

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

Oonagh B. Breen¹, Patrick Ford² & Gareth G. Morgan³

¹ **Dr Oonagh B. Breen, School of Law, University College Dublin**
Belfield Dublin 4, Ireland
Tel: +353-1-716 8787 E-mail: oonagh.breen@ucd.ie

² **Dr Patrick Ford, School of Law, University of Dundee, UK**
E-mail p.z.ford@dundee.ac.uk Tel: + 44 (0) 1382 384455

³ **Professor Gareth G Morgan, Sheffield Hallam University**
Centre for Voluntary Sector Research,
Stoddart Building, City Campus, Sheffield S1 1WB, UK
Tel: +44 114 225 5231 E-mail: gareth.morgan@shu.ac.uk

ABSTRACT

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 of these jurisdictions have embarked on major changes to their respective regimes of charity law. The Charities and Trustee Investment (Scotland) Act 2005, the Charities Act 2006 (for England and Wales) and the Charities (Northern Ireland) Act, 2008 are now on the statute books – though not yet wholly implemented. A Charities Bill is currently under consideration in the Dáil (the Irish Parliament) – and is expected to be enacted early in 2009.

These four pieces of legislation have much in common: they all seek to introduce modern systems of charity law, with new legal definitions of the “charity”, compulsory registration of “charities”, and more precise requirements for charity accounting – with requirements at various levels based on the income of the charity.

But despite these apparent similarities, there are many differences – which have the potential to create great difficulties where 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 are required *in addition* to register in Scotland if they have regular activities in Scotland. In some cases this is forcing them to amend their governing documents to meet the Scottish definition of “charity.” This means 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 Bill, which follows the Scottish approach, foreign charities operating in Ireland will also need to register with the proposed Charity Regulator. The Charities (Northern Ireland) Act only requires registration by charities subject to the High Court of Northern Ireland, but the fundraising provisions will affect any charitable or benevolent organisation operating in Northern Ireland.

The net effect is that charities operating throughout Britain and Ireland may soon find themselves required to register four times, and may face enormous obstacles in ensuring that their governing documents, their published accounts and their fundraising procedures meet all the requirements. It seems possible that some charities offering cross-border services may actually choose to withdraw services from beneficiaries outside their main jurisdiction, rather than deal with the legal complexities of multiple registrations.

Drawing on the specific experience of the three authors across the four jurisdictions discussed, the paper assesses these issues by summarising the legal framework in each of the four jurisdictions in turn and considering the specific issues for external charities operating there.

The particular experiences of the regimes of the UK and Ireland are then be used as a basis to present broader policy recommendations with regard to the cross-border regulation of nonprofit organisations in any part of the world.

1. INTRODUCTION

1.1 Regulation of the Third Sector

The ways in which countries and regions choose to regulate non-profit organisations (NPOs) can be revealing as to whether such organisations are seen 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 organisations (requiring tight regulation to prevent abuse).

Discussion of the regulation of the voluntary sector often sees regulation primarily as a burden which third sector organisations must bear.¹ Regulation of the sector, however, is not necessarily burdensome, and many features of the latest changes in the UK and Ireland are as a result of active lobbying by the voluntary sector for a modern framework.²

By its nature, such regulation may be either controlling (one might think of, for instance, 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 nonprofits organisations that are less demanding than those applied to for-profit bodies).

In this regard, the current deluge of new regulation in one sphere of the third sector – namely the sphere of charitable activity – provides a valuable opportunity in which to survey critically the different approaches of a number of neighbouring common law jurisdictions.³ In doing so, this paper focuses not so much on the treatment of domestic charities in their home state or region, but rather on each jurisdiction's embrace of (or suspicions of, as the case may be) those external or "foreign" charities that operate within its borders.

¹ See, for example, Rochester, Colin, 2001. *Regulation: The Impact on Local Voluntary Action* in Harris, M & Rochester, C (eds) "Voluntary Organisations and Social Policy in Britain" (Basingstoke: Palgrave).

² See, for example, Pratten, Belinda, 2004. *Charity Law Reform: Implementing the Strategy Unit Proposals* (International Journal of Nonprofit and Voluntary Sector Marketing 9(3) pp191-201).

³ The authors acknowledge that Scotland is not a pure common law jurisdiction – with a legal system which is a hybrid of civil law concepts, its own common law traditions, and statute law – see further in section 3.1 below.

1.2 Charitable Status and Jurisdiction

One unique aspect of NPO regulation is the concept of charitable status. This concept is a constituent element of such regulation in common law jurisdictions, and the particular consequences of its recognition for the regulation of cross-border charitable organisations in Scotland, Ireland, England and Wales, and Northern Ireland is the central theme of this paper.

The significance of charitable status can vary considerably between different countries and jurisdictions. 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 an NPO as a charity in the past has been primarily a matter of tax law. To this end, the relevant tax authority may have awarded a nonprofit organisation charitable tax exempt status based on tax law criteria but no greater conclusions regarding the governance or operation of that organisation 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 the organisation in question meets the higher governance and regulatory standards in the past imposed by the Westminster Parliament and enforced by the Charity Commission. It has also involved extensive legal protection of charitable gifts, where regulators or the courts will intervene if necessary to ensure that charitable property is not mis-directed.

Nevertheless, in all jurisdictions where charitable status is recognised, it is true to say that the third sector can be said to be divided between (a) those third sector organisations which are clearly non-charitable – which are not discussed further in this paper, (b) those voluntary organisations with charitable aims but which have not generally been subject to charity regulation, and (c) existing registered or recognised charities.

As a result of the various recent legislative developments in the UK and Ireland (discussed further below) it appears that the ambiguity between categories (b) and (c) is now starting to be removed, and that this clarification is extending to all jurisdictions of the UK and to Ireland. Except perhaps for small organisations in England and Wales with less than £5,000 income,⁴ every voluntary organisation 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

⁴ Charities Act 1993 ss. 3, 3A, 3B (as amended by ss. 8-9 of Charities Act 2006).

register with the appropriate charity regulator⁵ and subject to the appropriate framework and protection of charity law – or it will be clearly non-charitable.

