Regulatory Reforms: England & Wales, Ireland, Northern Ireland and Scotland

The Charity Commission for England & Wales states that charity regulation is necessary for the following reasons:1

- to ensure that charities meet the legal requirements for being a charity, and are equipped to operate properly and within the law;
- to check that charities are run for public benefit, and not for private advantage;
- to ensure that charities are independent and that their trustees take their decisions free of control or undue influence from outside; and
- to detect and remedy serious mismanagement or deliberate abuse by or within charities.

Following the lead given by England & Wales, the main changes to the regulatory framework in each of the other three jurisdictions of these islands have been: establishing a new independent lead regulatory body; modifications to the role of the tax-collecting agency; setting up a Register of Charities together with the introduction of new reporting and supervisory regimes; modifying the regulatory regime for fundraising; establishing a Charity Appeals Tribunal; and adjustments to the traditional roles of court and Attorney General. Additional jurisdiction specific changes, some particular to England & Wales, were also introduced.

The question now is – to what extent does the reformed regulatory regime in each of the four jurisdictions satisfy the above requirements?

(A)
THE REGULATORY REFORMS

1. Regulating Charities: a new Lead Regulatory Body

Decoupling the determination of charitable status from the regulatory regime applicable to all taxable entities, and vesting statutory responsibility for the former in a new and independent government body, was a strategy first formulated by government in England & Wales and implemented by it when it established the Charity Commission.2 This initiative has very recently been followed in the other three jurisdictions but calibrated in each case to reflect the particular nature of their government/sector partnership. New regulatory bodies, with powers of varying equivalence to those of the Charity Commission are now established in Ireland, in Scotland, and in Northern Ireland.

1.1 Decoupling the Determination of Charitable Status from Tax Exemption

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1 See, the Charity Commission, The Charity Commission And Regulation (Version 06/03) at http://www.charitycommission.gov.uk/spr/regstance.asp

2 The Charitable Trusts Act 1853 included provisions for establishing the Charity Commissioners for England & Wales.
The extent to which this strategy would in practice facilitate charities and promote growth of the sector in each jurisdiction, depended entirely upon the authority vested in the new body relative to that retained by the Revenue agency.

In England & Wales, the Charity Commissioners have long been central to the regulatory framework for charities, notwithstanding the involvement of other government agencies and the role of the courts. The Charities Act 1992\(^3\) sought to improve the monitoring, supervision and support of charities by providing the Charity Commission with enhanced registration and regulatory powers. The Charities Act 1993, consolidating the reforms of the 1992 Act with the provisions of both the 1960 Act and the Charitable Trustees Incorporation Act 1872, modernised and strengthened the Commission’s powers and considerably reinforced charity regulation in this jurisdiction. The Charities Act 2006 established the Charity Commission as a corporate body and stated its objectives and functions, as well as its general duties. It required the Commission\(^4\) to “have regard to the principles of best regulatory practice (including the principle under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).” For most purposes, the Commission now has a jurisdiction and exercises powers concurrent with those of the High Court\(^5\) and Commissioners are vested with the same powers as the Attorney General as regards taking proceedings in relation to charities.\(^6\)

In Scotland, the specific regulation of charities is of recent origin.\(^7\) The first statute regulating “Scottish charities” as such was implemented in 1992, when Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 came into force. The lead regulatory body, with responsibility for determining both charitable status and eligibility for tax exemption, has always been the Revenue Commission. The Charities and Trustee Investment (Scotland) Act 2005, s. 1, established the Office of the Scottish Charity Regulator (OSCR) as the new lead regulatory body.

In Northern Ireland, charities have long been regulated by the Charities Act (Northern Ireland) 1964 and the Charities Order (Northern Ireland) 1987. These statutes formed the most dated body of legislative provision governing charities and charitable activity of any jurisdiction in the UK. They were enabling rather than regulatory in nature, neither providing any powers for the inspection, monitoring, or registration of charities. The Charities Branch of the Voluntary Activity Unit (DHSSPS) had a supervisory and support role (not dissimilar to its southern counterpart of which it formed a part prior to the separation of the jurisdictions) in its exercise of certain responsibilities under the Charities Act (Northern Ireland) 1964. The main business of the Charities Branch centered on two areas of activity: the giving of consent to the disposal of land or other property by charity trustees who could not usually sell or otherwise dispose of property without specific consent; and the making of cy-près schemes to change the objects of charities whose original functions could no longer be effectively carried out. Again, the lead regulatory body, with responsibility for determining both charitable status and eligibility for tax exemption, had always been the Inland Revenue.

\(^3\) Following the recommendations made in Efficiency Scrutiny of the Supervision of Charities 1987 (the Woodfield Report).

\(^4\) The Charities Act 2006, s. 7.

\(^5\) The Charities Act 1993, s. 16.

\(^6\) Ibid, s 32.

\(^7\) The concept of bodies established in the public interest has long existed in this jurisdiction under the common law concept of a ‘public trust’, which is a trust formed for the benefit of either the public at large or a section of the public. The term ‘public trust’ is not synonymous with the term “charitable trust”.

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The Charities Act (Northern Ireland) 2008, s. 6(1), established the Charity Commission for Northern Ireland (CCNI) as the new lead regulatory body. This non-Departmental Public Body, under the umbrella of the Department for Social Development, reports to the Northern Ireland Assembly. Its main functions are: to keep a public register of charities; encourage, facilitate and monitor compliance with charity law; determine charity status; identify and investigate misconduct in charity administration and take remedial or protective action, as necessary.

In Ireland, charities have been governed for the last 40 years or more by a conservative legislative framework, consisting mainly of the Charities Acts of 1961 and 1973 as amended by the Social Welfare (Miscellaneous Provisions) Act 2002, which were closely modelled on the provisions of the English Charities Act 1960. The lead regulatory agency had always been the Revenue Commission with the Commissioners of Charitable Donations and Bequests (an antiquated forerunner to the present English Charity Commission) in a monitoring and support role.

The Charities Act 2009, s. 1, established a new body, An tÚdarás Rialála Carthanas, or the Charities Regulatory Authority (CRA) to replace the now dissolved Commissioners for Charitable Donations and Bequests and assume the latter’s powers (ss. 81-88). The Charities Act 2009, together with the Charities Acts 1961 and 1973, and the Street and House to House Collections Act 1962, now provide a composite regulatory framework for charities.

1.2 Independent

The independence of the Charity Commission in England & Wales has often been emphasized. It is a non–ministerial government department, as it is neither part of the Cabinet Office nor subject to the direction or control of Ministers. However, Cabinet Office ministers have some functions in relation to the Charity Commission, including: appointing the Charity Commission Board Members, after a fair and open competition; replying to questions in Parliament about the Commission; and making orders to give effect to changes in charities' constitutions which are regulated by Acts of Parliament and have been agreed by the Commission. The Commission stresses that it is not subject to the direction or control of any Minister or other government department and works in partnership with charities, umbrella bodies, local and central Government bodies, and with others to whom it considers itself to be accountable. It has explained:8

“As independent regulator of charities, the Commission's position on whether charities engage in public service delivery is neutral; we neither encourage nor discourage it. We are concerned with ensuring that charities retain their independence …”,

In keeping with the example set in England & Wales, the corresponding new regulatory bodies in the other UK jurisdictions and in Ireland have been similarly established as relatively independent government bodies.9

1.3 Regulating for the Public Benefit


9 See, for example, the Charities Act (Northern Ireland) 2008, Sched 2, s. 10(4), “The Commission shall not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown.”
The decision to establish a new regulatory body, armed with an extended definition of ‘charitable purpose’, has enabled the regulatory framework to accommodate a more expansive approach to charitable status. This has played out somewhat differently in each of the three jurisdictions. For all, however, the responsibilities vested in the new regulatory body included ensuring public benefit compliance in respect of all registered charities; the only exception being the rebuttable presumption of compliance that applies to Irish charities established for the advancement of religion.

1.3.1 Powers for Supervision and Compliance

The Charity Commission has long had extensive statutory powers to institute inquiries and appoint receivers, to investigate suspected misconduct, mismanagement and to protect a charity. It has developed a proportionate regulatory approach that is not based on size of charity alone as it also allows for a risk-based approach to compliance and enforcement.

The Commission may appoint a receiver and manager to act in the place of trustees. Its remedial powers include replacing trustees and requiring restitution of charity money improperly used. It does not, however, have powers to prosecute abuse (a referral to the police is made if a criminal activity is suspected) or to impose punitive sanctions. The Charity Commission has legal powers to amend the purposes and constitutions of charities through ‘schemes’ without the charity having to apply to the courts and it can deregister a charity that is no longer active or which has ceased to be charitable. Both the Commission and the High Court now exercise a concurrent jurisdiction to create cy-près schemes enabling the funds of such a charity to be administered, perhaps consolidated with those of other similar defunct charities, and be directed towards a new set of similar but viable set of objects. The Charities Act 1993 allows amendment or transfer not only when the original use is rendered impossible or impracticable but also when it is no longer effective. The new Charity Database and integrated monitoring system have improved the Commission’s regulatory role, as did the coming into effect in 1998 of the reporting requirements in the Charities Acts 1992 and 1993.

