<sup>122</sup> For the first time in Ireland, the new regulator will monitor charities from a charity governance perspective as distinct from purely taxation or company law perspectives. The Irish Charities Act provides that the functions of the CRA will include the protection of charitable assets and the facilitation of the better administration of charitable organizations and trusts.<sup>123</sup>

To this end, all organizations that wish to call themselves charities, regardless of size or organizational form, will be required to register with the CRA.<sup>124</sup> This registration requirement extends to external charities established outside but active within the State.<sup>125</sup> Subject to a limited exception for external charities, discussed below, it will be an offense to call oneself a charity and not be registered.<sup>126</sup>

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and commercial matters governs the circumstances in which preliminary orders, such as freezing orders can be granted in signatory jurisdictions.

<sup>116</sup> See Charities Trustee and Investment (Scotland) Act 2005, s. 36 and English Charities Act 1993, s. 80.

<sup>117</sup> Charities Act, 2009 (No. 6 of 2009).

<sup>118</sup> Cf. 2009 Act, s.3 with 2005 Act, s.7(2); 2006 Act, s.2; and 2008 Act, s.2.

<sup>119</sup> 2009 Act, s. 39.

<sup>120</sup> 2009 Act, ss. 48 & 49 (annual statement of accounts) and s. 52 (annual reports).

<sup>121</sup> 2009 Act, s. 38 (transfer of functions of Attorney General to CRA).

<sup>122</sup> 2009 Act, Part 6 (dissolution of the Commissioners of Charitable Donations and Bequests and transfer of functions to the CRA).

<sup>123</sup> 2009 Act, s. 14.

<sup>124</sup> 2009 Act, s. 39(3) & (4). Charities that qualified for tax relief prior to the enactment of the Charities Act will be deemed registered under s. 40.

<sup>125</sup> 2009 Act, s. 39(5). S. 39(5) [the 'Stauffer clause'] gives effect to the European Court of Justice's decision in Case C-386/04 *Centro di Musicologia Walter Stauffer v. Finanzamt Munchen fur Korperschaften* [2006] ECR I-8203, which prohibits a Member State from discriminating against an EEA-established charity on the grounds that its principal place of business is in another EEA member state.

<sup>126</sup> 2009 Act, s.41.

Traditionally, the availability of tax relief and the general credibility and confidence that the donating public places in charities were reasons said to motivate organizations to seek “charitable status” and therefore to buy into a regulatory regime. The label “charitable status” is used advisedly here since until the enactment of the 2009 Act, it signified nothing more in Ireland than that Revenue Commissioners had granted the organization tax-exempt status for charitable purposes. Registration with the CRA will not, however, guarantee an organization tax-exempt status since the Charities Act decouples the awarding of tax exemption (which will remain within the sole ambit of Revenue) from that of charitable status (now to be determined by the CRA).<sup>127</sup> In this regard, the Irish regime, when operational, will resemble the Scottish position where tax-exempt status and charitable status are also severed.<sup>128</sup>

With regards to the public confidence that flows from the bestowal of charitable status on an entity, prior to the enactment of the 2009 Act there was little in Ireland’s regulatory regime to justify the belief that a tax-exempt charity was a well-governed charity *per se*. The Charities Act will bring greater credence to this claim of faith since only registered charities will be entitled to use the charity label in future.<sup>129</sup> The “feel good” factor associated with registered charitable status will be shored up by obligations on registered charities to account annually for their performance and their financial activities, thus giving the moniker “registered charity” a depth and meaning that in the past it has lacked.<sup>130</sup> However, beyond the right to use the charity label, registration with the CRA *per se* will bestow few other rights.

The downside to registration for charities will flow from the concomitant duties of registered charities that buy into the statutory regime. All registered charities will have disclosure and reporting requirements. The Charities Register will be open to public scrutiny and registered charities will be required to file an annual report with the CRA detailing their performance<sup>131</sup> and to maintain proper books of account.<sup>132</sup> With the exception of charities having a gross income or total expenditure of less than €10,000,<sup>133</sup> all charities are required to prepare and file their annual

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<sup>127</sup> 2009 Act, s. 7. In this regard, s.7(2) expressly provides that in the exercise of its tax functions, the Revenue Commissioners shall not be bound by a determination of the CRA as to whether a charitable purpose is for the public benefit or not.

<sup>128</sup> See n. 41 *supra* and accompanying text. In terms of operation, it is likely that the CRA will enter into a memorandum of understanding with the Irish Revenue Commissioners regarding the respective approaches of these agencies to the determination of charitable purposes under s.33(1)(c) 2009 Act. Cf. Memorandum of Understanding between The Office of The Scottish Charity Regulator and HM Revenue & Customs (Charities) (2006).

<sup>129</sup> 2009 Act, s. 46(2). Subject to the exception set down in s. 46(6), it will be an offense to hold an organization out as a charity and not be registered with the CRA.

<sup>130</sup> To this end, s.46(2) of the Act makes it an offense for a body (other than a registered charity) to describe itself or its activities in any advert, promotion, or notice in such terms as would cause members of the public to reasonably believe that it is a charitable organization. It is intended that this provision will curtail the nefarious activities of certain commercial charity bag clothes collectors that masquerade as charities in their collection activities.

<sup>131</sup> 2009 Act, s. 52(1).

<sup>132</sup> 2009 Act, s. 47. Cf. s.47(11) exempting charitable companies from this requirement.

<sup>133</sup> 2009 Act, s.48 (6) & s. 52(4). These provisions also exempt charitable companies, education bodies, and designated education centers from the requirement to file with the CRA but in each of these cases those bodies are subject to existing filing requirements with other regulators. It follows that the combined effect of ss. 48 and 52 is that charities with income/expenditure of less than €10,000 will not be required to expose their accounts to regular scrutiny although they will still be required to file an annual report with the CRA under s.52(1).

returns with the CRA (in the case of unincorporated charities) or the Companies Registration Office (in the case of incorporated charities).<sup>134</sup> Charities will also find themselves under an onus to participate in a proposed non-statutory fundraising regulation regime since its failure would trigger legislative intervention and the imposition of a statutory framework.<sup>135</sup> Registration will bring charities under the jurisdiction of the CRA, which will have the power to carry out inspections in cases of suspected charity mismanagement or fraud and whose permission must be sought on matters ranging from cy prè applications and dissolution more generally to any other changes to an organization's declared charitable purposes or its charity name.