This creates an important agenda for the third sector, but it would appear to be beneficial to both sides of this divide. Clarity on charitable status may mean that grant-making charitable trusts, for example, will have far fewer problems in deciding whether or not a voluntary group which is not registered as a charity is in fact eligible for charitable funds.⁶ Public sector bodies concerned about the lack of accountability of some voluntary groups in terms of the use of funding may wish to state that grants will *only* be considered for organisations which are registered charities. Such organisations will then, of necessity – under the relevant framework of charity law – be subject to the requirements of producing annual accounts which are subject to audit or independent examination⁷ in a way which would not be applicable to private businesses of similar size.

On the other hand, those third sector organisations which are clearly established as non-charitable will be much less likely to be seen as second class, and potentially confused with voluntary organisations which have simply omitted to register as charities. They will be able to identify themselves clearly as political organisations or social enterprises with non-charitable aims.

1.3 What is a Charity?

In the UK and Ireland, charitable status – even where previously recognised only in tax terms – has long been a matter not of registration, but about the nature of an organisation in terms of its objects and benefits.

Recent legislation, as discussed in this paper, has updated or will update the definition of a charity – but does not alter the central principle of charitable status which in all four jurisdictions is, or is about to be, defined in terms of organisations with specific objects (falling within the so-called “heads of charity” – see below) and meeting the test of public benefit. In England and Wales, for example, an organisation subject to the law of England and Wales

⁵ *These are:* Charity Commission for England and Wales (CCEW), Office of the Scottish Charity Regulator (OSCR), Charity Commission for Northern Ireland (CCNI), or the Charity Regulation Authority (for Ireland) (CRA).

⁶ Morgan, Gareth G. *The Charities Act 2006: A Guide for Foundations and Grant-Making Trusts* (London: ACF, 2007).

⁷ See later sections for further discussion of charity accounting requirements. In each jurisdiction, the accounts of larger charities (over £500,000 income in the UK or €100,000 in Ireland) 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 Morgan, Gareth G. *Charities and Self-Regulation: Theory and Practice in the Role of Independent Examiners under s43(3) of the Charities Act 1993* (The Charity Law and Practice Review 8(3) 31-54, 2005).

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.

Recent legislative changes considered in this paper 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. This increased compulsion on charity registration can have unexpected consequences, which this paper explores – 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

The paper 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 paper to “Ireland” and “Irish”, unless otherwise qualified, relate to the Republic of Ireland.

The primary aim of this paper 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 very 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. The paper argues that these policy insights from the UK and Ireland are likely to be relevant the wider field of NPO regulation in all parts of the world.

1.5 Terminology

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 Scotland it becomes liable to regulation as a charity in Scotland. In the context of Scotland, we describe it as an external charity. Formally, we define an “external charity” as a body established and recognised 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 (€).

1.6 Structure of Paper

Following this introduction, sections 2 to 5 of the paper consider each of the four jurisdictions under discussion. In each of these sections, a brief summary is given of some of the main features of charity law in the jurisdiction concerned, followed by an assessment of how that system of charity law

impacts on external charities operating in that jurisdiction (as defined above). Section 6 reports some early non-statutory arrangements for co-operation between charity regulators in these jurisdictions. Section 7 of the paper appraises the cumulative effect of these provisions while the concluding section (section 8) offers, in light of this evaluation, some recommendations to policy makers.

2. ISSUES FOR EXTERNAL CHARITIES OPERATING IN ENGLAND & 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 centuries⁸ namely that a charity is an institution which is established exclusively for charitable purposes.⁹ A charitable purpose must satisfy two tests:

- (a) the purpose must fall within the list of 13 possible “heads of charity”¹⁰ (this is broadened extensively from the former four heads established in case law¹¹); and
- (b) the purpose must be for the public benefit.¹²

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.¹³ The implications of this for Scotland and Northern Ireland are explored in the following sections of this paper.

The Charity Commission (for England and Wales) (CCEW) is the government department charged with regulation of charities, and for the first time, the 2006 Act gives the Commission a series of objectives, such as increasing public confidence in charities and promoting compliance by charity trustees with their legal obligations.

⁸ Luxton, Philip. *The Law of Charities*. (Oxford: OUP 2001).

⁹ Charities Act 2006 s1.

¹⁰ Charities Act 2006, s. 2(2).

¹¹ The key case is the judgement of Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (hereafter, just referred to as *Pemsel*).

¹² Charities Act 2006, s3.

¹³ Charities Act 2006, s80.

All charities established in England & Wales are required to produce annual statements of accounts which are a public document. 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.¹⁴ Although some attempts have been made by legislators to align thresholds between the three UK jurisdictions (England & 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 or Northern Ireland. Key thresholds are presently as shown by table II.

Table II: Income thresholds determining accounting requirements for charities in England and Wales¹⁵

<i>Thresholds of (income of charity)</i>	<i>Requirement which applies to charities with a annual income above this amount¹⁶</i>
£0	Must publish annual statement of accounts (can be on a receipts and payments basis ¹⁷) – but statement can be approved purely by the trustees (no external scrutiny required).
£5,000	Must register with Charity Commission (unless the charity is excepted or exempt from registration – see below).
£10,000	Accounts must be independently examined. Annual report and accounts must be filed with Charity Commission (unless excepted/ exempt).
£100,000	Accounts must be prepared on an accruals basis, complying in most respects with the Charities SORP. ¹⁸
£250,000	Independent examiner must be professionally qualified
£500,000 ¹⁹	Full audit required (by a firm of registered auditors). Accounts must comply fully with Charities SORP (with any departures disclosed).