Again, this supervisory role has been largely adopted in Northern Ireland, Scotland, and in Ireland; although in the last two jurisdictions the regulatory bodies do not have comparable enforcement powers.

- **Power to Institute Inquiries**

  The new regulatory body may institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes. It may itself conduct such an inquiry or appoint a person to conduct it and submit a report. For that purpose it may require accounts, statements and documents to be furnished, require the disclosure of information, it may hear evidence on oath and can publish its findings. It is an offence to obstruct or mislead any such inquiry.

- **Power to Apply Property Cy-près**

  In certain specified circumstances, the new regulatory body may exercise its statutory power to allow property, given as a charitable gift, to be applied cy-près for similar purposes. It may alter the purposes for which the property given may be applied, and any provisions and conditions

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10 The Charities Act 1993, s. 16(1).
11 See: Charities and Trustee Investment (Scotland) Act 2005, ss. 28-38; Charities Act (Northern Ireland) 2008, ss. 22-25; and for Ireland, see the Charities Act 2009, ss. 64-74.
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governing the application of the property for those purposes, so as to ensure that the property is applied as beneficially as is possible, consistent with the spirit of the gift.\(^\text{12}\)

- **Power to Prepare or Settle a Scheme for the Administration of a Charity**

  The new regulatory body has the power to establish a scheme for the administration of a charity. Where the court directs that such a scheme be established, it may by order refer the matter to the regulatory body for it to prepare or settle a scheme in accordance with such directions (if any) as the court sees fit to give.\(^\text{13}\)

- **Powers Concurrent with High Court Jurisdiction**

  Again, in certain circumstances, the new regulatory body in Northern Ireland, as in England & Wales, when making schemes and acting for the protection of charities, is entitled to exercise powers concurrent with the jurisdiction of the High Court.\(^\text{14}\) This, however, is not the case in Scotland, where the jurisdiction for similar decisions is reserved to the Court of Session, nor in Ireland where the High Court retains jurisdiction.\(^\text{15}\) In both jurisdictions, the options open to OSCR and CRA respectively, following a s. 28 or s. 64 inquiry, include the suspension of persons from management or control and/or directing a charity or other body not to take the action that is the cause of concern. In more extreme cases the regulatory body must seek the authority of a court order to take further formal action such as the removal of the persons concerned from management or control.

1.3.2 **Powers for Protection of Charities**

In England & Wales, the ancient *parens patriae* responsibilities of the Attorney General to protect the interests of charities has very largely transferred in piecemeal fashion to the Charity Commission. Again, this approach has been by and large adopted in the other jurisdictions of these islands although in Ireland the step has been taken to transfer all Attorney General powers to the new regulatory body.

- **Power to Control Trustees**

  The new regulatory bodies, though to a lesser extent in Scotland and Ireland, have important but varying interventionist powers on a spectrum from a power to appoint, discharge, suspend or remove a charity trustee, or a trustee for a charity, to remove an officer or employee.\(^\text{16}\)

2. **Regulating the Fiscal Environment**

\(^{12}\) See: Charities and Trustee Investment (Scotland) Act 2005, ss. 39-41 (reorganization schemes); Charities Act (Northern Ireland) 2008, ss. 26-30; and for Ireland, see the Charities Act 2009, s. 82 (transfer of functions hitherto vested in Commissioners of Charitable Donations and Bequests).

\(^{13}\) See: Charities and Trustee Investment (Scotland) Act 2005, s. 35; Charities Act (Northern Ireland) 2008, s. 32 and ss. 43-44; and for Ireland, see the Charities Act 2009, s. 82 and residual powers under the 1961 Act.

\(^{14}\) Charities Act (Northern Ireland) 2008, s. 31.

\(^{15}\) See, respectively: Charities and Trustee Investment (Scotland) Act 2005, s. 35 and the Charities Act 2009, s. 82 (transferred functions).

\(^{16}\) See: Charities and Trustee Investment (Scotland) Act 2005, s. 71; Charities Act (Northern Ireland) 2008, s. 34; and for Ireland, see the Charities Act 2009, ss. 64-74.
In many ways the development of charity law has been driven primarily by a concern to supervise charity finances as reflected in the range of agencies with associated responsibilities (including Customs and Excise, Land Registry, Companies Registry, Family Societies Registry, Rates etc). The priority given to regulating fiscal affairs, together with the substance and judicial precedents of charity law, constituted the basic inheritance England passed on to its colonies. Charity law has its origins in legislative and judicial attempts to maximise tax revenues by establishing agencies and processes designed to regulate practice, detect abuse and restrain the availability of exemption on grounds of charitable status, as clearly illustrated by both the 1601 Act and the Pemsel case. The deep-rooted preoccupation of charity law with tax, rates, trading and more recently with the contract culture and the intricacies of profit distribution, illustrates this aspect of its common law heritage. The present day role of the Inland Revenue (now called Her Majesty’s Revenue and Customs or HMRC) in the UK in relation to charities, and of other such government bodies in all common law countries, grows from this very basic traditional concern. It is against that context that the gradual rise and current assertion of the public benefit test as the governing principle must be viewed.

The issue as to which agency in the regulatory framework bears responsibility for applying the public benefit test is of crucial importance to charities and for the development of the charitable sector. Where, in keeping with the traditional policing role, that responsibility rested with the tax collecting agency then, to some degree, the test had to operate in an exclusionary manner as that agency’s raison d’etre required it to protect and maximize the nation’s tax revenue base. This has been recognized in the UK jurisdictions and in Ireland where one outcome of their charity law reform processes has been to remove this responsibility from the tax agency and assign it instead to a more independent government body. In England & Wales and Northern Ireland, but not in Scotland and Ireland, the legislature has vested that body with High Court powers. Although the new charity legislation in the UK jurisdictions is silent on the matter of the relationship between the new regulatory body and the Inland Revenue, it may be assumed that the lead responsibility already acquired by the Charity Commission will transfer to the new regulatory bodies in Scotland and Northern Ireland. The combination of High Court powers, parens patriae responsibilities of the Attorney General and its authority relative to the Inland Revenue (now HMRC), has enabled the Charity Commission to deploy the public benefit test as a powerful means of supporting charities and developing the sector.

2.1 The Role of the Tax Agency

The HMRC in the UK jurisdictions, like the Revenue Commission in Ireland, has overall regulatory responsibility for matters relating to tax liability. The decoupling of charitable tax exemption from charitable status has freed the tax-collecting agency from its obligation to interpret charitable purpose and determine whether or not an organisation’s objects and activities can be construed as charitable. Where there is any doubt regarding the charitable status of an organization, a referral is made to the new lead regulatory body in each jurisdiction.

17 In the UK, since so empowered by the Finance Act 1986, the Inland Revenue has been working closely with the Charity Commissioners by referring to it those cases where it has reason to believe that a charity is engaging in non-charitable activities or is applying income for non-charitable purposes. It is statutorily required to follow the case law precedents set by the Commission.

18 The Charity Commission’s review of organisations listed on the Register, which it began in 1997, has broadened the range of activities now entitled to charitable status. Its capacity to do so has been assisted by an approach which seeks to identify the intrinsic public benefit component of an activity rather than continuing the traditional reliance upon the ‘spirit and intendment’ rule. There is no obstacle to the continuance of this approach in the 2006 Act.
In England & Wales, HMRC is statutorily required to defer to the Charity Commission on matters relating to charitable status: HMRC must accept the Commission’s registration as conclusive of charitable status for tax purposes. However, any organisation, claiming exemption from tax liability on grounds of charitable activity, may be investigated by HMRC which can direct submission of records etc for scrutiny. In Ireland, while it is expected that a good working relationship will exist between both bodies, the tax collecting agency is not statutorily required to follow the lead given by the CRA: registration by the CRA need not be automatically followed with tax exemption by the Commission. Further, and again demonstrating the conditional nature of the de-coupling, the CRA may establish the register of charities only “after consultation with the Revenue Commissioners”.20

2.2 Tax Exemption

The tax regime is applied by HMRC uniformly across all UK jurisdictions and does not allow for any general exemption. Charities can qualify for exemption from income tax and corporation tax under the Income and Corporation Taxes Act 1988 (Schedules A, C, D and F), from capital gains tax under the Taxation of Chargeable Gains Act 1992 and may also be eligible for exemption from inheritance tax and stamp duty. The Value Added Tax Act 1994 governs charitable exemption from VAT (a European Union tax imposed by the EC Sixth VAT directive which the UK is obliged to implement). The Local Government Finance Act 1992 provides charities with limited exemption from rates liability.