## **5.2 Issues for External Charities Operating in Ireland**

If the downside of "buying into" the Irish regulatory regime appears untenable for external charities that are already subject to regulatory regimes in their home countries, there does remain a limited "opt-out" possibility. Certain external charities can have a presence in Ireland while holding themselves out to be charities and yet avoid the requirement to register with the CRA and all of the associated statutory obligations. According to section 46(6), an unregistered charity that is publicly described as a charity in Ireland will not commit an offense under Irish law if it satisfies the following conditions:

- it is established under the law of a place other than the State<sup>136</sup> and under that law it is entitled to be described as a charity;
- its center of management and control is outside the State;
- it does not occupy any land in the State or carry out any activities in the State; and
- the advertisement or promotional literature, containing the description of the external charity, is accompanied by a statement as to its place of establishment.

A literal reading of the section would imply that it will have quite a narrow application and the provision drew little comment at Committee Stage in the Dáil (the Irish Lower House of Parliament), perhaps precisely for this reason.<sup>137</sup> An external charity, properly recognized under the laws of its home country, that does nothing in the State will be able to declare its charitable status without incurring an obligation to register. This constitutes the lowest form of mutual recognition available. One could conceive that whereas an external charity with Irish property investments in its portfolio could take advantage of section 46(6), an external charity with a toehold (in the form of an office site or shop) in the State or one that carried out "any activities," whether in the nature of fundraising, grant-making, or service provision – no matter how infrequent or minimal – would be required to register.

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<sup>134</sup> 2009 Act, s. 48(1). Under s. 49 of the Act, incorporated charities will continue to make their returns to the Companies Registration Office, which Office upon receipt of notification from the CRA will give a copy of those returns to the CRA, thereby avoiding dual filing requirements in respect of returns by incorporated charities. *See further* the Appendix below.

<sup>135</sup> 2009 Act, s.97. For details on the proposed non-statutory fundraising regulation regime *see* Irish Charities Tax Research Ltd, Final Report on the Regulation of Fundraising by Charities through Legislation and Codes of Practice (Dublin, May 2008) and Oonagh B. Breen, "Regulating Charitable Solicitation Practices— The Search For A Hybrid Solution" (2009) 25(1) *Financial Accountability & Management*, 115-143.

<sup>136</sup> *I.e.*, the Republic of Ireland.

<sup>137</sup> Irish Charities Bill 2007, Committee Stage, Dáil Debs, January 22, 2008.

The origins of section 46(6), as first set out in Head 53 of the Irish General Scheme of Bill in 2006, can be traced to section 14 of the Charities and Trustee Investment (Scotland) Act 2005.<sup>138</sup> Although no longer a verbatim version of s. 14 (reference to the location of the activities has been removed entirely), s. 46(6) still follows its basic structure. From its inception the Scottish provision has been construed as embodying a *de minimis* threshold with regard to activity. Whereas simple occupation (as opposed to mere ownership) of property in Scotland requires a charity to register with OSCR, significant activity is necessary to trigger a need for registration. This approach has been expressed both in policy memoranda preceding the Scottish Act and in subsequent guidelines from the Office of the Scottish Charity Regulator (OSCR) upon the Act's implementation.<sup>139</sup> In reviewing the extent of an organization's activities or operations in Scotland, OSCR focuses on the frequency of the activities, their significance with regard to activities carried out by the charity elsewhere, and the overall significance of the impact of those activities.

Neither the Explanatory Memorandum to the Irish Bill nor the parliamentary hearings on the Charities Bill gave any indication as to whether a strict literal interpretation (eschewing a *de minimis* approach) or a purposive interpretation (which would allow for a *de minimis* approach) will be adopted in relation to section 46(6). It is thus unclear, for instance, whether a Northern Ireland registered charity that holds a one-off fundraising event in Ireland will be obliged to register under s. 39 or will be exempt under s.46(6), or whether non-registration will necessarily grant external charities immunity from the investigative powers of the CRA, which are not limited to registered charities.<sup>140</sup>

The options for external charities which have, or would like to have, a presence in Ireland and which fall outside the opt-out provisions of section 46(6) are two-fold: either to operate as a nonprofit organization without charitable status in Ireland or to register with the CRA. The former will be at no disadvantage to registered charities when it comes to applying for a public collections permit<sup>141</sup> and indeed conceivably could apply for charitable tax-exempt status from Revenue, which currently is not dependent upon prior registration with the CRA.<sup>142</sup> If, however, registered charitable status is the preferred option, an external charity may still experience a number of difficulties in achieving that status under Irish law.

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<sup>138</sup> See section 3.2 above.

<sup>139</sup> See Scottish Parliament Information Centre (SPICe) Briefing 05/05: *Charities and Trustee Investment (Scotland) Bill: Regulation and Governance Issues* (January 21, 2005); Office of the Scottish Charity Regulator, *Guidelines to English and Welsh Charities on Registering in Scotland* (2006) at 4.1 ("The purpose of section 14 of the CTI(S) Act 2005 is to ensure that all charities with *significant* operations in Scotland register with OSCR.") [emphasis added]. See also Ford, *supra* n. 52.

<sup>140</sup> 2009 Act, s. 64, read in conjunction with s. 2.

<sup>141</sup> The Irish Charities Act 2009 only regulates public collections for charitable purposes and not for benevolent or nonprofit purposes and thus is narrower than the Charities Act (Northern Ireland) 2008, which does cover such latter types of fundraising. The implications of the Irish position is that nonprofit organizations wishing to fundraise will continue to be governed by the earlier Street and House to House Collections Act, 1962 and will fall outside the proposed non-statutory fundraising codes of conduct. On a related note, gaming and lotteries also will fall outside the remit of the Irish Charities Act 2009 so that a charity engaged in the street selling of scratch cards would appear not to be regulated by the 2009 Act either.

<sup>142</sup> It is likely that prior registration with the CRA may in future become a precondition for applying to the Revenue Commissioners for charitable tax exempt status. In this regard such registration could be seen as a necessary but not sufficient condition for tax exemption – see further 2009 Act, s.7.

The first difficulty concerns the types of charitable purposes that the CRA will recognize for the purposes of registration. The Irish statutory list of charitable purposes is considerably narrower than the statutory lists in Scotland, England and Wales, and Northern Ireland.<sup>143</sup> In contrast to neighboring jurisdictions, the Irish list of charitable purposes entirely omits reference to the advancement of human rights (found in all versions of the UK legislation), to the promotion of the armed forces (found in the English Act) and to amateur sport or recreational charities (again found in all the UK legislative versions) as acceptable charitable purposes.