¹⁴ For further details, see Morgan, Gareth G *The Charity Treasurer's Handbook: An Introduction to Voluntary Sector Finance and Accounting* (2nd edn, London: Directory of Social Change 2008).

¹⁵ These amounts derive from s3 and ss41-43 of the Charities Act 1993 (as amended by Charities Act 2006) and now apply to almost all charities regardless of legal form. This table shows the position as at 1 April 2008, although further increases are proposed in the consultation paper *Financial Thresholds in the Charities Acts: Proposals for Change* (London: Office of the Third Sector & Cabinet Office, 2007).

¹⁶ A charity may, of course, elect to do more than the minimum requirement for its income level (and in some cases may be required to do so by its governing document, requirements of funders, etc).

¹⁷ The receipts and payments basis is not permitted for charities constituted as companies.

¹⁸ *Statement of Recommended Practice on Accounting and Reporting by Charities* (Charity Commission 2005).

¹⁹ If the charity has more than £2.8M assets, the audit requirement is triggered at £100,000 income.

Under the 1993 Act, the Commission is given extensive powers to institute inquiries into charities,²⁰ 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.²¹ Nevertheless, it is now possible to challenge most of the Commission's decision, without going to Court, by means of an appeal to the Charity Tribunal.²²

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 organisations in England & Wales see charity registration as an optional badge, this is not the case in law: if an organisation is a charity, registration is normally compulsory if its income is over £5000 pa.²³ Some charities (for example, places of worship, armed forces charities) are for the time being excepted from this requirement – 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 the 2006 Act will gradually remove the category of excepted charities (initially for those above £100,000 income, though this limit will then be reduced).²⁴ There is also a category of “exempt charities”, which includes universities and charities constituted as community benefit societies.²⁵ 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” which can take the place of the Charity Commission in regulating their use of charitable funds.²⁶

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.

²⁰ Charities Act 1993, s8.

²¹ Charities Act 1993, ss9-19B – as amended.

²² Charities Act 1993, ss2A-2D, inserted by Charities Act 2006.

²³ Charities Act 1993, s3 – as amended by the Charities Act 2006 (Interim Changes in threshold for registration of small charities) Order 2007 (SI 2007/789).

²⁴ Charities Act 2006, s9.

²⁵ 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, s1(9).

²⁶ Charities Act 2006, ss11-13.

The new definition of “charity”²⁷ refers to an institution which is established for charitable purposes only and which is subject to the control of the High Court²⁸ 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.²⁹

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 fundraising. Under s63 of the 1992 Act it is an offence 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 offence is created if the term “registered charity” were used by an external charity in the context of promoting its work to potential beneficiaries.

However, 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 (CCEW) are almost entirely restricted to charities established under the law of England and Wales.

One small exception to this lies in sections 10 to 10C of the 1993 Act (as amended) which relate to the powers of the Charity Commission in relation to the disclosure of information – these powers are UK wide.³⁰ It follows that the CCEW may disclose information to other charity regulators in the UK (and to HM Revenue and Customs) and may receive disclosures from such bodies. The CCEW is also given specific powers³¹ 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 – and they only apply to Scottish charities, not to other external charities – in most cases where a concern arises in England and Wales with regards to the activities of an external charity

²⁷ Charities Act 2006, s1(1).

²⁸ *i.e.* The High Court of England and Wales.

²⁹ Charities Act 1993 s. 96(1) as amended.

³⁰ Charities Act 1993, s100(3) as amended.

³¹ Charities Act 1993, s80, as amended.

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 proposed Charity Commission for Northern Ireland (CCNI) as appropriate – or to other UK public authorities where appropriate.³² But if the external charity were established outside the UK – for example an Irish charity causing concern in England & Wales – the Act does not appear to permit disclosures even to a body such as the Irish Charities Regulatory Authority (CRA).

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 & 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.³³ 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 the proceeds is to be applied for charitable, benevolent or philanthropic purposes”³⁴ and to charitable institutions and persons or bodies connected to them.³⁵ The terms are defined to include any institution established for such purposes³⁶ – 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 & 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 promise that the funds would be applied for charitable purposes. There is, however, no power in England & Wales to require external charities to prepare financial statements or to account to the Charity Commission in respect of their charitable funds.

³² Charities Act 1993, s10C, as amended.

³³ 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) is not working effectively after five years.

³⁴ Charities Act 2006, s45(2).

³⁵ Charities Act 2006, s69.

³⁶ Charities Act 2006, s47(1) and the future s64A(7)(b) of the Charities Act 1992 which will be inserted by s69 of the Charities Act 2006.

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”,³⁷ 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.³⁸ 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,³⁹ the English definition, already familiar for tax purposes, was used to define “Scottish charities” for regulatory purposes also. Under the Act a “Scottish charity” was a body established under the law of Scotland (or managed or controlled from Scotland) and recognised by the United Kingdom tax authorities as eligible for charitable tax relief.⁴⁰

The new devolved Scottish Parliament,⁴¹ when it enacted the Charities and Trustee Investment (Scotland) Act 2005 by way of reform of the 1990 Act regime, chose to sever the connection between the United Kingdom tax system and the regulation of charities in Scotland, and devised as the touchstone of Scottish charitable status for regulatory purposes a new “charity test”,⁴² adapted from the English definition of charity but different from it. Notable differences between the charity test and the updated English definition are to be found in their treatment of sports organisations,⁴³ of organisations campaigning for changes in the law or government policy,⁴⁴ and of organisations subject to a greater or lesser degree of ministerial control.⁴⁵ These and other differences mean that a body which meets one test or definition may not necessarily meet the other.

Apart from the charity test, the principal innovation of the 2005 Act was to set up a statutory regulator of charities in Scotland, OSCR,⁴⁶ modelled broadly on

³⁷ 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.

³⁸ *Special Commissioners for the Purposes of Income Tax v Pemsel* [1891] AC 531. 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.