In Ireland, while the Law Reform Committee recommended that tax relief should continue to be an automatic consequence of charitable status, the Charities Act 2009 has drawn a line between the two and left tax exemption to be determined by the Revenue Commission. The latter body determines tax exemption eligibility in relation to income tax, corporation tax, capital gains tax, deposit interest retention tax, stamp duty, capital acquisitions tax, probate tax and sundry lesser liabilities.22

2.2.1 Donation Incentives

In the UK jurisdictions, the Income and Corporation Taxes Act 1988, as amended by the Finance Act 2000, entitles a company or an individual to tax relief on donations made by way of a gift aid scheme to charities. Gift aid by individuals is much more significant in scale and practical impact because the charity reclaims the tax paid by the donor; payroll giving is also significant.

In Ireland, the Finance Act 2001 introduced a uniform scheme of tax relief for donations to approved bodies, which includes a body of persons or trust established for charitable purposes.

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19 See, s. 31 of the Charities Act 2009, which provides for administrative cooperation between the CRA and other relevant regulators.
20 Charities Act 2009, s. 37(1).
22 See, the Taxes Consolidation Act 1997, s. 207(1) and (2) and s. 208, which allows certain exemptions from income tax under Schedules C, D, and F. Section 76(7) provides for the carrying over of any exemptions which would apply under income tax provisions to corporation tax. The Capital Acquisitions Consolidation Tax Act 2003, s. 76(2), provides that a gift or inheritance taken for public or charitable purposes will be exempt from capital acquisitions tax provided that the Revenue Commissioners are satisfied that it has been or will be applied to such purposes. Also, s. 848A of the 1997 Act, inserted by s. 45 of the Finance Act 2001, provides that charities or the individuals making donations can now reclaim the tax paid on such donations.
where the income is applied for charitable purposes only. The charity must have held tax exempt status from the Revenue Commissioners under the Taxes Consolidation Act 1997 for not less than three years prior to the date of its application. No ceiling is imposed on the amount which may qualify for a deduction, and no differentiation is made between charities.

2.3 Trading

In the UK jurisdictions, under the Income and Corporation Taxes Act 1988 (Schedule D), a charity will be eligible for tax exemption on profits from its trading activity provided that these are applied to further its charitable purposes and either the trade is in furtherance of its primary purposes or is conducted by its beneficiaries.

Irish tax law provides for a “trading exemption” in respect of profits which charities derive from trading. The Revenue Commissioners define trading as “generally involving the sale of goods or services to customers with a view to generating a profit”. To qualify for a trading exemption the relevant body must have charitable status and the income derived from trading must be applied solely to the purposes of the charity. In addition, the trade must be a primary purpose of the charity or the work in connection with the trade, must be carried on mainly by beneficiaries of the charity.

3. Establishing a Register of Charities

As in England & Wales, the new lead regulatory bodies in Scotland, Northern Ireland and Ireland will be responsible for establishing and maintaining a register of charities and will oversee the reporting regimes applicable to such registered charities. Any charitable organization, operating or intending to operate in one or more of the four jurisdictions, will be required to register with the appropriate new regulatory body. Any charitable organization, operating or intending to operate in one or more of the four jurisdictions, will be required to register with the appropriate new regulatory body. Such an organisation must prove that it is established for charitable purposes and that it satisfies the public benefit test. In England & Wales, all charities not specifically exempted or excepted have long been required to register with the Commission and the 2006 Act has brought many more charities, both larger and smaller than those previously registered, within the scope of Commission scrutiny and services.

Registration is an important outcome of the charity law review process. The introduction of a register of charities, coupled with mandatory registration and reporting requirements, means that for the first time in these three jurisdictions, as in England & Wales, there will now be reliable information as to how many charities exist, where they are located, their size, wealth and type. Registration provides an essential basis for an efficient regulatory system. The fact that the registers are accessible to the public will promote transparency.

The Charities Act 1993, in keeping with established precedents, requires a charity to be set up under the jurisdiction of the law of England and Wales if it is to be eligible for registration. If it operates wholly or partially within the jurisdiction, but is incorporated and registered elsewhere,


24 In this jurisdiction, mandatory registration was introduced by the Charities Act 1960 and continued under the Charities Act 1993, s. 3(1).

25 The Charities and Trustee Investment (Scotland) Act 2005, s. 3.

26 The Charities Act (Northern Ireland) 2008, s. 16.

27 The Charities Act 2009, s. 39.

28 See, for example, Re Hummeltenberg [1923] 1 Ch 237.
it will not qualify as a charity for the purposes of the 1993 Act.\textsuperscript{29} In Ireland, the requirement to register applies whether a charity is established within the State and has its administrative centre there, or whether it is a foreign charity with a presence in the State, established in another jurisdiction where it has its administrative centre.

Charitable purposes may, however, extend beyond the jurisdiction of the courts of England and Wales as, for example, is the case with Oxfam and many other such humanitarian relief agencies.

### 3.1 ‘Excepted’ and ‘Exempted’ Charities

In England & Wales, the registration system has always allowed for ‘excepted’ charities (i.e. those that are entitled to charitable status but are excepted from registration, from submitting annual reports and other requirements that vary according to the charity) and ‘exempt’ charities\textsuperscript{30} (i.e. those that are entitled to charitable status but are not permitted to register and are exempt from the provisions of charity legislation). The former include certain voluntary schools, the Boy Scouts and Girl Guides, certain charities for the advancement of religion, but in the main, these are charities with a low annual income. An exempt charity is an entity, established for charitable purposes, which is excused from registration and from the normal supervisory requirements of the Charity Commission because it is considered to be adequately supervised by, or accountable to, some other body or authority.\textsuperscript{31} These tend to be older and well endowed institutions including places of worship, universities and many national museums, galleries and any society registered under the Industrial and Provident Societies Act 1965 or the Friendly Societies Act 1974.

In the years prior to the introduction of the 2006 Act, the Commission’s regulatory role was restricted by the fact that 70% of the 167,022 “main” charities registered in England and Wales had an income below the registration threshold, and were therefore not required routinely to submit annual accounts and statutory annual returns to the Charity Commission. That statute lowered the threshold to require any charitable organization with an annual income of £5,000 to apply for registration. Since then the Commission has drawn up a programme for registering 4000 – 5000 previously excepted charities.\textsuperscript{32} However, under the 2006 Act, some charities will still become or continue to be excepted or exempt from registration which leaves holes in the public benefit safety net.\textsuperscript{33}

There is no equivalent in Scotland, Northern Ireland or Ireland (although Irish educational bodies are exempt from the accounting and audit provisions of the Act, as those bodies are already subject to separate scrutiny) to ‘excepted’ and ‘exempt’ charities.

### 3.2 Developing Charitable Purposes

\textsuperscript{29} See, for example, \textit{Gaudiya Mission v. Brahmachary} [1997] 4 ALL ER 957.

\textsuperscript{30} The Charities Act 1993, Sched 2.

\textsuperscript{31} See, further, the Charities Act 1993, Sched 3 and the Charities Commission, CC23,\textit{Exempt Charities} (Version April 2008).

\textsuperscript{32} Changes recently introduced will require: ‘excepted’ charities with an income of more than £100,000 to register and this threshold may be reduced over time – again, those with an income below the threshold must be able to register if they choose to do so; ‘exempt’ charities will be expected to comply more closely with charity law and this will be enforced by a ‘principal regulator’ determined by the Home Secretary, if no principal regulator can be determined they will be required to register with and be regulated by the Charity Commission; and Industrial and Provident Societies, that are also charities, will no longer be exempt unless they are also Registered Social Landlords.

\textsuperscript{33} The Charities Act 2006, s. 12 and Sched 5.
It is in the exercise of its registration function that the Commission is empowered to broaden the interpretation of charitable purposes. By registering (e.g. faith healing) or deregistering (e.g. gun clubs), in accordance with a contemporary interpretation of the public benefit test, the Commission is able to respond flexibly and reasonably promptly to changing definitions of social need and now does so without being unduly constrained by the ‘spirit and intendment’ rule. Although far from having a free rein in such matters, as its discretion remains confined by the straitjacket of established precedent and by the rule that new charitable purposes must still be analogous to those already recognised by the law, the Commission now has more powers and a broader menu of charitable purposes to work with.

It remains to be seen whether the new regulatory bodies in Scotland and Northern Ireland, equipped with powers not very dissimilar to those of the Charity Commission, will be in a position to follow the leadership role of the Commission in developing charitable purposes. By the same token, because the equivalent regulatory body in Ireland is not so equipped, it is unlikely that it will be able to extend the interpretation of charitable purposes beyond their existing statutory definition.

3.3 The Accountability Regime for Charities

In all four jurisdictions there is a general statutory requirement placed upon charities, including those that are otherwise ‘exempt’, to maintain proper records and accounts. These must be sufficient to show and explain all the charity’s transactions, and (a) disclose at any time, with reasonable accuracy, the financial position of the charity at that time, including income and expenditure on a day-to-day basis, and (b) provide a record of total assets and liabilities.