In some specific areas the Irish wording, while similar, is still narrower than neighboring statutes. In this regard, the Irish reference to the advancement of the environment is limited to “the natural environment,” thereby excluding the built environment. Similarly, the concept of religion retains its common law meaning in Ireland, excluding reference to faiths that have no belief in a god at all (unlike the UK, where a religion with no god now can be charitable).<sup>144</sup> In the absence of an equivalent provision to Northern Ireland’s section 167, external charities active in Ireland whose purposes encompass any of these broader headings may need to revise their governing documents prior to registration in order to comply with Irish charity law. Any such revisions may require the consent of existing charity trustees and other charity regulators with whom the organization is already registered.<sup>145</sup>

Once registered, an external charity will be required to file annual accounts and an annual report on its activities with the CRA.<sup>146</sup> The legislation is silent on whether registered external charities will be required to file accounts relating to their global operations or just accounts relevant to their Irish activities and operations carried out within the State.<sup>147</sup> Even assuming that the relevant accounts will relate only to Irish activities, it is worth bearing in mind that the Irish Charities Act imposes lower audit thresholds than its neighbors, which once exceeded will require an external charity to submit audited accounts to the CRA.<sup>148</sup> The specifics of the annual reports will be determined by Ministerial regulation<sup>149</sup> and so there is thus room for further variation in these requirements from those of neighboring jurisdictions. This differential will be

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<sup>143</sup> Cf. Irish Charities Act 2009, s.3 with English Charities Act 2006, s.2; Charities and Trustee Investment (Scotland) Act, 2005, s.7; and Charities Act (Northern Ireland) 2008, s.2.

<sup>144</sup> See s.7 (2A)(e) Charities and Trustee Investment (Scotland) Act, 2005; s.2(3)(a)(i) English Charities Act 2006; and s. 2(3)(a)(i) Charities Act (Northern Ireland) 2008.

<sup>145</sup> See s. 16(2) Charities and Trustee Investment (Scotland) Act, 2005 (requiring OSCR’s consent for any constitutional amendments relating to a charity’s charitable purposes); see also s. 31 English Charities Act 2006, amending s. 64(2) Charities Act 1993 (Charity Commission consent required to changes in a charitable companies memo and arts).

<sup>146</sup> See further Appendix, below.

<sup>147</sup> 2009 Act, s.47(1). Presumably, regulations will be made under s. 48(1) detailing the nature of the accounts required. Cf. s. 167 of the Charities Act (Northern Ireland) 2008, which makes specific reference to the regional nature of the accounts to be filed.

<sup>148</sup> See further the Appendix, below.

<sup>149</sup> 2009 Act, s. 52(1). See further the Appendix, below.



particularly troublesome for Northern Ireland charities that operate on an all-island basis and that are required to register with the CRA.<sup>150</sup>

In light of the limited exemption from registration, the differences in definition of charitable purposes, and the different reporting requirements, one might be forgiven for thinking that the drafters of the Irish Charities Act looked no further than their own borders when it came to facilitating charity practices. And yet other provisions of the Act indicate that this is not the case. Three sections are worthy of note in this regard. Section 28(3) empowers the CRA to disclose information obtained in the performance of its functions to relevant foreign regulators when it suspects the commission of an offense under the law of another state. Section 33 enables the CRA to enter into arrangements with both domestic and foreign regulators.<sup>151</sup> Such arrangements may include the facilitation of administrative cooperation in the regulation of charities, the avoidance of unnecessary duplication of regulatory activities, and ensuring, “as far as practicable” consistency between decisions made, measures taken, or determinations regarding the regulation of charities by the CRA and other relevant regulator. Section 33 is a broad section insofar as the definition of regulator is not limited to charity regulators; the definition of relevant foreign regulator expressly covers “a body, or holder of an office, in whom functions are vested under the law of [another] state . . . relating to the regulation of activities or persons in that state for any purpose. . . .”<sup>152</sup>

Finally section 34, headed “Administrative cooperation with foreign statutory bodies on law enforcement matters” focuses specifically on the relationship of the CRA with its charity regulator counterparts in other jurisdictions.<sup>153</sup> It allows for the conclusion of arrangements between the CRA and other charity regulators relating to both information disclosure (presumably in situations falling short of the suspected commission of an offense, which are already covered by s.28) and to the provision of assistance aimed at facilitating the other regulator in the performance of its functions.<sup>154</sup> Whereas s.34 arrangements require advance Ministerial approval, s.33 arrangements, which are expressed in subsection (2) to be non-binding in nature, merely must be notified to the relevant Minister.

## **6. INFORMAL COOPERATION BETWEEN CHARITY REGULATORS**

The differences between the four regimes discussed above and the complexities of cross-border charity regulation may be mitigated to some extent by arrangements for informal cooperation. These include the *UK and Ireland Charity Regulators Forum* and the *North-South Taskforce on Fundraising Regulation*.

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<sup>150</sup> See the minutes of the Meeting of the Ireland and UK Charity Regulators Forum, March 2007, recognizing these likely difficulties and discussing the need to consider issues relating to disaggregated account information and separate performance report information requirements for cross-border charities.

<sup>151</sup> See 2009 Act, s. 33 (6)(b) which specifically makes reference to the inclusion of foreign statutory bodies in the definition of “relevant regulator.”

<sup>152</sup> *Ibid.*

<sup>153</sup> 2009 Act, s. 34(6) (providing “In this section “foreign statutory body” means a person prescribed by regulations made by the Minister, in whom functions relating to charitable organizations or charitable trusts are vested under the law of a state other than the State.”)

<sup>154</sup> 2009 Act, s. 34 (1).

The former is a non-statutory forum, established in 2006, that meets on average three times a year and comprises officials from the Charity Commission for England and Wales, OSCR and, pending the establishment of the CCNI and CRA, Irish and Northern Ireland Departmental officials responsible for charity regulation. The forum aims to establish good working relations between the various charity regulators that will lead to a sharing of information and best practice and encourage greater consistency in regulatory practices and decisions while respecting the different legislative frameworks within which each regulator works.

The latter taskforce forms part of Ireland's review of charitable fundraising regulation. To progress the objective of employing non-statutory fundraising regulation the Irish Department of Community, Rural and Gaeltacht Affairs entered an agreement with a nonprofit think-tank (Irish Charities Tax Research Ltd) to carry out research and make recommendations on how the operational aspects of charitable fundraising can be effectively regulated through Codes of Good Practice. As part of this process, the North-South Task Force on Fundraising Regulation was established in 2006 comprising officials from Northern Ireland's Department of Social Development, representatives of the Northern Ireland Council for Voluntary Action (NICVA), the UK Institute of Fundraising and Irish charities along with fundraising and legal representatives familiar with both legal systems. The taskforce considered the feasibility of using similar fundraising regulation practices on an all-island basis, thereby lightening the regulatory burden on charities from each other's home jurisdiction that choose to fundraise across the border. ICTR's final report *Regulation of Fundraising by charities through legislation and codes of practice* was published in May 2008 and is currently under consideration by the Northern Ireland Department of Social Development.<sup>155</sup>

Each of the four jurisdictions also provides a legal basis for the respective charity regulators to enter into memoranda of understanding with each other.<sup>156</sup> These memoranda may provide a useful mechanism for embedding any future informal agreements reached by the regulators through the Regulators Forum. One memorandum currently exists between OSCR and the CCEW. Originally signed by the regulators in May 2005, the memorandum was revised in 2007 to reflect the transition of OSCR from an executive agency to a statutory body and enactment of the Charities Act 2006. The terms of the understanding make specific reference to the need to minimize the burden of dual regulation on cross-border charities.<sup>157</sup> To this end, the memorandum highlights crucial areas for operational liaison between OSCR and the CCEW and mandates that the regulators should meet twice yearly to discuss cross-border related matters, either as part of the Charity Regulators Forum or separately there from.<sup>158</sup>

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<sup>155</sup> See *supra* n.135.

