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A postscript to *Pye*

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The long-awaited decision of the Grand Chamber in *J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd* v *UK*[1] was handed down on 30 August 2007. It was held, by a majority, that the applicant's human rights had not been violated when it lost title to registered land as a result of the limitation of actions following adverse possession.

In a sense this paper could end here. The law is back where it was before the Pye companies ("Pye") took their case against the UK Government to the European Court of Human Rights (ECtHR). The provisions of the Land Registration Act 1925 in respect of adverse possession are perfectly safe; and so, therefore, are those of the Land Registration Act (NI) 1970 and of the Registration of Title Act 1964 (Ireland). But it has been very clear throughout the *Pye* litigation[2] that the interaction of human rights with the law of property in general, and specifically in the context of adverse possession, is extremely controversial. It must still be useful to discuss this strange journey taken by the law, and to consider where it may still lead us.

The *Pye* litigation prior to Grand Chamber's decision

This is now well-known and can be summarised briefly. Mr Graham had a grazing licence over 25 hectares of land near Newbury, in Berkshire, for 1983 from its owner, Pye.[3] When it expired he asked for another one, and was refused because Pye was intending to develop the land. He was not asked to leave, and so he kept his cattle there and in 1984 he bought the hay crop. After that, he asked again for a renewed grazing licence but received no response and, thereafter, continued to graze his cattle on the land and also to maintain it by harrowing and fertilising it and repairing fences. In 1997 Graham registered a caution

* This paper was written for a meeting of the Judicial Studies Board of Northern Ireland, on 16 October 2007. It is therefore a sequel to an address given to the JSB on 26 January 2006; see E Cooke, "Adverse possession after *J A Pye (Oxford) Ltd* v *the United Kingdom*" (2006) 57 *NILQ* 429. I am grateful to Laura Edwards and to Laura Graham for research assistance; to Una Woods of the University of Limerick for the insights I have gained from her paper at the conference of the Society of Legal Scholars in September 2007, and to Amy Goymour of Cambridge University for discussing this paper with me and providing many helpful thoughts. The remaining errors are my own.

1 Application no. 44302/02.

2 Hereafter the whole litigation saga, heard in five courts altogether and between two different sets of parties, is referred to simply as *Pye*.

3 Martin Dixon, "Adverse possession in three jurisdictions" (2006) *The Conveyancer and Property Lawyer* 179, points out that the figure of 23 hectares given by the ECtHR seems to be a typographical error.

against Pye's registered title. Pye took action a year later to have the caution cancelled, and in 1999 commenced a further action to recover possession of the land. But their action failed because of the limitation of actions. So held Neuberger J in the High Court.[4] The Court of Appeal found in favour of Pye on the basis that Graham did not have the requisite possession, since the quality of his occupation was unchanged from that of a grazing licensee, and that he had not had the requisite intention to possess the land;[5] but Graham succeeded in the House of Lords.[6] The value of the land has been in dispute, but one valuation put it at £2.5 m in 2002.[7]

The legal background to these events was the Limitation Act 1980 and the Land Registration Act 1925; the parallel enactments in Northern Ireland are of course the Land Registration Act (NI) 1970 and the Limitation (NI) Order 1989. The combined effect of these statutes is that title to land is lost 12 years after possession of it is taken by another. The limitation of actions to recover land works just as well in registered land as in unregistered land, and the adverse possessor's title is protected against purchasers even before he becomes the registered proprietor, although the technical means by which this is achieved differs very slightly between the two Acts.[8]

Pye lost its title before the Human Rights Act 1998 came into force, but was free to apply to the ECtHR on the pre-Human Rights Act basis. It did so, the respondent being now not Graham but the UK Government, on the basis that the legislation that led to the loss of its land contravened Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. Pye succeeded, leaving the UK Government with a huge bill for compensation for the loss of that valuable development land.