3.3.1 Annual Accounts

There is a general statutory requirement on all charities, including those that are otherwise ‘exempt’, to maintain proper records and accounts. In the UK jurisdictions, it is evident that efforts have been made to bring the accounting thresholds and audit requirements for charities into approximate alignment. These requirements are tiered in accordance with income and are very similar to those subsequently introduced in Ireland.

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34 See, Re Le Cren Clarke [1996] I All ER 715.
36 Note, for example, that in Northern Ireland s. 2(4)(b) of the 2008 Act clearly and deliberately includes the spirit and intention rule in the following terms: “any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes…..” In the Irish statute, the lack of any approximation to such wording appears equally clear and deliberate.
37 See, for England & Wales, the Charities Act 2006, s. 28; for Scotland, the Charities and Trustee Investment (Scotland) Act 2005, s. 44; for Northern Ireland, the Charities Act (Northern Ireland) 2008, s. 63; and for Ireland, the Charities Act 2009, s. 47.
38 The statutory accounting requirements are to be found: for England & Wales, in the Charities Act 1993, s.43, as amended by the Charities Act 2006, ss. 28-30; for Scotland, in the Charities and Trustee Investment (Scotland) Act 2005, ss. 44-48; and for Northern Ireland, in the Charities Act (Northern Ireland) 2008, s. 64. The reporting requirements for charities are set out in the Statement of Recommended Accounting Practice (SORP).
Where charities are unincorporated: those with an annual income of under £100,000 must get an independent examination carried out by an independent examiner or, alternatively, they can opt for an audit; charities with an income of more than £10,000 but less than £500,000 must have their accounts independently examined, they do not have to be audited unless this is required by their governing document; those with an annual income of between £250,000 and £500,000 must have their accounts examined by someone who has a relevant professional qualification, as defined in the Act, if they choose not to have a full audit; but those with an annual income of £500,000 or more, or with assets valued at £2.8 million or more, require a full audit. Where charities are incorporated then they must submit annual accounts in accordance with the standard requirements of company law.

3.3.2 Annual Activities Report
All registered charities in England & Wales, Northern Ireland, Scotland and Ireland are required to draw up and submit to their respective lead regulatory body an annual report of activities undertaken in pursuit of their objects, together with annual financial accounts, the complexity of which is determined by the size of the charity (measured in terms of income).

4. Regulating Fundraising
In England & Wales, where endowed foundations have never played quite such a prominent role as in the US, there has been a strong tradition of reliance upon public fundraising. This has been accompanied by a separate and distinct legislative interest in regulating matters associated with the raising of funds from the public, whether by street collections or door-to-door collections, for charitable causes.

Fundraising has tended to attract two forms of regulatory regimes: statutory provisions to maximise probity and minimise fraud when funds are solicited; and the application of common law principles to determine eligibility for tax exemption on the funds raised. The former has in the past been largely left to self-regulation by the organisations involved (whether charitable or otherwise) and administered by the police through the issue of licences. The latter arises in the normal way when the organisation provides the regulatory body with evidence that it complies with the Pemsel definition of charity and then also demonstrates that the funds raised are to be applied exclusively for charitable purposes. Fundraising, which in recent years has been transformed into a sophisticated and often multi-national activity involving professional fundraisers, now requires a more modern regulatory regime. The new charities legislation in the UK jurisdictions, and to a lesser extent in Ireland, sought to also address deficiencies in the regulatory regime for fundraising.

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40 In England & Wales, since 1 April 2008, all charities (company and non-company) can opt for an independent examination instead of an audit. This follows a change in company law brought in by the Companies Act 2006.
41 For Northern Ireland, the Companies (NI) Order 1986 as amended by the Companies Act 2006.
42 See, Charity Commission, Charity reporting and accounting: the essentials April 2008 (cc15a) and the Charities (Accounts and Reports) Regulations 2008.
43 The Charities Act (Northern Ireland) 2008, s. 68(1).
44 The Charities and Trustee Investment (Scotland) Act 2005, s. 44(1)(b).
45 The Charities Act 2009, s. 52(1).
46 See, for example, the Police, Factories, etc (Miscellaneous Provisions) Act 1916 that dealt with street collections and the House to House Collections Act 1939.
4.1 The Reforms

As with other areas of charity law reform, the initiatives taken in England & Wales to modernise the regulatory regime for fundraising, set the direction for similar reforms in the other jurisdictions of these islands. An important first step came with the statutory differentiation between fundraising for charitable purposes as distinct from any other cause; though this distinction has not found favour in Scotland where the generic term ‘benevolent body’ is used in the 2005 Act. The provisions of the Charities Act 1992, which came into effect in 1995, were directed towards ‘charitable institutions’ defined as ‘a charity or an institution other than a charity which is established for charitable benevolent or philanthropic purposes’. Parts II and III provided the main body of legislative provisions governing fundraising by charities. The aim of the statutory requirements relating to ‘professional fundraisers’ and ‘commercial participators’ was to ensure transparency and accountability where fundraising is undertaken for profit. The Act required a written agreement between the charity and the professional fundraiser or commercial participator; a statement to potential donors as to the proportion of their donation going to the fundraiser, or the extent of benefit to the charity through involvement with the commercial participator; and that the funds raised must be passed to the charity. Most of the provisions in Part 3 were intended to implement the Home Office’s proposals to introduce a unified system to regulate public charitable collections throughout England and Wales.

The Charities Act 2006 introduced amendments and further provisions to provide an integrated approach to ‘public charitable collections’ and, more generally, to regulate fundraising. Professional or commercial fundraisers, raising money for charitable purposes or institutions, will be required to make appropriate statements about their role and how much of the money raised will benefit the charity or cause concerned. The Institute of Fundraising has developed a self-regulatory scheme for fundraising but the Act gives the Secretary of State reserve powers to introduce statutory regulation if self-regulation fails. The Act expands the definition of a ‘public place’ where permits are required to include any highway and any place where members of the public have access that: ‘is not within a building, or if within a building, is a public area within any station, airport or shopping precinct or any other similar public area.’ The Act also provides for a new licensing scheme for public collections. In order to undertake a collection, a charity will have to obtain both a ‘certificate of fitness’ from the Charity Commission and a permit from the local authority where the collection is due to take place.

These reforms have been largely followed in Scotland and Northern Ireland, though not yet in Ireland, where fundraising has always been governed by legislative provisions that were quite

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47 The distinction between professional fundraisers and commercial participation, as defined in the 1992 Act, is that the main business of the former is fundraising whereas the business of the latter is not fundraising but making a promised contribution to charity out of the proceeds of business.


50 *Ibid*, ss. 67-68.

51 *Ibid*, s. 69.

52 *Ibid*, ss. 45(5).

53 The Charities and Trustee Investment (Scotland) Act 2005, ss. 79-92. Public charitable collections have been regulated under the Civic Government (Scotland) Act 1982, s. 119, whereby application for street and door-to-door collections is made to local authorities or in certain circumstances to the Secretary of State for Scotland.

54 The Charities Act (Northern Ireland) 2008, ss. 131-159.
detached from charity law and had no specific application to charities as such. The present government policy in all jurisdictions is to bring the law relating to fundraising into the main body of charity law, give the lead regulatory body oversight of fundraising practice but also to await and review the outcome of the charity sector’s efforts to develop an effective policy of self-regulation of fundraising practices before deciding whether to make use of its reserved power to introduce mandatory regulations.56

4.2 Role of the Lead Regulatory Body

The Charity Commission in England & Wales has a purely advisory role in relation to fundraising57 although it does have jurisdiction over funds collected in the name of charity, whether or not collected by a charitable body, and can act to protect funds so raised, e.g. by freezing bank accounts. The rules governing street collections and house-to-house collections on behalf of charity have been consolidated in the Part III provisions, are subject to certain rules and regulations and are supervised by the local authority. In the case of raising money or selling goods for charity, in the streets or public places, a permit is usually required from the local authority. Similarly a local authority licence is normally required for house-to-house collections. Alleged criminal activity involving a charity (e.g. in the context of fundraising) will necessitate police enquiries and possible criminal proceedings in the normal way. This is not dissimilar to the approach taken in Scotland, Northern Ireland and Ireland.

5. Charity Appeals Tribunal

The creation of a Charity Appeals Tribunal in Ireland,58 the Charity Tribunal for Northern Ireland59 and the Scottish Charity Appeals Panel60 is intended to provide an alternative to the courts system for the review of regulatory decisions: rather than incur the prohibitive costs and endure the delays of High court proceedings, charities can instead appeal regulatory decisions to a specialist Tribunal. The tribunal will consider the decision afresh and can admit new evidence. In England & Wales, the tribunal can hear appeals on a point of law. In all jurisdictions, appeals will lie to the High Court against the tribunal’s decision on a point of law.