<sup>156</sup> The legal bases are to be found in 2005 Act, s. 24(1); 1993 Act, ss. 10 to 10C (as inserted by the Charities Act 2006, par. 104 of Schedule 8); 2008 Act, s.24 (1) and 2009 Act, s.33.

<sup>157</sup> Memorandum of Understanding between the Office of The Scottish Charity Regulator and The Charity Commission (March, 2007) at par. 1.1, available from <http://www.oscr.org.uk/PublicationItem.aspx?id=66d891da-e0bd-4cb1-9865-011b3da894c1>.

<sup>158</sup> *Ibid*, at paras 5.1 & 5.2.

## **7. EXTERNAL CHARITIES – FOUR APPROACHES ASSESSED**

### **7.1 Provisional assessment**

As we have seen, Ireland and the three jurisdictions of the United Kingdom will shortly each have in place a sophisticated system for the regulation of charities. The system for England and Wales is long-established, though recently revamped, and is unmistakably the model for the other three – the system operative in Scotland since 2006 and the systems for which legislative provision has very recently been finalized in Northern Ireland and Ireland. There will shortly, therefore, be four parallel charities regulation systems in force in the four neighboring jurisdictions. In practice, there will be some organizations established as charities in one of the four jurisdictions as their “home” jurisdiction, which seek to be active, whether in raising funds from the public or in conferring benefit on the public, in all three of the other jurisdictions, and many more which seek to be active in at least one of the other three. There will also be organizations established as charities outside the four jurisdictions that seek to be active in one or more of them.<sup>159</sup> Each of the four systems approaches this phenomenon differently – the phenomenon that a charity established outside the jurisdiction in question, an external charity, may seek to be active as a “charity” within the jurisdiction. The purpose of this section of the article is to examine what the existence of these four approaches is likely to mean for organizations seeking to operate as external charities in one or more of the four jurisdictions, and to draw out from the examination a provisional assessment of the four approaches, taken together.

### **7.2 Overview of four systems**

It may be helpful, as a preliminary, to offer a brief overview of the four charities systems described in previous sections as they will be when fully in force. As we have seen, the main features of the four systems are similar. Each has a definition, or “test,” of what makes a particular organization a charity and each has a registrar-regulator, responsible both for registering charities and for administering what may be described as a “compliance regime.” In each jurisdiction the compliance regime provides for charities, once registered,<sup>160</sup> keeping annual accounts and reporting to the regulator on their stewardship in fulfilling their objects,<sup>161</sup> as well as submitting to a system of monitoring (intended to ensure that their stewardship is satisfactory), of investigation (where there are suspicions that a charity’s stewardship has fallen short of the required standard), and of enforcement (for instance, by removal from involvement with a charity of the persons responsible for an established failure of stewardship). In each jurisdiction, too, there are controls on fundraising. These are not, strictly speaking, in any of the four jurisdictions, part of the charities regulation system as such, since, while they regulate fundraising by charities, they control fundraising by a much wider range of organizations than charities registered with the regulator.

The main features of each of the four charities systems are similar, therefore, but there are many differences of detail. For example, the specifics of the definition or test of charity, and of the various other criteria of registration, differ from jurisdiction to jurisdiction, as do the

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<sup>159</sup> For examples see *Gaudiya Mission supra* n. 22 (India); *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1956] AC 39 (New York State, USA).

<sup>160</sup> In England and Wales not all charities are required to register: see section 2.1 above.

<sup>161</sup> See Appendix below.

accounting and reporting requirements. Such differences mean that an organization registered as a charity in one jurisdiction may not be eligible for registration in another and that reports and accounts which satisfy the compliance regime in one system may not satisfy the equivalent regimes elsewhere.

### **7.3 Overview of four approaches to external charities**

If the registration and reporting requirements are different in detail across the four jurisdictions, so also is the treatment of external charities. By way of overview, the key elements in each jurisdiction's approach to external charities can be summarized as follows.

The focus of the treatment of external charities in England and Wales (intended or unintended, since the key provisions pre-date the development of charities regulation in the three neighboring jurisdictions) is on the protection of donors.<sup>162</sup> An organization established as a charity outside England and Wales may raise funds within the jurisdiction, provided it abides by the fundraising controls applicable to local organizations, and provided in particular that no claim is made on its behalf that it is a "registered charity," that is, as charity registered with the CCEW. There is a criminal sanction against any person soliciting funds in association with a false claim that an organization is a "registered charity" in this sense. The effect is that donors in England and Wales may give to an organization which claims to be a registered charity in the knowledge that it is registered with the CCEW and subject to the CCEW's compliance regime. Otherwise, the system gives no guarantees in respect of an organization claiming to be a charity – whether local or external – and donors must give at their own risk.

A charity external to England and Wales is not, therefore, under any obligation to register – indeed will not normally be eligible to register<sup>163</sup> – with the CCEW, and will not be subject to CCEW's compliance regime, yet may call itself a "charity," but not a "registered charity," when fundraising within the jurisdiction. So far as the beneficiaries of external charities are concerned, the system in England and Wales offers minimal protection since external charities will not (normally) be subject to the CCEW's jurisdiction. Beneficiaries or donors who may have a complaint against an external charity must, in principle, refer it to the authorities of the charity's home jurisdiction.<sup>164</sup> The charities system in England and Wales does not, in other words, assert jurisdiction over external charities, but defers to the authorities of the relevant territories of establishment. The justification for this approach lies in the practical difficulties faced by the authorities in England and Wales in enforcing the domestic compliance regime against organizations based outside the jurisdiction.<sup>165</sup> There is, however, some (limited) provision for cooperation by the CCEW with other regulators, both by way of sharing information and taking enforcement action, as outlined in section 2.2 above.

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<sup>162</sup> See generally section 2.2 above.

<sup>163</sup> Because not "subject to the control of the High Court in the exercise of its jurisdiction with respect to charities": see Charities Act 2006, s. 1(1) and *Gaudiya Mission supra* n. 22, interpreting the equivalent provision in the Charities Act 1993. Exceptional circumstances can, however, be imagined in which a charity established under the law of another jurisdiction is sufficiently subject to the control of the High Court in the exercise of its charities jurisdiction to be eligible for registration (and obliged to register) with the CCEW, for instance where all the charity trustees are resident in England and Wales.