³⁹ Scottish public trusts are supervised at common law by the Court of Session. The Court of Session is a civil court broadly equivalent to the High Court in England and Wales.

⁴⁰ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s.1(7).

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

⁴² Charities and Trustee Investment (Scotland) Act 2005, s.7.

⁴³ *C.f.* 2005 Act, s. 7(2)(h) and 7(3)(c) with Charities Act 2006, ss.2(2)(h) and (3)(d).

⁴⁴ *C.f.* 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).

⁴⁵ *C.f.* 2005 Act, s.7(4)(b) with *Construction Training Board v Attorney-General* [1973] Ch 173.

⁴⁶ 2005 Act, s.1. “OSCR” stands for “Office of the Scottish Charity Regulator”.

the CCEW. OSCR maintains a Scottish charity register, entering in it those bodies which apply for registration and meet the charity test.⁴⁷ In contrast to the position in England and Wales, a body only becomes a charity in Scotland on being entered in the register.⁴⁸ 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.⁴⁹ Registration is voluntary, but there are strong incentives to registration in the foundational principle of the 2005 Act that only bodies entered in the register may represent themselves as charities in Scotland,⁵⁰ and in the subsidiary provision that only bodies entered in the register are entitled to automatic “charitable” relief from non-domestic rates.⁵¹ 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.⁵² The requirement to register in order to use the designation “charity” applies regardless of the size of the body in question.

Bodies entered in the register are subject to a charities compliance regime which involves, in particular, keeping accounts and reporting annually to OSCR.⁵³ To assist it in monitoring and enforcing the regime, OSCR has powers of investigation, and short-term powers of intervention of its own,⁵⁴ such as the power to suspend charity trustees.⁵⁵ OSCR may also apply to the Court of Session for exercise of the court’s fuller powers of intervention,⁵⁶ such as power to remove charity trustees.⁵⁷ 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.⁵⁸

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

⁴⁷ 2005 Act, s.3.

⁴⁸ 2005 Act, s.106

⁴⁹ *C.f.* Charities Act 2006, s.1(1): also *Gaudiya Mission v Brahmachary* [1998] Ch 341.

⁵⁰ 2005 Act, s.13.

⁵¹ Local Government (Financial Provisions etc) (Scotland) Act 1962, s.4 as amended by 2005 Act, s.104 and sched 4, para 2. The overall effect is that charitable relief from local taxation is granted by reference to the charity test, but that charitable relief from United Kingdom-level taxation continues to be granted by reference to the English definition of charity.

⁵² 2005 Act ss.28, 31, 32 and 34.

⁵³ 2005 Act, s.44 and regulations.

⁵⁴ 2005 Act, ss.28, 31, 32.

⁵⁵ 2005 Act, 31(4).

⁵⁶ 2005 Act, s.34.

⁵⁷ 2005 Act, s.34(5)(c).

⁵⁸ 2005 Act, ss.75-78.

charitable, benevolent or philanthropic purposes.⁵⁹ The controls deal, among other issues, with the relationship between benevolent bodies and professional fundraisers, with the prevention of unauthorised fundraising, and with collections of money or goods from the public.⁶⁰

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.⁶¹ First, an external charity may operate within the constraints of the section 14 exception by carrying out its activities in Scotland without the benefit anything more than a minimal territorial 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 electronically or by post without using premises in Scotland – provided that any references to charitable status refer to the jurisdiction where it is established.

Secondly, 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 which registers with OSCR.⁶² 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, might necessitate an alteration of the

⁵⁹ 2005 Act, s.79.

⁶⁰ 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.

⁶¹ OSCR regards the section 14 exception as covering bodies with “only an occasional connection” with Scotland which does not amount to a “significant operation”: OSCR, *Guidance on Registration*, Section 2; see also Section 4.2.a.

⁶² 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.

charity's governing instrument since, as also mentioned, the charity test does not coincide exactly with the English definition of charity.⁶³ 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 accounting and reporting, dual compliance is likely to lead to additional if not double devotion of resources to compliance⁶⁴.

In practice, therefore, an external charity contemplating activity in Scotland under the banner of "charity" has three clear options: to squeeze into the section 14 exception; to go the whole hog of registration with OSCR and dual compliance;⁶⁵ or not to be active in Scotland after all.

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,⁶⁶ and is authorised to disclose information to those regulators in the exercise of its functions.⁶⁷ OSCR may also, on a reference from the CCEW, apply to the Court of Session for measures to protect moveable 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.⁶⁸

4. ISSUES FOR EXTERNAL CHARITIES OPERATING IN NORTHERN IRELAND

⁶³ 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).

⁶⁴ In particular, for small and medium-sized charities, the accounting requirements are frequently more onerous under the s44 of the 2005 Act – as a result of the Charities Accounts (Scotland) Regulations 2006 – than they would be under the law of England and Wales. For example, in E&W, charities up to £10,000 income are not obliged to have their accounts independently examined, or even to submit them to the CCEW – but this concession does not apply if the charity is registered in Scotland. Also, in E&W, the independent examiner (IE) only has to be professionally qualified if the charity's income is over £250,000, but if registered in Scotland, a qualified IE is mandatory whenever "fully accrued accounts" are prepared, which is compulsory at £100,000 income and above.

⁶⁵ A feature of the compliance regime which may act as a disincentive to registration is the "asset-lock" which applies in the eventuality of subsequent de-registration: 2005 Act, s.19. On removal from the register (which may be voluntary) a 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 to a diluted version of the Scottish compliance regime in respect of those assets. Arguably this provision could be challenged in the case of an external charity as effective only over its Scottish assets: Scotland Act 1998, s. 29(2)(a) and 101(2).

⁶⁶ 2005 Act, s.20.

⁶⁷ 2005 Act, ss.24 and 25.

⁶⁸ 2005 Act, s.36. Charities Act 1993, s.80, contains reciprocal provisions.