55 The only reference to fundraising in the 2009 Act is the s. 97(1) provision which reserves a power to make regulations in relation to charitable fundraising.
56 The sector, led by the Institute of Fundraising, established the Buse Commission in 2003, under the chairmanship of Rodney Buse, to review the scope for the charity sector to establish a self-regulatory framework for charity fundraising. It released its initial report in January 2004.
57 For England & Wales, see the Charities Act 1992 (Part III) makes provision for new Regulations to be made governing public charitable collections to replace the separate existing legislation on street and house-to-house collections. See, also, Charity Commissioners, CC20, Charities and Fund-Raising, (Version April 2008). For Scotland, see the 2005 Act, s. 83(1). For Northern Ireland, see the 2008 Act, ss. 157 and 158. For Ireland, see 2007 Bill, s. 94.
58 The Charities Act 2009, s. 75(1).
60 The Charities and Trustee Investment (Scotland) Act 2005, s. 75. Scottish Charity Appeals Panel; but note the recent announcement that this body is to be terminated as it has only heard one case in two years.
Given that the adjustment of charitable purposes to meet contemporary social need was for centuries dependent upon High Court rulings and emerging keystone judicial precedents regarding matters that could or could not be construed as 'charitable', a role greatly diminished in recent years, the vesting of such powers in a Tribunal would seem to offer the possibility of reviving and continuing this vital creative forum. Indeed, in the UK jurisdictions this is broadly the case as the tribunal can consider points of law referred to it by the Attorney General and therefore can challenge rulings on issues with sector-wide importance, such as on matters that might constitute public benefit or political campaigning. However, in Ireland, the power of the Charity Appeals Tribunal is limited to reviewing decisions to register or refuse to register a charity, unlike in England & Wales where the Charity Tribunal is able to review any decision made by the Charity Commission. This, in conjunction with the removal of the 'spirit and intendment' rule, arguably fences in Irish charity law to the parameters established by the new definition of 'charitable purpose' and leaves this jurisdiction without a forum capable of flexibly developing those purposes, as indicated by the public benefit test, in the context of emerging patterns of social need.

6. The Roles of Court and Attorney General

In the UK and Irish jurisdictions, although the court and Attorney General continue to have a role in relation to charities, they are in practice very rarely called upon to exercise their traditional responsibilities. Nowadays, neither the High Court nor the Attorney General make a significant contribution to the application or development of this law.

In England & Wales, the traditional common law powers of the High Court and the Attorney General - to protect, supervise and where necessary to amend charitable trusts - have been largely statutorily transferred to or assumed by the Charity Commission since the Charities Act 1993. This has been partially a natural consequence of the high cost and lengthy duration of court proceedings, compounded by unwelcome publicity, and the increased marginalisation of the Attorney General to practice developments in the charitable sector. One outcome of the charity law reform processes has been that the other UK and Irish jurisdictions have, to a varying degree, followed the example set by England & Wales.

6.1 The High Court

The High Court in England & Wales continues to share a dual jurisdiction for most purposes with the Charity Commission, it retains its powers of adjudication in relation to certain matters, and it will hear cases on appeal from the Commission and from the Tribunal. Although the High Court maintains its traditional inherent jurisdiction over charities, and its protective remit in respect of charitable trusts, this has now very largely fallen into abeyance: displaced by statutory powers vested in the Charity Commission; the consent of which is required to any proceedings concerning the administration of a charity. Although the court can and does hear cases where proceedings are initiated by or against a charity, involve complex legal issues or are on appeal from the Commission and continues to exercise its powers to make cy-près schemes or schemes for the administration of charities, it now does so very rarely. In this jurisdiction, as with other

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61 See, s. 45 of the Charities Act 2009. Note the ruling of the European Court in Koretskyy and Others v. Ukraine No 40269/02 (3 April 2008) which emphasises the importance of a judicial review procedure to prevent arbitrary refusals of registration.

62 The Charities Act 2006, s. 8(9). Also, the Charities Act 1993, Sched 4.

63 Charities Act 1993, s. 33.
common law jurisdictions, the capacity of the courts to have an ongoing role in developing the
guiding principles necessary to ensure an appropriate fit between charity law and contemporary
patterns of social need has faded.

In Northern Ireland, the new charities legislation has introduced much the same provisions as in
England & Wales regarding a shared jurisdiction between High Court and lead regulatory body and a right of appeal to the court against a Tribunal decision. In Scotland, the corresponding legislation draws a sharper distinction between the powers of court and regulatory body. The Court of Session, which has long had significant powers for regulating Scottish charities, is assigned a prominent role in issues affecting charities: for example, as regards allegations of misconduct, maladministration or misrepresentation; the making of schemes; and the appointment of trustees. In Scotland, as in the other UK jurisdictions, a right of appeal lies to the court against a Tribunal decision.

In Ireland, the charities legislation carries no suggestion that the new lead regulatory body will be equipped with any High Court powers, or otherwise share that jurisdiction, although a right of appeal lies to the court against a Tribunal decision on a point of law. In the virtual absence of any provisions addressing the powers of the High Court, it is to be assumed that the traditional and increasingly marginal role of this body in the affairs of charities will continue relatively unchanged.

6.2 The Attorney General

The ancient parens patriae jurisdiction of the Crown in relation to charities, and the right to bring proceedings in respect of them, devolved from the Lord Chancellor to become vested in the Attorney General. These powers have been described as “theoretically limitless” because they “spring from the direct responsibility of the Crown for those who cannot look after themselves”. However, the traditional role of the Attorney General, exercising the parens patriae powers to protect and supervise, is no longer fully operational in any of the UK or Irish jurisdictions. While,
in the UK jurisdictions, some of the responsibilities of that office have been statutorily transferred to the new regulatory body, in Ireland that transfer has been absolute. It is unlikely that divesting the Irish Attorney General of all his powers in relation to charities and vesting them in the CRA will constitute a significant outcome of the Irish reform process, but it does constitute a difference in approach with that taken in the adjoining jurisdiction where the Attorney General retains a supervisory role.

7. Regulating for Good Governance

Charitable activity is housed in a range of different legal structures. Government agencies, religious organisations and foundations as well as the more traditional trusts, incorporated and unincorporated associations, Royal charters, other bodies and eleemosynary corporations are now all likely to be claiming tax exemption on the grounds of their charitable activities. Industrial and Provident Societies, Friendly Societies and corporations may also, though infrequently, provide structures for charitable activity. The principles and models of governance for a charity vary accordingly and are particularly evident in the distinction between companies and trusts. The new UK and Irish charity legislation failed to address the central issue - management models, duties of CEOs and staff, governing principles and external regulatory mechanisms for ensuring proper standards of practice, transparency and accountability, need to apply uniformly regardless of the legal structure adopted. In the current climate of global recession, attributed by many to the reckless management, inadequate board supervision and structural failings in the regulatory systems of banking in the developed nations, it would seem important to ensure that new regulatory frameworks for charity provide the safeguards necessary to insulate charity from similar failings in corporate governance.

However, some measures were adopted that will contribute to better governance in the sector. These include provisions to better regulate trustees and to adjust their role and responsibilities. Also, in the UK jurisdictions, new legal structures have been introduced designed specifically to provide a vehicle for charitable activity.

7.1 Responsibilities of Trustees

Charity trustees, being responsible for the management and administration of a charity, are always required to ensure that its mission and planned activities are within the purposes set out in its governing document and that it remains independent and pursues its own purposes not the policies or directions of any other body. While all four jurisdictions introduced provisions adjusting the responsibilities of trustees, in Ireland these were grafted onto law that has essentially remained unchanged since 1893, whereas in each of the other jurisdictions the new provisions amended or complemented an existing relatively modern body of trustee law.