<sup>164</sup> The principle is explored in *Gaudiya Mission supra* n. 22. See in particular remarks of Mummery LJ at 352, citing Lord Brougham in *Mayor of Lyon v East India Co* (1836) 1 Moo PC 175, 297-298.

<sup>165</sup> See Mummery L.J. in *Gaudiya Mission supra* n. 22 at 350-352.

The Scottish system, on the other hand, seeks to protect the interests of both donors to and beneficiaries of charities external to Scotland.<sup>166</sup> A charity external to Scotland may raise funds within the jurisdiction provided it abides by the fundraising controls applicable to local organizations, but it must make no claim to be a “charity” when fundraising in Scotland unless either it is registered with OSCR and submits itself to OSCR’s compliance regime, or falls within the 2005 Act’s section 14 exception by virtue of carrying out no significant activities in the jurisdiction and having only a minimal territorial foothold there. An organization that claims to be a charity in Scotland without being registered or fitting within the section 14 exception is subject to enforcement action by direction of OSCR or in the Scottish civil courts.<sup>167</sup> These restrictions on the use by external charities of the charity label are not, however, confined to the context of fundraising. They apply in all situations, including the situation in which an external charity raises no funds in Scotland but only confers benefit. It should perhaps be emphasized that, in contrast to the arrangements in England and Wales, the restrictions govern the use of the word “charity” pure and simple, not merely the use of the term “registered charity.”

In principle, therefore, both donors and beneficiaries in Scotland may deal with any body claiming to be a charity in Scotland in the knowledge that it is registered with OSCR and subject to the Scottish compliance regime. In short, the Scottish authorities assert jurisdiction over external charities that wish to call themselves charities and do not fit within the section 14 exception, by requiring that they register in Scotland in the same way as local charities. There is a weakness in this approach in that it ignores the rationale behind the refusal of the authorities in England and Wales to assert a similar jurisdiction over organizations external to their own territory: it may in some circumstances be difficult in practice for OSCR and the Scottish civil courts to bring home their directions and orders against a body established outside Scotland, despite its being registered with OSCR, for instance where its officers are all resident outside Scotland. In such a situation, donors and beneficiaries in Scotland may be best in practice to direct any complaints they may have about an external charity to the authorities in the charity’s own jurisdiction of establishment. There is, again, however, some provision for cooperation between OSCR and the other regulators, in particular CCEW, in the fields of information-sharing and enforcement.

The approach of the Northern Ireland system to external charities can be seen as a compromise between the approach in England and Wales and the Scottish approach, and as seeking to offer protection to the interests of both donors and beneficiaries.<sup>168</sup> The approach in England and Wales is followed to the extent that a charity external to Northern Ireland will not be required to register as a charity with the CCNI<sup>169</sup> and will not be subject to the CCNI’s compliance regime, yet will be permitted to call itself a charity both when fundraising and conferring benefit within the jurisdiction, so long as no funds are solicited on its behalf in association with a representation that it is a “registered charity,” in the sense – here – of a charity

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<sup>166</sup> See generally section 3.2 above.

<sup>167</sup> An external charity which, even though registered with OSCR, claims falsely to be established under the law of Scotland, or managed or controlled in Scotland, is likewise liable to enforcement action.

<sup>168</sup> See generally section 4.2 above.

<sup>169</sup> And may not normally register as a charity in Northern Ireland: the position is parallel to that in England and Wales.

registered with the CCNI. There is a criminal sanction against any person soliciting funds in association with a false claim that an organization is a “registered charity” in this sense.

Northern Ireland goes beyond the approach in England and Wales, however, by providing that a charity external to the territory may be obliged to register and to submit to a compliance regime administered by the CCNI, not as a “charity” but as a “section 167 institution,” if it “operates for charitable purposes” within the jurisdiction.<sup>170</sup> If (as it appears to) this latter expression includes fundraising, the effect will be to require an external charity which has purposes that fit the Northern Ireland definition and which is active in pursuit of them in the jurisdiction, by way of fundraising or conferment of benefit or otherwise, to submit to a secondary regime of accountability for its operations in Northern Ireland. The section 167 arrangement amounts, in effect, to an assertion of jurisdiction over external charities active in Northern Ireland parallel to the Scottish one, and there may be similar difficulties of enforcement in practice. There is, however, once more, some provision for cooperation by CCNI with other regulators on information-sharing and enforcement.

Lastly, under arrangements broadly similar to those applicable in Scotland, a charity external to Ireland will be obliged to register with the Irish CRA, and to submit itself to the Irish compliance regime, if it is to represent itself as a “charity” in Ireland – whether when fundraising or conferring benefit or in any other circumstances – unless it falls within the much stricter Irish version of the Scottish section 14 exception by virtue of carrying out no activities whatever in the jurisdiction and occupying no land there.<sup>171</sup> In contrast to the position in Scotland, the prohibition against an organization calling itself a charity unless registered or covered by the exception is policed by a criminal sanction rather than civil enforcement,<sup>172</sup> but there is, otherwise, the same assertion of jurisdiction over external charities as in Scotland, with a view, no doubt, to protecting the interests of both donors and beneficiaries. The criminal as opposed to civil law underpinning of the prohibition may to some extent overcome difficulties of enforcement, since any person who makes a misleading representation within the jurisdiction is open to prosecution, not just a charity trustee, but in any event there is also some provision for cooperation by the CRA with other regulators in the fields of information-sharing and enforcement.

This overview alone is perhaps sufficient to show that the treatment of external charities across the four jurisdictions is not the product of a fully coordinated and coherent joint approach by the four sets of legislators. England and Wales has simply persevered with an arrangement dating from a time when the charities regulation system in England and Wales was the only one of its kind in the four jurisdictions. The prohibition against false claims as to charitable status in a fundraising context applies to external charities just as it applies to local organizations which are not registered with the CCEW, and outside the fundraising context the authorities in England and Wales eschew any special charities’ jurisdiction over external charities. Scotland has taken the different line that, in principle, any “charity” active within its borders, whether in a

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<sup>170</sup> Charities Act (Northern Ireland) 2008, s. 167(1).

<sup>171</sup> See generally section 5.2 above.

<sup>172</sup> A person who falsely claims that an external charity, even though it is registered with the CRA, is established under the law of Ireland, or has its seat of management or control in Ireland, is likewise liable to criminal prosecution: 2009 Act, s.46(3).

fundraising context or otherwise, and however well regulated elsewhere, should be subject to the Scottish compliance regime,<sup>173</sup> and Scotland has been followed in principle by Ireland.