4.1 The Proposed Framework of Charity Law for Northern Ireland

The Charities (Northern Ireland) Act 2008 received Royal Assent on September 9, 2008. The Act draws on the experiences of the recent Scottish and the English and Welsh charity legislation. The main provisions of the Act introduce a new regulatory framework for charities in Northern Ireland with the establishment of the Charity Commission for Northern Ireland (CCNI), a new register of charities, the adoption of a statutory definition of charitable purposes, broadly reminiscent of the English statutory definition⁶⁹ complete with the adoption of a public benefit test that draws inspiration from the Scottish test.⁷⁰ 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,⁷¹ will enjoy wide powers to investigate apparent misconduct in the administration of charities, to suspend or remove trustees, freeze charitable assets⁷² and determine applications for public collection permits.⁷³ 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.⁷⁴

4.2 Impact on External Charities Operating in Northern Ireland

Section 1 of the Charities (Northern Ireland) Act defines ‘charity’ as limited to an institution that is established for charitable purposes only and falls to be subject to the control of the 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 registration⁷⁵ and the concomitant disclosure⁷⁶ and reporting requirements⁷⁷ that flow therefrom. 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.⁷⁸ It follows that a charity established

⁶⁹ Compare section 2 of the Charities (Northern Ireland) Act 2008 with s. 2 of the English Charities Act 2006.

⁷⁰ Compare section 3 of the Charities (Northern Ireland) Act 2008 with s.8 of the Charities Trustee and Investment (Scotland) Act 2005.

⁷¹ 2008 Act, Part 4.

⁷² 2008 Act, Parts 6, 8 and 9.

⁷³ 2008 Act, Part 13.

⁷⁴ 2008 Act, Part 3.

⁷⁵ 2008 Act, s. 16.

⁷⁶ 2008 Act, ss. 19 and 70.

⁷⁷ 2008 Act, ss. 66 and 69.

⁷⁸ See *Gaudiya Mission v. Brachmachary* [1997] 4 All ER 957 (C.A.) in which the Court interpreted s. 96(1) of the Charities Act 1993 – the predecessor of s. 1 of the 2006 Act – to mean that the definition of ‘charity’ did not extend to a charity established under the laws of another legal system.

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 that 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 organisations and the Department will also have the power to apply or disapply any of the provisions of the Charities (NI) Act to these organisations, 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 Charities (NI) Act has no comparator provision amongst its English, Scottish or Irish neighbours. 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. Such amendments caused difficulties for the CCEW, which resulted in its representations to Northern Ireland not to replicate this procedure. The underlying purpose of section 167 seems to be to recognise as “charitable” organisations 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.⁷⁹ The practical effect of this provision will allow for organisations 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 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

⁷⁹ Testimony of Mr. Seamus Murray, Department of Social Development, Committee for Social Development, Charities Bill, Hansard, February 28, 2008.

Great Britain, since Irish or, indeed, French or German charities if operating in Northern Ireland will be caught equally by the definition of ‘charity’ in section 1 and will thus arise for consideration under section 167 too. Indications are that where a state has a rigorous charity regulation regime in place, the NI Department of Social Development will direct the CCNI to recognise 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 (Northern Ireland) Act does not give external charities registered in another jurisdiction an unconditional passport to operate in Northern. 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.⁸⁰ The Northern Ireland accounting requirements are exacting in so far as it is clear on the face of the legislation 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 (Northern Ireland) Act 2008.⁸¹

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 being required.

⁸⁰ *Ibid.*

⁸¹ Ireland: see n. 113 *infra* and accompanying text; Scotland: 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) NORTHERN IRELAND LEGAL QUARTERLY 201.

Although Irish charities with substantial operations in Northern Ireland that qualify as 167 institutions will be subject to the provisions of SORP 2005 in preparing their accounts the higher audit thresholds applicable under section 66 of the 2008 Act are likely to benefit those entities and may relieve them of the need to submit audited accounts in relation to their NI operations.⁸² Additionally, section 167 gives the Department some leeway to set lower levels of financial reporting for external charities that already file full accounts in another state. What cannot be said with any certainty at present is the extent to which the CCNI will exercise its statutory powers to investigate or oversee external charities.

In terms of broader international cooperative powers, section 24 of the Charities (Northern Ireland) Act 2008 provides a right of disclosure by or to the CCNI that extends to public bodies beyond the territory of the United Kingdom.⁸³ 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. 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 office holder 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 (Northern Ireland) Act expressly providing for co-operation between the CCNI and other public bodies or office holders, whether based in Northern Ireland or outside of the UK.⁸⁴ 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 neighbouring jurisdictions have not had modern charity regulatory regimes much less comparative charity regulators with which the Charity Commission could conceivably have cooperated.

⁸² Most of the thresholds in sections 65-66 of the Northern Ireland Act are the same as for England and Wales – *see* table II above. But 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 requirements are closer to those in Scotland.

⁸³ 2008 Act, s. 24(1).

⁸⁴ By contrast, s.20 of the Charities Trustee and Investment (Scotland) Act, 2005 and ss. 32 & 33 of the Irish Charities Bill 2007 provide for such external regulatory cooperation.

The only provision relating to cross-border cooperation in the Charities (Northern Ireland) Act is to be found in section 56 and it is limited to cooperation within the UK to the exclusion of Ireland.⁸⁵ The CCNI, may, on a reference from either OSCR or the CCEW, apply to the High Court for Northern Ireland for measures to protect moveable 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.⁸⁶ The generosity of asset protection is extended only to UK neighbours and does not apply to charities established in the Republic of Ireland.⁸⁷ Neither Scotland nor England and Wales afford a similar reciprocity of asset protection to Northern Ireland in their charity legislation.⁸⁸ This oversight most likely is due to the order of the statutes' respective enactment but the absence of full reciprocity is unfortunate, nonetheless.