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75 The traditional parens patriae role of the Attorney General in relation to charities is unknown in Scotland, where the office of Lord Advocate is vested with some such responsibilities.
76 The Charities Act 2009, s. 38(1).
77 The Charities Act (Northern Ireland) 2008, s. 15.
78 Such as the Nolan principles of: Selflessness; Integrity; Objectivity; Accountability; Openness; Honesty; and Leadership. See, further, First Report of the Committee on Standards in Public Life (1995) Cm2850.
7.1.1 Controlling and Advising Trustees

The new interventionist powers granted to the Charity Commission under the 2006 Act, (amending provisions in the 1993 Act), enabling it to take action to protect charities by suspending, removing and replacing trustees,\(^{80}\) by directly dealing with charity property,\(^{81}\) by issuing directions for trustees to take specific actions,\(^{82}\) and by entering charity premises and seizing documents\(^{83}\) have been replicated in the Northern Ireland statute.\(^{84}\) In Scotland, these powers are considerably diluted: the regulatory body may suspend trustees and/or may issue certain directions,\(^{85}\) including directions as to charity property, but must otherwise seek authority from the Court of Session to remove trustees or prevent disposal of charity property etc. In Ireland, only the power to enter premises and seize documents has made it onto the statute book, and then only with the authority of a court order.\(^{86}\) The Commission’s powers to give advice and guidance to trustees have, also been replicated in Northern Ireland.\(^{87}\)

7.1.2 Powers

In England & Wales, the 2006 Act introduces some permissive provisions which relax the more onerous restrictions that traditionally constrained trustees. So, for example, there is now a power of waiver in respect of a trustee’s disqualification if 5 years have elapsed since the date on which that disqualification took effect.\(^{88}\) Further, it permits a trustee to be paid for professional services provided to their charity over and above their usual duties as trustee, but not under a contract of employment, subject to a duty of care by the trustee board as a whole (the Act sets out what a duty of care means in this instance).\(^{89}\) It also empowers the Charity Commission to remove the liability of trustees for a breach of trust or duty where they have acted ‘honestly and reasonably’.\(^{90}\) Finally, it permits trustees to use charitable funds to purchase indemnity insurance if they believe it is in the best interests of the charity that they should do so.\(^{91}\) These provisions have been largely replicated in other UK and Irish charity statutes.\(^{92}\)

7.2 The Board

The legislative provisions introduced in England & Wales, to modernize the role of executive officers and the boards of charities, are again likely to set the direction for the other jurisdictions. However, this initiative has been greatly assisted by conducting the reform of company law in conjunction with that of charity law. For example, the provisions addressing conflict of interest

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\(^{80}\) The Charities Act 2006, s. 19.

\(^{81}\) Ibid, s. 21.

\(^{82}\) Ibid, s. 20.

\(^{83}\) Ibid, s. 26.

\(^{84}\) See: for Northern Ireland, the Charities Act (Northern Ireland) 2008, s. 34, s. 37, s. 36, s. 52.

\(^{85}\) The Charities and Trustee Investment (Scotland) Act 2005, s. 31.

\(^{86}\) The Charities Act 2009, s. 69(1).

\(^{87}\) The Charities Act 2006, s. 24. See, also, the Charities Act (Northern Ireland) 2008, s. 49.

\(^{88}\) Ibid, s. 35 (amending s. 72 of the 1993 Act).

\(^{89}\) Ibid, s. 36.

\(^{90}\) Ibid, s. 38.

\(^{91}\) Ibid, s. 39.

\(^{92}\) See, respectively: Scotland, the Charities and Trustee Investment (Scotland) Act 2005, ss.69, 67 and 68, but no equivalent to provisions dealing with trustee liability and indemnity insurance; Northern Ireland, the Charities Act (Northern Ireland) 2008, s. 86, s. 88, s. 91 and s. 93; and Ireland, the Charities Act 2009, s. 55 (but only by High Court order), s. 88, but no counterpart to trustee liability provision, and s. 89.
situations in the Charities Act 1993, s. 26, are usefully complemented by the duties placed on directors in the Companies Act 2006, s. 175. The latter also aligns the requirements for preparation and scrutiny of the accounts of charitable companies with those for non-company charities. Further, this jurisdiction has pioneered the use of statutory government regulations to apply standard setting and performance indicators for measuring and monitoring the delivery of public benefit services. So, it has introduced the ‘National Occupational standards (NOS) for Trustees and Management Committee Members’. The NOS complements the Code of Governance\(^93\) and is aimed at individual trustees whereas the Code and the Hallmarks are aimed at trustee boards as a whole and the organisations they govern. This package of provisions demonstrates the value to be gained in building a coherent and integrated body of law and highlights the absence of such an approach, more generally, in the law relating to charities. In the other jurisdictions, the lack of legislative provisions ascribing a uniform role, duty of care, range of responsibilities and duties to all trustees/officers/directors of charities, regardless of the legal structure or type of governing instrument used, is likely to continue to present problems.

7.3 The Charitable Incorporated Organisation (CIO)

Prior to the charity law reform processes, incorporated charities had to submit to the dual regulatory authority of the Charity Commission (or tax agency) and the Companies Registrar. An important outcome of the law reform processes was the inclusion of provisions facilitating the introduction of a new type of legal structure better suited to give effect to charitable purposes, and intended to streamline governance, reduce the personal liability of trustees and simplify the regulatory burden. In England & Wales, the Charities Act 2006, s. 34, introduced the Charitable Incorporated Organisation which can be established with limited or unlimited liability but only for charitable purposes. The Charity Commission is solely responsible for the incorporation and registration of the CIO and for assisting existing charitable companies limited by guarantee or industrial and provident societies to convert to a CIO.\(^94\) This initiative was replicated in the charity legislation of Scotland\(^95\) and Northern Ireland\(^96\) but, despite proposals being drafted to achieve the same outcome in Ireland, the Irish legislation failed to address the need for new legal structures.

When and where this new structure becomes available, an organisation that registers as a charity will be able to become incorporated without having to also register as a company, if the trustees choose to do so, and a charity that is already a company may instead opt to become a CIO. Should the CIO eventually become the standard legal vehicle, this will permit a consolidation of


\(^94\) In addition, the government is proposing to introduce the Community Interest Company which will provide an alternative to charitable status.

\(^95\) The Charities and Trustee Investment (Scotland) Act 2005, s. 49.

\(^96\) The Charities Act (Northern Ireland) 2008, s. 105 et seq.
the principles, models of governance and regulatory mechanisms relating to charities and their activities.

8. Regulatory Practice and Input from the Sector

In each of the Irish and UK jurisdictions, the outcome of the charity law reform process was very much a product of the partnership arrangement between government and the sector. In that spirit, it might be expected that the resulting legislation would reflect a joint commitment to partnership and make provision for ongoing input from the sector. In fact, the extent to which this has materialised in legislative provisions varies considerably between the jurisdictions.

8.1 Forums for Sector Involvement

In England & Wales, neither the 1993 Act nor the 2006 Act make any reference to engagement with the sector; though the latter does permit the Commission to establish committees and sub-committees.\(^97\) Equally, the 2005 Act in Scotland does not speak directly or indirectly of any such engagement and the same is true of the Northern Ireland legislation. In sharp contrast, the Irish statute has in-built provisions\(^98\) for ongoing contribution from the sector though a representative panel or panels which will make observations or proposals concerning: performance of the new regulatory body; any developments within the European Union or internationally that have implications for that body; initiatives which that body could usefully take with related costings; any policy or document, or guidelines, or code of conduct, issued or proposed to be issued by that body; the performance of the charities sector in any particular area or respect; and an assessment of the effectiveness of the regulation of the administration and operation of charitable fundraising through codes of conduct.

Despite the lack of any statutory requirement to do so, both in England & Wales and in Northern Ireland forums have been created to facilitate sector input to implementation issues arising from the charities legislation. In England & Wales, the Commission conducted a survey\(^99\) to take stock of stakeholders’ perceptions of its performance and help shape its strategic aims and objectives. In the resulting report, the Commission states its view that “we share the expectation of stakeholders that the Commission should be building partnerships with others” and makes reference to its ‘established relationships’ with bodies representative of sector interests such as NCVO, ACEVO, CEMVO, DSC etc. In Northern Ireland, the Charities Implementation Team in the Department has set up a Charity Regulation Stakeholder Forum to consider the implications arising from the new statute.

The different approach of the Irish and UK jurisdictions is interesting. It is indicative of the formal social partnership model in Ireland, forged to ensure the contractual and collective engagement of all partners in dealing with matters of socio-economic policy, that this should be recognized and embedded in actual legal provisions. It would seem that in the UK jurisdictions, government assumes a commonality of purpose with the sector (shored-up in England & Wales with compacts and an Office of the Third Sector at Cabinet level) flowing from its espousal of

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\(^97\) The Charities Act 2006, s. 6 (1), which provides that the Commission may establish committees and any committee of the Commission may establish sub-committees and (2) the members of a committee of the Commission may include persons who are not members of the Commission.

\(^98\) The Charities Act 2009, s. 36.

‘third way’ politics, and consequently doesn’t see a need for similar statutory acknowledgement and specified terms of engagement. Arguably, the sector can have greater confidence that its distinctive voice will be heard and its views taken into account when provision for this is specifically written into the legislation; though whether in practice this positions it to exercise more influence in effecting change in the regulatory regime remains to be seen.

8.2 Sector Self-Regulation

There are at least two respects in which the governments of the UK and Irish jurisdictions have conceded a measure of self-regulation to the sector: the setting and monitoring of standards of practice in fundraising; and similarly as regards the accountability requirements of small charities. In relation to the first, while government has been content to leave the creation and supervision of codes of practice to the sector, the legislation in all jurisdictions also contain enabling provisions allowing for the introduction of mandatory regulations should this become necessary due to ineffective sector self-regulation. In respect of the second, while the principle of proportionality should ensure that levels of accountability will be tiered in accordance with the size and assets of charities, it is clear that for a variety of reasons (e.g. surveillance of activities and tracking of funds to detect terrorism involvement) government is intent in gradually drawing as many charities as possible into the registration net. In short, the scope for sector self-regulation in the Irish and UK jurisdictions is narrow and closing.