Northern Ireland has backed both horses, following the English approach of outlawing the misleading use in a fundraising context of the term “registered charity” but otherwise allowing external charities to operate as “charities” within the jurisdiction without submitting to its domestic charities regime, yet providing for a secondary compliance regime that may in practice be little less onerous than the principal regime. The net result, it is suggested, has the potential to discourage cross-border activity by external charities, whether by way of fundraising or conferment of benefit, certainly in the three jurisdictions – Scotland, Northern Ireland, and Ireland – that require external charities to submit to a local compliance regime additional to the one in their own jurisdiction.<sup>174</sup>

#### **7.4 Implications for external charities and provisional assessment**

The implications for external charities can be seen from a snapshot of what the arrangements just summarized are likely to mean for organizations seeking to be active – as external charities – in one or more of the four jurisdictions. The effect will vary according to a charity’s jurisdiction of establishment and the “host” jurisdiction or jurisdictions in which it seeks to be active. To take, first, the obvious case of a large charity established in England and Wales that intends to be active, whether by way of fundraising or conferment of benefit, in each of the four jurisdictions, the implications are as follows.

The charity will be registered with the CCEW as its “home” regulator and subject to the CCEW’s compliance regime;<sup>175</sup> if it is to be active as a “charity” in Scotland, to a significant extent, and with the benefit of a territorial foothold, it must also register with OSCR – if necessary adjusting its governing instrument to enable it to meet the Scottish charity test – and submit itself to the Scottish compliance regime; if it is to operate for charitable purposes in Northern Ireland it will be liable to register and submit itself to regulation as a section 167 institution; and if it is to be active as a “charity” in Ireland it must register with the CRA – again, adjusting its purposes if necessary to ensure that it meets the Irish definition of charity – and submit itself to the Irish compliance regime. In other words, such a charity will be liable to quadruple registration and quadruple regulation. Even if the charity is active in only one of the three jurisdictions other than England and Wales, it will be liable to dual registration and regulation. It is in such circumstances that the differences in detail between the compliance regimes are likely to prove irksome and expensive, when, for instance, a charity finds itself producing different sets of reports and accounts for different regulators.<sup>176</sup>

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<sup>173</sup> The policy appears to have originated in the Report of the Scottish Charity Law Review Commission, *CharityScotland* (Edinburgh, Scottish Executive, 2001) (known as the “McFadden Report” after its chair Jean McFadden), paras 3.22-3.28. The report envisaged dual registration as the norm for external charities rather than dual compliance.

<sup>174</sup> There may be some signs of dual compliance operating to discourage medium or small charities established in England and Wales from activity in Scotland in the fact that the vast majority of charities that have dual registration are large or very large charities (by Scottish standards), *See supra* n.78. Charities with less sophisticated administrative capacity may be more daunted by the dual compliance requirements.

<sup>175</sup> Unless it is a charity exempt or excepted from registration.

<sup>176</sup> Even if a charity established in England and Wales were to hive off its Scottish, Northern Irish, and Irish activities to local “subsidiary” charities, that would still amount to multiple registration and regulation overall.

Because of the less demanding approach of England and Wales to external charities, the requirements for a charity established in any one of the other three jurisdictions are slightly less onerous. For instance, a charity established in Scotland which seeks to be active in all four jurisdictions will, of course, be registered with and subject to regulation by OSCR; it will be liable to registration and regulation as a section 167 institution in Northern Ireland and to registration and regulation as a charity in Ireland; but in England and Wales it will be free to operate under the banner of “charity” so long as no funds are solicited on its behalf in association with a claim that it is a charity registered with CCEW. Similarly, a charity established in Northern Ireland seeking to operate as an external “charity” in the other jurisdictions will be fully subject, at home, to its domestic charities system, and as an external charity to the Scottish and Irish charities systems, but in England and Wales its charity trustees and its officers and representatives need do no more than abide by the general fundraising rules, including the rule against misleading use of the term “registered charity.”

To fill out the picture a little further, an organization established outside the four jurisdictions – for instance, a charity established in the United States – that seeks to be active as a “charity” within all three of the United Kingdom’s jurisdictions and in Ireland, will be subject to whatever registration and compliance regime exists in its home jurisdiction, to the full Scottish and Irish charities registration and compliance regimes, and to the section 167 regime in Northern Ireland, but only to the fundraising controls in England and Wales. Notably, therefore, while on the face of it the system in England and Wales offers less protection than the others to the beneficiaries, in particular, of external charities, it has the merit of sparing external charities an additional layer of compliance.

This glance at the implications for external charities of operating across the four neighboring jurisdictions tells immediately, even for organizations originating in one of the four, of duplication, triplication, and even quadrupling of effort. The multiple registration and compliance requirements seem only too likely to act as a disincentive to charities operating across the jurisdictions.<sup>177</sup> If there is to be duplication of compliance effort on the part of the organizations themselves, there is likewise to be duplication of regulatory effort on the part of the authorities. It is certainly too early to assess whether the interests of donors and beneficiaries in any given jurisdiction will in practice be better protected as a result of a charity’s being fully registered and regulated in more than one of the four jurisdictions,<sup>178</sup> but the new arrangements already invite the concern that any improvement in protection will have been bought at too high a price in terms of administrative effort by charities and regulators alike.

It may also be wondered whether sufficient account has been taken by the Scottish, Northern Irish, and Irish legislators, in their assertion of a charities jurisdiction over external charities, of the difficulties of enforcement that have caused the authorities in England and Wales to eschew such a jurisdiction. Even a provisional assessment of the four different approaches to external charities, taken together, suggests that any additional protection required might have been achieved by less heavy-handed means, for instance by harmonizing the efforts of the

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<sup>177</sup> As between England and Wales on the one hand and Scotland on the other, the disincentive seems so far to have acted principally against cross-border operation by small to medium sized charities: *see* n. 78 *supra*.

<sup>178</sup> For example, the Salvation Army is registered in both England and Wales and in Scotland: are its supporters and beneficiaries in Scotland really the more secure for the charity’s being subject to OSCR’s regime as well as the CCEW’s?



regulators within a framework of properly developed mutual recognition arrangements, which would allow for fully reciprocal information exchange and cooperation on inter-jurisdictional enforcement.

## **8. CONCLUSIONS AND POLICY IMPLICATIONS**

This article has sought to analyse the position of an external charity that wishes to fundraise, provide services, or have a presence in a jurisdiction other than the jurisdiction in which it is established. We have focussed on cross-border charities operating in the United Kingdom and Ireland for two reasons: first, the close historical and legal links between the four jurisdictions in this case study provide a rich source of cross-border charity activity for examination; second, the relatively recent introduction of new charity regulation in all four jurisdictions provides a natural starting point from which to conduct our study given the varying degrees of reference to regulation of external charities in each of the respective Charities Acts. Although the article has dealt with cross-border charities as being charities that originate in Scotland, England and Wales, Ireland, or Northern Ireland, an external charity operating in any of these jurisdictions could easily have its place of establishment in another jurisdiction. It follows that the policy implications emerging from the assessment in the foregoing section will be relevant to external charities in the broadest meaning of the term, whether established in another European Member State, the United States, Canada, or Australia, that choose to operate in the UK or Ireland.