Meanwhile, of course, the Land Registration Act 1925 was repealed by the Land Registration Act 2002 ("the 2002 Act"). That Act made radical changes, so that there is now no limitation period for the recovery of possession of registered land;[9] it is possible for an adverse possessor to take over the dispossessed proprietor's registered title, but if the dispossessed proprietor objects to his application for registration the circumstances in which the squatter can be registered are very limited indeed. It should be stressed that these changes were not motivated by the *Pye* saga, having been proposed by the Law Commission before Pye had been heard of;[10] but the first instance decision added weight to the Law Commission's views.[11] Rather, they arose from two quite different concerns. One was the view that to allow loss of title by adverse possession was inconsistent with the certainty of title that registration is supposed to confer; the other was the wish to induce large organisations to register their title voluntarily, by making registered title attractive (because it is now "squatter-proof").

Despite that change in the law, the decision of the ECtHR in *Pye* raised serious concerns. There must be titles acquired by adverse possession against registered proprietors under the 1925 statute and still unregistered; to the compensation payable to Pye may be

4 (2000) 81 P&CR 177.

5 [2001] EWCA Civ 117, [2001] Ch 804, paras 41 and 43.

6 [2002] UKHL 30.

7 According to the UK Government; Grand Chamber decision *J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd* v *UK* (application no. 44302/02), para. 23.

8 See E Cooke, "Adverse possession after *J A Pye (Oxford) Ltd* v *the United Kingdom*" (2006) 57 *NILQ* 429, p. 431.

9 S. 96.

10 In Law Commission, *Land Registration for the Twenty-First Century: A consultative document* (Law Com no. 254, 1998), Part X.

11 *Law Commission, Land Registration for the Twenty-First Century: A conveyancing revolution* (Law Com no. 271, 2001); Neuberger J's conclusion is quoted at length at para. 14.1.

added claims for compensation in the future, to an incalculable extent. Moreover, the decision raised open-ended problems for Northern Ireland and the Republic, both of whose registration statutes appeared to violate human rights following the court's decision. The decision even raised fears about the Land Registration Act 2002, which might be seen to have weak points even in its much attenuated provisions for adverse possession. The new Act makes it possible for a squatter to supplant a registered proprietor who fails to respond to the registrar's notice of the squatter's application, yet the majority in the European Court of Human Rights took the view that the fact that a proprietor had "slept on his rights" should make no difference to the fact of violation.[12]

It was therefore unsurprising that the UK Government appealed to the Grand Chamber of the ECtHR;[13] and the Irish Government made a third-party submission in the case.[14]

A digression . . .

Here we have to digress and note two developments that took place parallel with the *Pye* litigation and in response to it.

One is the English decision in *Beaulane Properties Ltd* v *Palmer*.[15] This was another case arising from the grazing of livestock, where the limitation period for the recovery of land had expired well before the coming into force of the Land Registration Act 2002. It was heard after the House of Lords' ruling in *Pye* and after the coming into force of the Human Rights Act 1998, but before the judgment in *Pye* in the ECtHR. Nicholas Strauss QC, sitting as a Deputy Judge of the High Court, was able to find in favour of the dispossessed registered proprietor despite the fact that on a conventional understanding of the legislation he would have lost his title. The judge was persuaded by the registered proprietor's argument that there a violation of Article 1 of the First Protocol and, rather than making a declaration of incompatibility in respect of the legislation, reinterpreted the requirements for adverse possession itself. He decided the case as if a nineteenth-century Court of Appeal decision, *Leigh* v *Jack*[16] remained authoritative, so that the squatter had to be doing something obviously incompatible with the proprietor's current use of the land. That was not the case here; and so the registered proprietor's action succeeded.[17]

The other is the proposal to reform the law in the Irish Republic with a view to making the law of adverse possession in registered land human rights compatible. The Law Reform Commission's draft Bill, in 2005, contained clauses (129 and 130) restricting significantly the rights of a squatter, requiring him or her to make an application to court before he or she could be registered, cutting down the circumstances in which he or she could be registered and empowering the court to order the squatter to pay compensation. However, the circumstances in which the squatter could be registered, under these proposed provisions, were nowhere near so narrow as those under the Land Registration Act 2002 for England

12 For further comment on the decision of the ECtHR, see Cooke "Adverse possession" (n. 8 above); Dixon, "Adverse possession" (n. 3 above); A Goymour, "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65(3) *Cambridge Law Journal* 696–720.