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

5.1 The Anticipated Framework of Charity Law in Ireland

The Irish Charities Bill, 2007 will introduce a new regulatory framework for charities in Ireland, thereby amending the existing Charities Acts 1961-1973.⁸⁹ The Bill 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 proposed in Northern Ireland. A register of

⁸⁵ In this regard, section 56 of the Charities (Northern Ireland) Act 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.

⁸⁶ 2008 Act, s. 56.

⁸⁷ 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 harmonising 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 and commercial matters governs the circumstances in which preliminary orders, such as freezing orders can be granted in signatory jurisdictions.,

⁸⁸ See Charities Trustee and Investment (Scotland) Act 2005, s. 36 and English Charities Act 1993, s. 80.

⁸⁹ References to the Charities Bill, 2007 are to the Bill as passed by Dáil Éireann (the lower House of the Irish Parliament) on November 5, 2008 and available from <http://www.oireachtas.ie/documents/bills28/bills/2007/3107/B31b07D.pdf> (last accessed December 31, 2008). The upper House, Seanad Eireann, made further amendments to the Bill in November 2008 before passing the legislation in December. The Bill will be returned to the Dáil in early 2009 for final consideration before being signed into law by the President of Ireland.

charities will be established under the Bill⁹⁰ and registered charities will be subject to certain annual reporting requirements⁹¹ as well as to the supervisory oversight of a new statutory regulator, the Charities Regulatory Authority (hereinafter the ‘CRA’). The CRA will take over both the protective responsibilities of the Attorney General⁹² and the supportive role of the Commissioners of Charitable Bequests and Donations towards charities.⁹³ For the first time in Ireland, the new regulator will monitor charities from a charity governance perspective as distinct purely from taxation or company law perspectives. The Irish Charities Bill provides that the functions of the CRA will include the protection of charitable assets and the facilitation of the better administration of charitable organisations and trusts.⁹⁴

5.2 Issues for External Charities Operating in Ireland

To this end, all organisations that wish to call themselves charities, regardless of size or organisational form, will be required to register with the Charities Regulatory Authority (CRA).⁹⁵ Subject to a limited exception for external charities, discussed below, it will be an offence to call oneself a charity and not be registered.⁹⁶ Traditionally, the availability of tax relief and the general credibility and confidence that the public place in such entities are two reasons said to motivate organisations to seek ‘charitable status’ and therefore to buy into a regulatory regime.

This label ‘charitable status’ is used advisedly here since it currently signifies nothing more in Ireland than that Revenue Commissioners have granted the organisation tax exempt status for charitable purposes notwithstanding that many members of the public mistakenly believe this label to be an indication of quality of the governance of the organisation. The ‘charitable status’ label will become more meaningful in the latter regard after the enactment of the Charities Bill since it will imply registration with the CRA.⁹⁷ Registration with the CRA will not, however, guarantee an organisation tax-exempt status since the Charities Bill decouples the awarding of tax exemption (which will

⁹⁰ Irish Charities Bill, 2007, s. 39.

⁹¹ 2007 Bill, ss. 48 & 49 (annual statement of accounts) and s. 52 (annual reports).

⁹² 2007 Bill, s. 38 (transfer of functions of Attorney General to CRA).

⁹³ 2007 Bill, Part 6 (dissolution of the CCDB and transfer of functions to the CRA).

⁹⁴ 2007 Bill, s. 14.

⁹⁵ 2007 Bill, 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.

⁹⁶ 2007 Bill, s.41.

⁹⁷ Subject to the exception set down in s. 46(6), it will be an offence to hold an organization out as a charity and not be registered with the CRA under the Charities Bill, 2007.

remain within the sole gift of Revenue) from charitable status (now to be determined by the CRA).⁹⁸

With regards to the public confidence that flows from the bestowal of charitable status on an entity, at present there is little in Ireland's existing regulatory regime to justify this confidence in organisations enjoying tax exempt status for charitable purposes. The Charities Bill registration regime will bring greater credence to this claim of faith since, subject to s42, only registered charities will be entitled to wear the charity label in future. The feel good factor associated with the label of charity 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 it currently lacks.⁹⁹ However, beyond the right to use the charity label, registration with the CRA *per se* will bestow few other rights on charities.

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;¹⁰⁰ to maintain proper books of account;¹⁰¹ and to make annual returns to the CRA in the case of unincorporated charities.¹⁰² Charities will also find themselves under an onus to participate in a non-statutory fundraising regulation regime since its failure would trigger legislative intervention and the imposition of a statutory framework. 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 organisation's declared charitable purposes or its charity name.

⁹⁸ 2007 Bill, s. 7.

⁹⁹ To this end, s.46(2) of the revised Bill currently before the Irish Parliament makes it an offence 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 organisation. 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.

¹⁰⁰ 2007 Bill, s. 52.

¹⁰¹ 2007 Bill, s. 47.

¹⁰² 2007 Bill, s. 48. Under s. 49 of the Bill, 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.

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 an ‘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 offence under Irish law if it satisfies the following conditions:

- it is established under the law of a place other than the State¹⁰³ and under that law it is entitled to be described as a charity;
- its centre 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 advert 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 the section will have quite a narrow application and the provision drew little comment at Committee Stage in the Dáil (the Irish Parliament), perhaps precisely for this reason.¹⁰⁴ An external charity, properly recognised 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 toe hold (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.

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 Scottish Charity Trustee and Investment Act 2005.¹⁰⁵ 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, substantial activity is necessary to trigger a need for registration. This approach has been

¹⁰³ i.e. the Republic of Ireland.

¹⁰⁴ Irish Charities Bill 2007, Committee Stage, Dáil Debs, January 22, 2008.

¹⁰⁵ See section 3.2 above.

expressed both in policy memoranda preceding the Bill and in subsequent guidelines from the Office of the Scottish Charity Regulator (OSCR) on the Act's implementation.¹⁰⁶ In reviewing the extent of an organisation'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.