As this article has shown, although sharing a similar common law basis, each of the four jurisdictions here has dealt with the issue of external charities independently (or not at all) without reference to the regulatory regimes in the neighboring jurisdictions. The overall outcome of this approach – this article has argued – will be an unnecessary duplication of effort on the parts of both regulators and cross-border charities.

To work effectively, there is a need for each of the regimes to face up to the predominantly unintended consequences of four parallel charity regulatory regimes for cross-border charities. The ideal outcome, to take up one of the suggestions in section 7 above, might be for reciprocal statutory mechanisms allowing for mutual recognition of cross-border charities such that registration in one jurisdiction would be accepted as sufficient in another. Any such system would require charity traceability so that a donor could as easily verify the legitimacy of the external charity as he/she could a domestic charity. The realization of this outcome is dependent upon two factors, the first of which is the existence of general consensus that charities are trustworthy institutions deserving of facilitation as opposed to self-serving organizations the operations of which require heavy policing. The second precondition for a functioning mutual recognition regime is the requirement that each state hold the regulatory standards of its neighbors in esteem. The first factor may be more easily achieved than the second. Given that Scotland, Northern Ireland, and Ireland do not yet have an established track record in charity governance, it may be premature for the latter precondition to be fulfilled to the satisfaction of each individual regulator.

A more modest step towards mutual recognition may therefore lie in the newly established UK and Ireland Charity Regulators Forum, described in section 6 above. The forum has raised the issue of cross-border monitoring of charities at a number of its meetings and to this end established a working group to explore the possibilities of alignment and eventual

passporting of cross-border charities.<sup>179</sup> To date, there has been one meeting of the Cross Border Monitoring subgroup, attended by the three UK regulators, with the general consensus being that the subgroup would be a good vehicle for further discussion about reducing the overarching burden of administration and regulation and developing a common ground approach on issues. It remains to be seen whether this positive start in the dialogue stakes (albeit, unfortunately, without an Irish representative present) can be translated into action on the regulatory front.

In the end, the effective regulation of external charities calls for one primary overseer in the home jurisdiction coupled with a series of linked-up checks and balances in all satellite jurisdictions in which those charities operate. As with all regulatory regimes, proportionality and an ability to see the bigger regulatory picture will be the key to success. Given the range of agents involved, not to mention the fledgling status of some of the regulators, and the subtle shades of difference in the definition of charitable status between the jurisdictions, pragmatism, as much as neighborly goodwill, will be required if cross-border charitable operations are to flourish.

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<sup>179</sup> See the minutes of the UK and Ireland Charity Regulators Forum, October 2006 (Belfast) and November 2007 (Belfast).

## **APPENDIX – CHARITY ACCOUNTING AND REPORTING REQUIREMENTS IN EACH JURISDICTION**

As explained in sections 2 to 5 above, all four jurisdictions under consideration have established frameworks for charity registration, accounting, and reporting. The requirement that charities in the UK and Ireland publish financial statements, in most cases accompanied by a trustees' report, and a scrutiny report (audit or independent examination) is central to the regulatory arrangements.

However, each jurisdiction has accepted that very small charities cannot be required to achieve the same levels of financial reporting as the largest, and accordingly has established a series of thresholds, largely based on the gross income of the charity. For example, larger charities are required to have their accounts professionally audited, whilst smaller ones are permitted to have a lesser form of scrutiny – an independent examination – but even so the requirements for appointment of independent examiners, and their reporting duties are laid down in the legislation.<sup>180</sup>

The income thresholds at which particular accounting thresholds take effect in each jurisdiction can be summarized as shown in table II. It should be noted that the table indicates the *minimum* requirements, but in each case a charity is free to adopt more rigorous standards of accounting than those necessitated by its income (and in some cases may be required to do so as a condition of its governing document or to satisfy requirements of funders). Also, the table does not take account of additional requirements under company law for charities which are companies, and is based on what would be regarded in each jurisdiction as a “normal charity” – additional requirements may apply to investment fund charities, for example.

As explained in section 1.5, the Irish thresholds are in euro (€) whereas the thresholds for the three UK jurisdictions are in pounds sterling (£). As a result, even when thresholds are numerically similar – such as the audit threshold (£500,000 or €500,000) – Irish charities are actually subject to a lower threshold than those in the UK jurisdictions.

The figures in the table indicate the accounting requirements for charities fully subject to the jurisdiction concerned.<sup>181</sup> Where an amount is shown as £0 or €0 it means there is no lower limit – i.e., *all* charities subject to home regulation in the jurisdiction indicated must comply with the requirement shown.

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<sup>180</sup> In England and Wales, the duties of independent examiners are determined by reg. 31 of the Charities (Accounts and Reports) Regulations 2008 (SI 2008/629) and by the Directions of the Charity Commission under s.43(7)(b) of the Charities Act 1993 which appear in *Independent Examination of Charity Accounts: Examiner's Guide* (Charity Commission 2008 ref CC32). In Scotland, the duties are stated in reg. 11 of the Charities Accounts (Scotland) Regulations 2006 (SSI 2006/218) (OSCR also produces non-statutory guidance). Power to make regulations for the conduction of independent examination is provided in Northern Ireland (under s. 66 of the 2008 Act) and in Ireland (under s. 51 of the 2009 Act). *See also Morgan supra*, n.1.

<sup>181</sup> It follows that no attempt is made to show thresholds applicable to external charities registered under the section 167 regime in Northern Ireland (*see* section 4 above). Moreover, any accounting thresholds under that regime are yet to be established, as they will only be determined by future regulations.

**Table II: Income thresholds determining accounting requirements for charities in each jurisdiction<sup>182</sup>**

<i>Requirement</i> <sup>183</sup>	<i>Income threshold:</i> <sup>184</sup> <i>England &amp; Wales</i> <sup>185</sup>	<i>Income threshold:</i> <i>Scotland</i> <sup>186</sup>	<i>Income threshold:</i> <i>Northern Ireland</i> <sup>187</sup>	<i>Income threshold:</i> <i>Ireland</i> <sup>188</sup>
Must keep proper accounting records	£0	£0	£0	€0
Must publish annual statement of accounts (can be on a receipts and payments basis <sup>189</sup> )	£0	£0	£0	€10,000 <sup>190</sup>
Must register with relevant regulator (local charities in jurisdiction concerned)	£5,000 <sup>191</sup>	£0	£0	€0

<sup>182</sup> For England and Wales, and for Scotland, these are actual thresholds as applicable in April 2009 (i.e., for accounting years *ending* on or after 1 April 2009). For Northern Ireland and Ireland, these are the limits which will apply when relevant provisions of the Charities Act (Northern Ireland) 2008 and the Irish Charities Act 2009 are implemented.