13 Leave is given for this only in exceptional cases, i.e. those raising a serous question about the interpretation or application of the Convention, or a serious issue of general importance: Art. 43(3) of the Convention. See H Fenwick, *Civil Liberties and Human Rights* (London: Cavendish, 2002), p. 24.

14 Grand Chamber judgment, para. 8.

15 [2005] EWHC 1071 (Ch). See J Howell, "The Human Rights Act 1998: land, private citizens, and the common law" (2006) 123 *LQR* 618.

16 (1879) 5 Ex D 264, CA.

17 Again, for further discussion, see Cooke, "Adverse possession" (n. 8 above).

and Wales. They were essentially the circumstances in which adverse possession is normally successful in Ireland, namely:

> 1. whether from the lack of response to notices, inquiries, searches, or advertisements displayed, served, made or placed, from statutory declarations or other evidence furnished, it is reasonable to assume that the owner has abandoned the land or is unlikely to be found;
> 2. owing to a mistaken assumption as to the position of the boundary between the applicant's land and the owner's land, the applicant has throughout the period encroached upon part of the owner's land reasonably believing it to be part of the applicant's land;
> 3. where the application relates to land comprised in a deceased person's estate, it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes; or
> 4. in any other case, in the interest of settling the title to land in the fairest manner, it is appropriate to make the order.[18]

Point 3 is especially significant because adverse possession has been widely used both in the Republic and in Northern Ireland to resolve disputes arising on intestacy, in a context where families have been scattered by migration and where farming has often simply been carried on by the next generation without those involved feeling it necessary to extract a grant of probate.

However, the Land and Conveyancing Law Reform Bill presented to the Seanad on 16 June 2006 did not include those clauses. It was felt (in response to representations made to the Irish Government by the Law Society of Ireland's Conveyancing Committee) more appropriate to await the decision of the Grand Chamber and, indeed, as we have noted, for the Irish Government to intervene in those proceedings.

The decision of the Grand Chamber

Article 1 of the First Protocol reads as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

It is trite law that there are three things here: a general principle, a provision about the deprivation of possessions, and, in the second paragraph, a third provision, about the control of use of property. It is also well-established that the second and third provisions are instances of the first.[19]

The Grand Chamber gave a majority decision in favour of the UK Government; two different minority opinions were also handed down.

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18 Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), Appendix B, Land and Conveyancing Bill 2005, cl. 130(2)(b).

19 Grand Chamber decision, para. 52.

The majority decision

The majority reasoned as follows. First, they disagreed with the UK Government's submission that the case should be heard with reference solely to Art. 6, since it was not a case where the Government was trying to confiscate possessions or otherwise carry out any direct deprivation (so that Art. 1 of the First Protocol was not relevant). The court found "nothing in principle to preclude the examination of a claim under Article 1".[20] But that feature of the legislation was relevant in another respect; because this was not legislation which permitted the state to transfer ownership from one person to another, nor a manifestation of a social policy of transferring ownership. Rather, it was a provision for the limitation of actions. Accordingly, the statutory provisions were not intended to deprive anyone of their ownership, but to "regulate questions of title". Accordingly, the court found that the operation of the statutory provisions in question was a control of use of the land, not a deprivation of possessions.