To date, neither the Explanatory Memorandum to the Irish Bill nor the parliamentary hearings on the Bill give 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 42(6). It is thus unclear, for instance, whether a Northern Ireland registered charity that holds a once-off fundraising event in Ireland will be obliged to register under s39 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 merely registered charities.¹⁰⁷

The options for external charities that have, or would like to have, a presence in Ireland and which will not be able to satisfy the opt-out provisions of section 46 (6) are two-fold: either to operate as a nonprofit organisation 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 permit¹⁰⁸ and indeed could still apply for charitable tax exempt status from Revenue, which presently is not dependent upon registration with the CRA in the first place.¹⁰⁹ If, however, registered charitable status is your preferred option an external charity may still experience a number of difficulties in registering under Irish law given other provisions of the Irish Charities Bill.

¹⁰⁶ See 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. 81.

¹⁰⁷ 2007 Bill, s. 64, read in conjunction with s. 2.

¹⁰⁸ The Irish Charities Bill 2007 only regulates public collections for charitable purposes and not for benevolent or nonprofit purposes and thus is narrower than the Charities (Northern Ireland) Act 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 Bill 2007 so that a charity engaged in the street selling of scratch cards will not be regulated by the Charities Bill either.

¹⁰⁹ It is likely that prior registration with the CRA may in future become a pre-condition 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.

The first difficulty concerns the types of charitable purposes that the CRA will recognise 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.¹¹⁰ In contrast to neighbouring 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 (which is 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 neighbouring 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 interpretation in Ireland, excluding reference to faiths that have no belief in a god at all (as is now the case in the United Kingdom).¹¹¹ 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 organisation is already registered.¹¹²

Once registered, an external charity will be required to file annual accounts and an annual report on its activities with the CRA. 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,¹¹³ though conceivably this is an issue that will be dealt with by regulation. Even assuming that the relevant accounts will relate only to Irish activities, it is worth bearing in mind that the Irish Charities Bill imposes lower audit thresholds than its neighbours, which once exceeded will require an external charity to submit audited accounts to the CRA. Section 50 requires that registered organisations with an annual gross income or expenditure in excess of an amount to be prescribed not exceeding €500,000 shall submit audited accounts, whereas the audit threshold in the UK

¹¹⁰ Compare s.3 of the Irish Charities Bill 2007 with s.2 English Charities Act 2006, s. 7 Charities and Trustee Investment (Scotland) Act, 2005 and section 2 Charities (Northern Ireland) Act 2008.

¹¹¹ 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 (Northern Ireland) Act 2008.

¹¹² 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);

¹¹³ 2007 Bill, s.47 (1). *C.f.* s. 167 of the Charities (Northern Ireland) Act 2008, which makes specific reference to the regional nature of the accounts to be filed.

stands at the higher figure of £500,000.¹¹⁴ The specifics of the annual reports will be determined by Ministerial regulation¹¹⁵ and so there is thus room for further variation in these requirements from those of neighbouring jurisdictions. This differential will be particularly troublesome for Northern Ireland charities that operate on an all-island basis and that are required to register with the CRA.¹¹⁶

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 Irish drafters of the Charities Bill 2007 looked no further than their own borders when it came to facilitating charity practices. And yet other provisions of the Bill indicate that this is not strictly 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 offence under the law of another state. Section 33 enables the CRA to enter into arrangements with both domestic and foreign regulators.¹¹⁷ 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 in so far 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. . . .”¹¹⁸

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.¹¹⁹ It allows for the conclusion of arrangements between the CRA and other charity regulators relating to both information disclosure (presumably in situations

¹¹⁴ English Charities Act 1993 s43 – as amended by Charities Act 2006.

¹¹⁵ 2007 Bill, s. 52(1).

¹¹⁶ 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.

¹¹⁷ See 2007 Bill, s. 33 (6)(b) which specifically makes reference to the inclusion of foreign statutory bodies in the definition of “relevant regulator.”

¹¹⁸ Ibid.

¹¹⁹ 2007 Bill, 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 organisations or charitable trusts are vested under the law of a state other than the State.”)

falling short of the suspected commission of an offence, 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.¹²⁰ 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 CO-OPERATION 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*.

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 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 NICVA and the Institute of Fundraising and Irish charity and fundraising representatives and a lawyer 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*

¹²⁰ 2007 Bill, s. 34 (1).

and codes of practice was published in May 2008 and is currently under consideration by the Northern Ireland Department of Social Development.

To date, Northern Ireland has not committed itself to follow the practice in Great Britain of fundraising self-regulation under the Fundraising Standards Board so it may be that matters relating to fundraising in future will not cause issues for charities established in Ireland or Northern Ireland respectively and that external issues will only arise in relation to external charities from Great Britain.

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 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 is even now being finalised in Northern Ireland and Ireland. There will shortly, therefore, be four parallel charities regulation systems in force in the four neighbouring jurisdictions. In practice, there will be some organisations, 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 organisations established as charities outside the four jurisdictions which seek to be active in one or more of them.¹²¹ 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 paper is to examine what the existence of these four approaches is likely to mean for organisations 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.

¹²¹ For examples see *Gaudiya Mission v Brahmachary* [1998] Ch 341 (India); *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1956] AC 39 (New York State, USA).

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 organisation 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,¹²² keeping annual accounts and reporting to the regulator on their stewardship in fulfilling their objects, 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 organisations 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 also do the accounting and reporting requirements. Such differences mean that an organisation registered as a charity in one jurisdiction may not necessarily be eligible for registration in another and that reports and accounts which satisfy the compliance regime in one system may not necessarily satisfy the equivalent regimes elsewhere.