(B)
THE REGULATORY REFORMS: TRANSFERABILITY & FEDERATED JURISDICTIONS

The three UK jurisdictions each have a degree of relative independence and, in administrative terms, they collectively function in a manner that bears some resemblance to federated jurisdictions. However, the regulatory reforms pioneered in England & Wales did not prove to be wholly transferable to the neighbouring jurisdictions. This, perhaps, is only to be expected, as the singular advantage of a ‘federated’ regime is that it allows for a regional variation in legislation dependant upon local differences in culture etc. Moreover, these jurisdictions together with Ireland are all participants in the 27 nation conglomerate that constitutes the European Community, and yet the regulatory reforms reveal very little in the way of acknowledgment that a wider European legal dimension exists. There is, therefore, some merit in examining the regulatory reforms, now embodied in four distinct pieces of legislation, to establish the extent to which they have borrowed from each other and made adjustments that reflect wider European considerations.

1. A New Regulatory Body: the Charity Commission Model

Decoupling charitable status and tax revenue, establishing a new regulatory body to deal with matters specific to the former, vesting that body with more rigorous control and supervisory powers while also broadening the range of charitable purposes available to it to work with, were logical developments, equally beneficial to the jurisdictions concerned. For all the reasons identified earlier, not least the Catch-22 of needing to simultaneously facilitate and harness the
flowering of civil society while also tightening surveillance of those elements that might act as a conduit for terrorism, the time had come to separate out the business of charity from that of tax collecting.

1.1 Jurisdictional Differences

The Charity Commission model, although very expensive, was tried and tested and conformity of regulatory systems was the preferable option for jurisdictions that would necessarily always be interacting, a situation reinforced by the Belfast Agreement. Certain ancillary components, such as a charities register and at least some aspects of the Attorney General’s parens patriae powers, together with co-ordinating functions in relation to other parts of the regulatory system and an appeal forum, were an integral part of that model and had to accompany it. Other components were less vital. Those elements of the model did not wholly transfer to the other three jurisdiction are revealing.

1.1.1 Powers of the new Regulatory Body

Scotland, with its particular public trust legal heritage and rather different culture, clearly chose not to vest its regulatory body, the OSCR, with interventionist powers equivalent to those of the Charity Commission. Ireland, a sovereign State with a distinct culture and a commitment to subsidiarity, also elected not to equip the CRA with equivalent powers, indeed of the four regulatory bodies the Irish model is the least interventionist. Only in Northern Ireland has the new regulatory body, the CCNI, more or less fully subscribed to the English model – as has long been the customary approach of the legislature in that jurisdiction.

The degree of authority vested in the new body was to some extent conditioned by the existence or otherwise of an appropriate legislative context that could readily accommodate it. This was particularly evident as regards the body’s powers in relation to trustees, fundraising and new legal structures for charities. In those jurisdictions where such matters were already the subject of modern provisions (e.g. the duties of trustees in Northern Ireland or the availability of CIOs in Scotland) this was conducive to empowering the regulatory body with related governing authority. The reverse was the case in Ireland where the powers of the new body had to fit in with the provisions of outdated legislation relating to trustees, companies and fundraising. In all jurisdictions, the common inability to realign provisions across a spread of legislation prevented the creation of a regulatory regime that could have equal applicability to trusts, incorporated entities and all other legal structures for charities.

The uniform focus of authority on powers of inspection reflected the common concern of all governments to ensure that measures were in place to detect abuse. Similarly, and closely connected to this, the fairly standard specification of duties regarding the annual submission of accounts and activity reports, accompanied by varying powers in relation to removal and replacement of trustees, reflected government concern to enforce standards of transparency and accountability and improve governance.

1.2 Regulatory Reform and Fundraising

The role of the Charity Commission in respect of fundraising in England & Wales has largely transferred to the other UK and Irish jurisdictions. This has taken the form of the Commission having oversight of fundraising and retaining a statutory power, under the 1993 Act, to seek regulations if sector efforts to formulate and implement codes of practice prove to be an inadequate means of raising and maintaining standards. In all jurisdictions this approach has been assisted by regulatory reform, embodied in legislation, which has modernised aspects of earlier
statutory provisions to reflect changes in methods of collection and permit more effective management of recently developed fundraising methods.

1.3 Supporting the Sector

Part of the rationale for establishing an independent lead regulatory body is that it should provide a bridge between government and sector: able to channel resources and guidance to the sector and thereby enhance its capacity to further the public benefit; and able also to respond to practice issues as they arise while advising government on matters of strategy affecting the sector. To optimize the potential effectiveness of this bridging role, it is vital that the sector should have confidence in the regulator: know that the latter understands and is sympathetic to its interests, is readily accessible, and trust that it will take appropriate action. The governments of the Irish and UK jurisdictions have fully grasped this and, although they position the bridge somewhat differently, they clearly conceptualise the regulator as the main link with the sector. The strategies employed to give effect to the regulator’s bridging role are, arguably, not only transferable but are indispensable if sector capacity is to be enhanced and a mutuality of government and sector contribution to public benefit activity is to be achieved.

As mentioned above, there would appear to be two rather different models. In England & Wales the regulator functions within a sophisticated framework, comprising compacts and an Office of the Third Sector etc. In Ireland that body is located within the social partnership model and the agenda of sector interests is embedded in the new charity legislation along with a requirement that the regulator establish sector panels to address agenda issues. Both models represent the culmination of protracted government/sector negotiations and only after attaining such formalized relations was it then possible to move on to charity law reform and, in that context, agree the role of a charity regulator. While the jurisdictional difference in models is probably attributable to and reflective of differences in political and cultural context, the point remains that for the regulator to function effectively as a bridge between government and sector, there probably has to be a governing framework that sets out the principles and terms of reference for the engagement of both parties on public benefit matters. The charity law legislation then serves to ‘lock in’ government and sector around the central role of the charity regulator and an agreed list of charitable purposes.

2. Registration

All jurisdictions necessarily built their reformed regulatory infrastructure on the foundation of a mandatory system of registration. The systems varied somewhat with some jurisdictional differences in conceptual matters, though to a lesser extent as regards lists of Pemsel plus charitable purposes (with the notable exception of the Irish list with its conspicuous absence of human rights, social justice etc), which constituted a prerequisite for registration. All followed the lead given by England & Wales as regards adopting a tiered approach in relation to the level of accountability required from those charities on the register. However, there were also important and revealing differences in the systems and in their assigned roles within their respective regulatory frameworks.

2.1 Developing Public Benefit

In England & Wales, the register not only functioned as a data bank, it formed the basic tool for re-interpreting charitable purposes to meet emerging patterns of social need. The Charity Commission launched a rolling programme of review in 1997 in respect of registered charities,
and used that as an opportunity to examine activities constituting a contemporary interpretation of public benefit. A direct consequence of that exercise was the recognition given to several new charitable purposes (e.g. the relief of unemployment and rural and urban regeneration) an initiative that probably contributed considerably to stimulating the move towards charity law reform in that and other jurisdictions. This initiative was made possible by the fact that the Commission was vested with the powers and responsibilities of the High Court and Attorney General respectively, coupled with the freedom to apply the ‘spirit and intendment’ rule. A similar capacity would only be available to other jurisdictions if they too were vested with that package of powers. In Scotland and Ireland, the legislature has ensured that this capacity will not be transferable from England & Wales to the new regulatory bodies by leaving them dependent upon the judiciary for the exercise of anything other than administrative powers and thereby retaining for government any possible further extension of charitable purposes.

2.2 Non-registration

There are also significant jurisdictional differences in respect of eligibility to register. Most obviously, the example set in England & Wales as regards exempted/excepted charities, which results in a significant proportion of all charities not being registered, failed to transfer to the other jurisdictions. However, apart from such categories, the charities legislation in England & Wales takes a positive approach to eligibility for registration. This approach definitely did not transfer to the other jurisdictions, all of which pointedly identify criteria for non-registration.

In Scotland, entry to the register is by means of the ‘charity test’ which a body will not have satisfied if: (a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose; (b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or (c) it is, or one of its purposes is to advance, a political party. Moreover, under s. 8(2)(ii) the test will again not be met if, as a consequence of its activities, any disbenefit is incurred or likely to be incurred by the public.

In Ireland, the Charities Act 2009 declares a category of organizations to be ‘excluded’ from registering. An “excluded body” for this purpose means: (a) a political party, or a body that promotes a political party or candidate; (b) a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body; (c) an approved body of persons within the meaning of s. 235 of the Taxes Consolidation Act 1997; (d) a trade union or a representative body of employers; (e) a chamber of commerce, or (f) a body that promotes purposes that are unlawful, contrary to public morality, contrary to public policy, supports terrorism or terrorist activities, or is for the benefit of an illegal organization.