That finding of itself led the court to its conclusion. It seems to have regarded it as beyond dispute that the limitation of actions serves a legitimate aim. Reference was made to *Stubbings and Others* v *UK*,[21] which concerned the limitation of an action for personal injury. As to the extinguishment of the registered proprietor's title, the court regarded this as being within the margin of appreciation accorded to states as to what is in the public interest, unless the provision is manifestly without reasonable foundation; and the court held that this provision was not.[22]

Even so, could it be said that the application of the law in this case did not strike a fair balance between the public interest and the individual? Again, the strength of the public interest in the limitation of actions seemed to draw the court to its conclusion; it took the view that the termination of the title of the paper owner merely regularises the positions of the parties once the cause of action to recover land is barred. And while the Chamber had laid much weight upon the absence of compensation, the Grand Chamber noted that the issue of compensation was not generally engaged in connection with a control of use, and that no other country had compensation provisions as part of its adverse possession regime.[23] It agreed with the UK Government that "a requirement of compensation would sit uneasily alongside the very concept of limitation periods".[24] And the court was unimpressed with the idea that the legislation did not incorporate sufficient procedural safeguards for the registered proprietor, in view of the fact that the limitation period was relatively long, at 12 years; that very little action would have been needed to stop time running; and that Pye had ready access to the courts throughout the 12 years. What of Pye's contention that their loss was so great, and Graham's gain such a windfall (on top of the free use of land for so many years) that the fair balance required by Art. 1 was upset? Again, the court was unimpressed. Their reasoning focuses on the legislation itself, rather than on the legislation's application to the facts of this case, because of their view about the importance of the limitation of actions: "limitation periods, if they are to fulfil their

20 Grand Chamber decision, para. 60.

21 [1996] ECHR 22083/93.

22 Grand Chamber decision, paras 71 and 74; reference was made to *Jahn and Others* v *Germany* nos 46720/99 and 72552/01, ECHR 2005-VI.

23 Both parties submitted comparative evidence; on behalf of the UK Government the British Institute of International and Comparative Law submitted a detailed report of adverse possession regimes in a number of jurisdictions. The court found, at para. 78, that it could not derive any general principle from this material, save to say that periods of limitation differed from one regime to another, as did the relevance of the good faith or otherwise of the squatter.

24 Grand Chamber decision, para. 79.

purpose . . . must apply regardless of the size of the claim. The value of the land cannot therefore be of any consequence to the outcome of the present case."[25]

The dissents

There were two minority opinions. One ("the first dissent") was given by Judges Rozakis, Bratza, Tstatsa-Nikolovska, Gyulumyan and Sikuta, and the other ("the second dissent") by Loucaides and Kovler.

The first dissent is, with respect, the more powerful. The dissenters agreed with the majority that this was a control of use of land; and they agreed that the statute served a legitimate aim in the public interest and that the extinguishment of the registered proprietor's title was not "manifestly without reasonable foundation". Where they parted company was on the question of fair balance. They went into rather more detail than had the majority of the Grand Chamber on the purposes of the law of adverse possession, looking not simply at the limitation of actions but at matters much more closely linked with land law itself – in particular, the justifications raised by the Law Commission for England and Wales,[26] and also the Government's additional argument raised before the Grand Chamber, namely the public interest in ensuring that land, as a finite resource, should be used and maintained. They noted that some of the general reasons for the limitation of actions for the recovery of land are unnecessary where title is registered – in particular there is no need to use limitation to ensure certainty of title, since the register provides this. And they took the view that the public interest in keeping land in use does not require the landowner to be deprived of his title without compensation. Nor were they attracted to the idea of giving the adverse possessor a windfall, taking the view that his moral entitlement was quite different from that of the tenants in *James and Others* v *UK*,[27] where it could be said that the tenants' investment in the property over the years justified their being able to enfranchise their leases. The impact on the landowner was, they said, "exceptionally serious". Significantly, the minority agreed that compensation provisions simply do not fit with the idea of limitation of actions; but they went on to say that this only made the loss of beneficial ownership all the more serious. They laid more stress on the extent of the changes in the 2002 Act – thus emphasising the contrast, as had the Chamber, and the new safeguards in the legislation, which might be said to make the lack of safeguards in the older statute all the more conspicuous.

Thus they could not agree that a fair balance had been struck, quoting words used to describe Pye's loss in the national courts: "draconian", "unjust", "illogical", "disproportionate".