7.3 Overview of four approaches to external charities

If the registration and reporting requirements are to be 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 summarised 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

¹²² In England and Wales not all charities are required to register: *see* section 2.1 above.

charities regulation in the three neighbouring jurisdictions) is on the protection of donors. An organisation established as a charity outside England and Wales may raise funds within the jurisdiction, provided it abides by the fundraising controls applicable to local organisations, 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 organisation is a “registered charity” in this sense. The effect is that donors in England and Wales may give to an organisation 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 organisation 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 register¹²³ – 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, that is, the members of the public in England and Wales at the receiving end of the benefit conferred by such charities, the system in England and Wales offers minimal protection since external charities will not (normally) be subject to the CCEW’s jurisdiction. Beneficiaries who may have a complaint against an external charity must, in principle, refer it to the authorities of the charity’s home jurisdiction.¹²⁴ 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 organisations based outside the jurisdiction.¹²⁵ 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.

¹²³ Because not “subject to the control of the High Court in the exercise of its jurisdiction with respect to charities”: see Charities Act 2006, s1(1) and *Gaudiya Mission v Brahmachary* [1998] Ch 341, 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.

¹²⁴ The principle is explored in *Gaudiya Mission v Brahmachary* [1998] Ch 341. 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.

¹²⁵ See *Gaudiya Mission v Brahmachary* [1998] Ch 341, per Mummery LJ 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. A charity external to Scotland may raise funds within the jurisdiction provided it abides by the fundraising controls applicable to local organisations, 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 organisation which 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.¹²⁶ 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 emphasised 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 which 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 organisations 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.

¹²⁶ 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.

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. 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,¹²⁷ 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 registered with the CCNI. There is a criminal sanction against any person soliciting funds in association with a false claim that an organisation 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.¹²⁸ If (as it appears to) this latter expression includes fundraising, the effect will be to require an external charity which has purposes which 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. In contrast to the position in Scotland, the prohibition against an organisation calling itself a charity unless registered or covered by the exception is policed by a criminal

¹²⁷ And may not normally register as a charity in Northern Ireland: the position is parallel to that in England and Wales.

¹²⁸ Charities (Northern Ireland) Act 2008, s. 167(1).

sanction rather than civil enforcement,¹²⁹ 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 co-operation 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 organisations 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 fundraising context or otherwise, and however well regulated elsewhere, should be subject to the Scottish compliance regime,¹³⁰ 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 which 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 – which require external charities to submit to a local compliance regime additional to the one in their own jurisdiction.

¹²⁹ 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.

¹³⁰ 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.

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 summarised are likely to mean for organisations 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 and subject to the CCEW’s compliance regime;¹³¹ 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.¹³²

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

¹³¹ Unless it is a charity exempt or excepted from registration.

¹³² 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.

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 organisation established outside the four jurisdictions – for instance a charity established in one of the United States of America – but which 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 neighbouring jurisdictions tells immediately, even for organisations 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. If there is to be duplication of compliance effort on the part of the organisations themselves, there is likewise to be duplication of regulatory effort on the part of the authorities. Yet, will the interests of donors and beneficiaries in any given jurisdiction really be better protected as a result of a charity’s being fully registered and regulated in more than one of the four jurisdictions?¹³³ Has sufficient account 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 which 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 there must be some scope for harmonising the efforts of the regulators, perhaps by means of fully developed mutual recognition arrangements and a properly coordinated scheme of cooperation on the sharing of information and inter-jurisdictional enforcement.

¹³³ 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?

8. CONCLUSIONS AND POLICY IMPLICATIONS

This paper has sought to analyse the position of external charities that wish to fundraise, provide services or to 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 contained in this case study provide a rich source of cross-border charity activity for examination; second, the relative recency 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 or Charities Bill. Although the paper has dealt with cross-border charities as being charities that originate in Scotland, England & 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 section 7 of this paper will be relevant to external charities in the broadest meaning of the term whether established in another European Member State, the US, Canada or Australia that choose to operate in the UK or Ireland.

As this paper 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 neighbouring jurisdictions. As the law thus stands, a charity wishing to operate on a cross-border basis will be subject to multiple registration regimes and different accountability requirements with little or no regard being had to oversight currently exercised over that charity in its home jurisdiction. Three of the four (the exception being England & Wales) make specific provision for the recognition of external charities. For the most part, the English legislation is silent on the issue of external charities. Silence in this regard is a double-edged sword: on the surface, it avoids the complexities of multiple registrations for external charities found in the other statutes but it offers little comfort to English donors with regards to CCEW validation of such charities wishing to operate in England and Wales. In the case of the other three regimes, their practical application is likely to lead to multiple filing requirements for cross-border charities including an onus of supervision on each Regulator without necessarily a clear indication of the nature of powers open to that Regulator to pursue charitable wrong-doing in the administration of an organisation based outside the Regulator's own jurisdiction. A further drawback is the absence of coordinated statutory powers of cooperation between the various Regulators in pursuance of their oversight functions in all

four jurisdictions. Overall this is an outcome – this paper has argued – which will result in 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 realisation of this outcome is dependent upon two factors, the first of which is the existence of general consensus that charities are trust-worthy institutions deserving of facilitation as opposed to self-serving organisations the operations of which require heavy policing. The second precondition for a functioning mutual recognition regime is the requirement that each state holds the regulatory standards of its neighbours in esteem. The first factor may be more easily overcome than the second. Given that Scotland, Northern Ireland, and Ireland do not yet have an established track record in charity governance it may yet be premature for the latter precondition to be easily satisfied 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. This non-statutory forum, established in 2006, meets on average three times a year and brings together officials from the Charity Commission for England and Wales, OSCR and 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 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.¹³⁴ To date, there has been one meeting of the Cross Border Monitoring Sub Group, attended by the three UK regulators, with the general consensus being that the Sub Group would be a good vehicle for further discussion about reducing the overarching burden of administration / regulation, and developing a common ground approach on

¹³⁴ See the minutes of the UK and Ireland Charity Regulators Forum, October 2006 (Belfast) and November 2007 (Belfast).

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 neighbourly goodwill, will be required if cross-border charitable operations are to flourish.