In Northern Ireland, whereas there is no counterpart to the above exclusion of specified bodies, there is an equivalent to the Scottish stipulation that there be no ‘disbenefit’ as s. 3(3)(ii) states that the public benefit requirement for registration will not be met if, as a consequence of an body’s activities, any detriment is incurred or is likely to be incurred by the public.

3. The Revenue

100 This view finds support in the comment made by a spokeswoman for the Scottish Council for Voluntary Organisations who noted that: “The OSCR has completed only two rolling reviews, covering 70 or so charities. It has also been quite conservative and is not pushing the boundaries of what constitutes a charity.” Conservative, perhaps, because it lacks authority to be otherwise.
The decoupling of charitable status and tax is clearly necessary to establish a new regulatory body for the former but this gives rise to questions as to what exactly is to be the latter’s role, if any, in relation to charitable status and on what terms will the two bodies thereafter relate?

3.1 Retained Powers of the Tax Agency

The crucial matter of whether the new regulatory body was established as the lead agency, empowered to co-ordinate the roles of all other relevant bodies and, in particular, able to direct the involvement of the tax agency, varied between the UK and Irish jurisdictions.

The initiative taken in England & Wales to firmly establish the Charity Commission as the lead regulator for charities, with responsibility to determine charitable status and related tax exemption privileges, was pointedly rejected by the Irish jurisdiction. While this matter was not specifically addressed in the charities legislation of either Scotland or Northern Ireland, it may be safely assumed that the new regulatory bodies will relate to the Inland Revenue in the same manner as the Charity Commission in England & Wales.

In Ireland, the determination of entitlement to tax exemption on funds applied for charitable purposes, remains exclusively the function and responsibility of the Revenue Commission which has sole responsibility to determine whether or not any funds applied by such an organisation for charitable purposes should be granted entitlement to tax exemption. It remains to be see how in practice this will work and whether the Revenue Commission will act in a manner that constrains the independence of the CRA.

3.1.1 Residual Responsibilities

In general, this agency now has no particular remit in relation to charities beyond ensuring that, like any other claimant, a charity complies with normal legal and administrative requirements and meets the eligibility criteria for tax exemption. It will need to be satisfied that such a charity is applying its income exclusively for charitable purposes and will hold that charity liable for tax in respect of any income not so applied. It does have a specialist role in terms of processing applications for repayment of tax on gift aid donations.

4. The High Court, Attorney General and other Regulators

As with the relationship between the new regulatory body and the tax agency, the empowerment of the former has necessarily also been at the price of reducing the traditional remit of the High Court, Attorney General and other bodies in relation to charities. Again, the legislative example set in England & Wales has not wholly transferred to the other UK and Irish jurisdictions.

4.1 The High Court and Attorney General

In all jurisdictions, the vesting of powers in the new regulatory body has directly impacted upon the role and responsibilities of the High Court and Attorney General in respect of charities. The extent to which they have been disempowered or now share power, varies.

4.2 Other Regulators

In all jurisdictions, the legislation is equally silent on any implications arising for other bodies with a regulatory role that includes charities such Customs & Excise, the Rateable Valuation Office, the Registrar of Companies, and the Registrar for Industrial and Provident Societies or Friendly Societies, and the Probate Office (or their counterparts) etc. The absence of clear
statements assigning lead responsibility and co-ordinating duties to the new regulatory body is very apparent.

The role of the Official Custodian, as initially created in England & Wales by the Charities Act 1960 and continued under the 1993 Act, s. 2(2), to act as a custodian trustee for charities in respect of any charity land or cash and investments that are the subject of proceedings, has transferred only to the Northern Ireland jurisdiction.101

5. Appeals Tribunal

Again, transferability of function is considerably eased when there are factors conducive to such a transfer in the receiving jurisdictions. In this case it was also facilitated by ‘push’ factors from Europe.

5.1 Establishing the Tribunals

In England & Wales, the Charity Tribunal commenced on Tuesday 18th March 2008,102 in Scotland103 the Panel was established in April 2006, while in Ireland104 and Northern Ireland105 preparation for launching these forums is well underway. In short, the tribunals are viewed as inseparably linked to the new regulatory body and as needing to be operational as soon as possible after that body was established. The fact that a tribunal is viewed as an integral component of the regulatory framework ensures its transferability.

This is interesting, as clearly the Charity Commission had long functioned without being linked to a tribunal. Previously, a party adversely affected by a Commission decision had to appeal to the High Court after obtaining leave to appeal from the Commission. Such a process, operated by way of a re-hearing before a High Court judge, was inevitably an expensive and protracted exercise. Indeed, the fact that High Court proceedings are so lengthy and expensive, combined with the current pressure on the court system due to the increasing number of litigants, were also important considerations: there was a need to divert proceedings away from the judicial system to prevent it from being inundated.

The tribunals are all similarly required to be properly constituted, with a President and a lay panel that includes legally qualified persons, obliged to hear appeals within specified time limits, at no cost to the appellants. In the UK jurisdictions, the range of matters that may be the subject of appeal is now more extensive than was the case under the previous process in England & Wales.

5.2 Transferability

Arguably, the decision to substitute a fully-fledged tribunal for the previous process was one that was expedited, if not forced, by pressures external to the jurisdictions involved.

101 The Charities Act (Northern Ireland) 2008, s. 11.
102 The Charities Act 2006, s. 8, and Sched 4.
103 The Charities and Trustee Investment (Scotland) Act 2005, s. 75 and Sched 2.
104 The Charities Act 2009, s. 75.
105 The Charities Act (Northern Ireland) 2008, s. 12 and Sched 2.
In Koretskyy and Others v. Ukraine, the ECtHR had again drawn attention to the need for Member States to have proper appeal processes. That case concerned the applicants' complaint about the authorities' refusal to register their association. The City Department of Justice had informed the applicants that, under the Associations of Citizens Act, it refused to register their association on the ground that its articles had not been drafted in accordance with domestic law. The ECtHR noted that the Ukrainian Government's main argument, as regards the necessity of the interference with the applicants' right to freedom of association, was that the State enjoyed the exclusive right to regulate independently the activities of non-governmental organisations on its territory. The Court found that the provisions of the Associations of Citizens Act, which regulated the registration of associations, had been too vague to be sufficiently "foreseeable" and had granted an excessively wide margin of discretion to the authorities to decide whether a particular association could be registered. In such a situation, the judicial review procedure available to the applicants could not prevent arbitrary refusals of registration.

The Article 6 requirement of the European Convention that "an independent and impartial tribunal" be available to hear, within a reasonable timeframe, the grievances of those who believe their civil rights have been infringed, has undoubtedly acted as an incentive for the UK and Irish jurisdictions to put in place such a tribunal.

6. Regulatory Reforms: Transferability and Convention Compliance

Pressure from Europe is steadily requiring compliance with Convention standards and has had some bearing on the regulatory reforms instituted in the UK and Irish jurisdictions.

6.1 Charities as Public Bodies

Arguably, to the extent that charities perform public functions they fall within the definition of ‘public bodies’ and are therefore subject to the Convention. That would seem to have been the conclusion reached by the ECtHR when it ruled in Foster v. British Gas:

“A body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the State, for providing a public service under control of the State and has for that purpose special powers beyond those which resulted from the normal rules applicable in relations between individuals is included among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.”

As charities increasingly assume or share responsibilities that were previously borne by government bodies, so they are also increasingly liable to scrutiny to ensure their activities are fully Convention compliant. As noted in Tudor, "the activities of the charity may be so enmeshed with those of a public authority as to be public functions". The extent to which a charity is

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106 No 40269/02 (3 April 2008).
107 Article 6 states: “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”.
109 [1990] 3 All ER 897.
dependent upon funding from a government department will also, to that extent, indicate that it is controlled by and functioning as an arm of that public authority.111

If this is the case, then Convention requirements in respect of public bodies are necessarily transferable to charities.

6.2 Anti-terrorism Measures

The global fight against terrorism, including prevention of the misuse of charities for terrorist financing, has provided a further, specific context for ensuring that national regulatory reform allows for provisions that are compatible with international anti-terrorism measures (e.g. FATF112). Accordingly, the new Irish113 charities legislation contains provisions that provide a basis for administrative co-operation with foreign statutory bodies on law enforcement matters.

6.3 Council of Europe

The Council of Europe has issued a declaration of fundamental principles that should govern all ngos, including charities.114 So far, these principles have not proved to be transferable as new UK and Irish legislation make no reference to them nor does it attempt to address any such linkage between charities and the broader world of ngos. Similarly, the rulings given by the ECJ in the Stauffer115 and Persche116 cases have yet to result in the UK and Irish governments addressing the implications arising for charity law. However, if the proposed European Foundation Statute attracts the support of other Member States then this initiative will be transferable throughout the EC and require to be at least recognized by the new charities legislation and regulatory bodies of the UK and Irish jurisdictions.

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112 The Financial Action Task Force (FATF) is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.
113 The Charities Act 2009, s. 34. Interestingly, the UK legislation does not have comparable provisions.
115 Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften (C386/04).