The second dissent was rather shorter. Judges Loucaides and Kovler could not agree that the legislation in question served a legitimate aim in the general interest. They took the view that the provisions amounted to a deprivation, rather than a control of use. Insofar as there might be an interest in keeping land in use, that could be achieved by "taxation or the creation of incentives"; and the system complained of showed, they said, disrespect for the owner's legitimate rights and encouraged illegal possession of property and the growth of squatting. The fact that Judges Loucaides and Kovler thought that this was a deprivation may have influenced their finding of a violation, owing to the general rule that compensation should be payable where there is a deprivation of possessions.[28]

25 Grand Chamber decision, para. 84.

26 Law Com no. 254 (n. 10 above), 10.6–10.

27 [1986] ECHR 8793/79.

28 I am indebted to Amy Goymour for this point.

Comment

There is much to reflect on here, and we are still in the early days of evaluating the decision. One of the striking factors, already highlighted in the account given above, is the extent to which the majority was swayed by the fundamental importance of the limitation of actions across the board. It made little or no use of specific justifications for the limitation of actions *to recover land*, although in its discussion of relevant domestic law and practice it did rehearse the Law Commission's thinking about the justifications for the law on adverse possession.[29] The majority did not really carry out much of an examination of the justification for extinguishing title, regarding that as simply a logical consequence of the limitation of the action for possession. And, of course, that latter point is right – the public interest could not possibly be served by a situation in which a registered proprietor remained the "owner" of land but could not access it, use it or sell it, while the squatter had de facto ownership which he could not then register (so that the squatter could not sell the land either). But is the former point correct: is there anything more to be said about the justification of the limitation of actions to recover possession of land? If not, we might now pause to worry about why we have virtually abolished that limitation in England and Wales for registered titles. Have we gone too far? We look at this again in the final section of this note.

One curious feature of the Chamber's decision was its very European, civil law view of the ownership of land. It will be recalled that the civilians are uncomfortable with the idea that property rights can be fragmented (seen pre-eminently in the common law concepts of the trust and of relativity of title); and so were particularly uncomfortable with the idea that an owner might be penalised for sleeping on his rights. But this is rather a theoretical position; in practice, land throughout Europe is subject to restrictions upon its use and management, and may be subject to compulsory purchase; land ownership carries obligations as well as privileges. The Grand Chamber's decision may be seen as a more realistic view of the nature of ownership itself than was that held by the Chamber.[30]

The second dissent is curious; it is hard to see any justification for a view that certainty of title is the *only* justification for the law of adverse possession, so that it has *no* justification in registered land. But the first dissent is much stronger. The dissenters part company with the majority only on the final question as to fair balance, whether the circumstances of an individual case can ever be subject to examination so as to provide a possible challenge to a squatter's title. The majority's view is quite simply that for the limitation of actions to work *at all* there can be no exceptions; the minority disagrees. Neither has a knock-down argument as a matter of logic.

The authority of the Grand Chamber decision

This is perhaps the most crucial issue for the courts in Northern Ireland, England and Wales, and the Irish Republic. For these courts are not bound by decisions of the ECtHR; they are obliged only to have regard to its jurisprudence (s. 2 of the Human Rights Act 1998). And it has to be acknowledged that there is force in the minority's view in the Grand Chamber decision in *Pye*. It is difficult not to imagine circumstances in which the Limitation

29 Grand Chamber decision, para. 30.

30 The Grand Chamber did not explore, perhaps because it was not invited to do so, the question of the squatter's own rights under Art. 1 of the First Protocol. Could not the grazing land be said, after so many years, to be among Graham's possessions? The point might sound rather a weak one but for decisions of the ECtHR granting a measure of protection to illegal occupiers in some (perhaps rather extreme) circumstances: see H Ploeger and D Groetelaers, "Informal settlements and fundamental rights" at www.fig.net/pub/fig2006/papers/ts27/ts27_01_ploeger_groetelaers_0436.pdf.