<sup>183</sup> In general the English, Northern Irish, and Irish legislation only triggers a requirement when a threshold is *exceeded* (so, e.g., an English charity with exactly £500,000 income could elect to have an independent examination). However, in Scotland, the requirements are triggered when a threshold is *reached* (so a Scottish charity with exactly £500,000 income would have to have an audit).

<sup>184</sup> These amounts derive from s.3 and ss.41-43 of the Charities Act 1993 (as amended by the Charities Act 2006 and by the Charities Acts 1992 and 1993 (Substitution of Sums) Order 2009 – SI 2009/508). These thresholds now apply to almost all charities regardless of legal form – previously there were a number of different rules for charitable companies (i.e., charities using the legal form of a limited company).

<sup>185</sup> Some of these thresholds took effect only from 1 April 2009 as a result of a review – see *Financial Thresholds in the Charities Acts: Proposals for Change* (London: Office of the Third Sector, Cabinet Office, August 2008). The main effect of the change was (a) to raise the lower threshold at which accounts must be independently examined and at which registered charities must file accounts with the CCEW from £10,000 to £25,000 income, and (b) to raise the threshold at which accruals accounts become compulsory from £100,000 to £250,000 income.

<sup>186</sup> These amounts derive from the Charities Accounts (Scotland) Regulations 2006 (SSI 2006/218) made under s. 44 of the Charities and Trustee Investment (Scotland) Act 2005.

<sup>187</sup> These amounts derive from ss. 63-65 of the Charities Act (Northern Ireland) 2008.

<sup>188</sup> These amounts derive from ss. 47-52 Charities Act, 2009.

<sup>189</sup> In each case the receipts and payments account must be accompanied by a statement of assets and liabilities (or, in Ireland, an income and expenditure accounts plus a statement of assets and liabilities). The receipts and payments basis is not permitted in any of these jurisdictions for charitable companies.

<sup>190</sup> The requirement to publish a statement of accounts does not apply to Irish charitable organizations where the gross income or total expenditure is less than €10,000 (this amount may be increased by regulations up to a figure not exceeding €50,000) – 2009 Act, s. 48(6).

<i>Requirement</i> <sup>183</sup>	<i>Income threshold: England &amp; Wales</i> <sup>185</sup>	<i>Income threshold: Scotland</i> <sup>186</sup>	<i>Income threshold: Northern Ireland</i> <sup>187</sup>	<i>Income threshold: Ireland</i> <sup>188</sup>
Annual report and accounts must be filed with regulator	£25,000	£0	£0	€10,000 <sup>192</sup>
Accounts must be independently examined (lay examiner permitted)	£25,000	£0	£0	N/A <sup>193</sup>
Accounts must be prepared on an accruals basis (as opposed to receipts and payments) complying in most respects with the Charities SORP <sup>194</sup>	£250,000	£100,000	£100,000	€100,000
Independent examiner must be professionally qualified	£250,000	£100,000 <sup>195</sup>	£100,000	€10,000 <sup>196</sup>
Full audit required (by a firm of registered auditors). <sup>197</sup> Accounts must comply fully with Charities SORP <sup>198</sup>	£500,000	£500,000	£500,000	€500,000 <sup>199</sup>

<sup>191</sup> As explained in section 2.1 above, a higher limit of £100,000 currently applies to charities which were formerly exempted from registration.

<sup>192</sup> In Ireland, all charities will be required to submit an annual report to the CRA under s. 52(1) of the 2009 Act. Under s. 52(4), the charity's accounts – on whichever basis they are prepared – must be attached to the report, but the exemptions mentioned in n. 190 *supra* will apply. Below this level the charity must therefore file an annual report but is not required to file accounts.

<sup>193</sup> The Irish legislation uses the term “independent person” rather than “independent examiner,” but in every case, the person must be approved by the CRA (Charities Act 2009, s. 50(3)(a)), which implies a professional qualification requirement.

<sup>194</sup> *Statement of Recommended Practice on Accounting and Reporting by Charities* (Charity Commission, 2005). For charities below the audit threshold, Appendix 5 of the SORP permits some minor simplifications to the framework. In Northern Ireland and in Ireland the regulations are yet to be made, so it is not yet certain whether or not they will refer to the SORP although at least in Northern Ireland this seems likely. As it currently stands, the SORP is a UK accounting standard though under par. 8 it may be applied voluntarily in Ireland. At present, a number of larger charities in both of these jurisdictions apply the SORP, though its use is by no means universal.

<sup>195</sup> In Scotland a professionally qualified independent examiner is required whenever the accounts are on the accruals basis. This necessarily applies to charities of £100,000 income above, but also applies to smaller charities which use the accruals basis either from choice or necessity (e.g., in the case of charitable companies).

<sup>196</sup> Where an Irish charity is not required to produce a statement of accounts (see n. 190) the charity is also exempted from the requirement for audit or independent examination – 2009 Act, s. 50(13).

<sup>197</sup> In England and Wales an audit requirement can also be triggered if the charity has more than £3.26m of assets (even if the income is below £500,000, though only if the income is over £250,000). In Scotland this applies if

As noted in the body of the paper, cross-border charities may well be subject to more than one accounting regime – for example an English charity which is also registered in Scotland must prepare accounts which comply *both* with ss.41-43 of the Charities Act 1993 (as amended) and with s.44 of the Charities and Trustee Investment (Scotland) Act 2005. In practice, because a number of the Scottish thresholds are lower,<sup>200</sup> such a charity needs to focus on the Scottish requirements even if the vast majority of its activity is in England. (In theory, the charity could choose to prepare two separate financial statements – one for CCEW and one for OSCR – but since they would both cover the activities of the whole charity there is little point in doing so. However, where one set of accounts is produced to cover both requirements, the report of the auditor or independent examiner has to be carefully worded to satisfy both regimes.<sup>201</sup>)

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the charity has at least £2.8m of assets (and at least £100,000 income). No assets threshold applies in Northern Ireland or Ireland.

<sup>198</sup> See n. 194 regarding the status of the SORP in Northern Ireland and Ireland.

<sup>199</sup> This amount is to be set by regulations - €500,000 is the maximum figure permissible.

<sup>200</sup> E.g., the starting point at which independent examination becomes compulsory; the level at which accruals accounts become compulsory and the income level at which the independent examiner must be professionally qualified are all significantly higher under the English requirement than under the Scottish rules.

<sup>201</sup> For further details see *Example 3.1: Examiner's unqualified report for a non-company charity also registered with OSCR* in Charity Commission (2008) *Independent Examination of Charity Accounts: Examiners Guide* (ref CC32).