Acts could operate in a manner perceived to be unjust, despite the Grand Chamber's reassurance that the statutory machinery here is human rights compliant and, indeed, its view that the nature of the legislation precludes the examination of individual circumstances. We might or might not think that Pye deserved its fate; but it is easy to construct stories of registered proprietors deprived of their land through no fault of their own, in circumstances where, perhaps through infirmity, they were unable to look after it. That land might be all a person had. Is it not still open to the domestic courts to hold that in some extreme circumstances the operation of the Limitation Acts is disproportionate to the end sought to be attained – as, indeed, was the view of the first dissent in the Grand Chamber in *Pye*? The majority of the Grand Chamber would seem to say not only that there was no violation of Art. 1 in *Pye* itself, but that there could be no violation in any other circumstances, even extreme ones.

Again, no knock-down arguments come to hand. But three factors would seem to point in the direction of the courts' not examining the issue of fair balance in individual cases.

One is the authority of the Grand Chamber's judgment. It is not binding precedent. But it is very persuasive indeed. To quote Lord Bingham from *Leeds City Council* v *Price and Others*; *Kay and Others* v *London Borough of Lambeth* ("*Kay;Price*"):[31]

> . . . it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights specified in s 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down.

Lord Bingham also referred to the courts' liberty, under s. 2 of the 1998 Act, to depart from the Strasbourg court on "isolated occasions" in a class of case "peculiarly within the knowledge of the domestic authorities". But note that he speaks of a "class of case", not of the circumstances of a particular individual;[32] and note that the Grand Chamber has denied the relevance of individual circumstances in cases concerning the limitation of actions.

Another powerful persuasion must be the majority's central argument, which is that there is no room for consideration of the size of the claim (and therefore of the loss or of the "windfall" gain) in the context of the limitation of actions. We do not, for example, decide to override the limitation periods in actions in contract, or arising out of personal injury. Limitation is, to a considerable extent, about drawing bright lines.

Third is the House of Lords' decision in *Kay;Price*. These conjoined cases were both possession proceedings, taken in one case against tenants whose lease had come to an end, and in the other against gypsies. The occupiers' defence, in both cases, was that possession proceedings violated their rights under Art. 8 of the Convention: their right to respect for their home. As is well known, the cases reached the House of Lords and the occupiers' appeals failed. Their lordships' decision was reached in the light of the ECtHR's decision in *Connors* v *UK*,[33] which also involved the actions taken by a local authority to get rid of gypsies. In that case, it was held that the gypsies' procedural rights had been violated; and

31 [2006] UKHL 10, para. 28. The decision in *Kay;Price* is helpfully expounded by Carnwath LJ in *Doherty and Others* v *Birmingham* CC [2006] EWCA Civ 1739.

32 Bear in mind that the *Kay;Price* case was decided partly in response to the ECtHR's decision in *Connors* v *UK* (2004) 40 EHRR 189, which was precisely about the special considerations relevant to a *class* of cases (gypsies), not to a particular individual.

33 See n. 32 above.

legislation was passed in response to ensure that gypsies in the future would have the opportunity to have possession proceedings adjourned for up to 12 months.[34]

Against this background the House of Lords had the opportunity to decide the status of a challenge pursuant to Art. 8 in the face of possession proceedings based on indisputable property rights. By a majority they made a far-reaching decision. They held that an Art. 8 defence to possession proceedings can *only* be mounted on the basis that the legislation concerned is incompatible with the Convention – and not on the basis of hardship in an individual case. They reasoned that parliamentary scrutiny of legislation will already have carried out the necessary balancing procedure, and that therefore there is no need for the courts to address that issue afresh. There can be a challenge based on Art. 8 only where it can be said that the legislation as a whole is not human rights compliant – as it was not in the *Connors* case because the unusual needs of a particular community had been overlooked. And of course in that event a challenge would (in the appropriate court) lead to a declaration of incompatibility (if the legislation could not be interpreted pursuant to s. 3 of the Human Rights Act 1998) which would, of course, make no difference to the outcome for the individual suffering hardship.

The majority in the House of Lords was motivated in particular by their concern not to flood standard county court possession proceedings with human rights arguments, of which 99.99 per cent or more must be doomed to failure.

Can the ratio of that case (that is, that domestic property legislation can only be challenged as a whole, rather than its effect examined in individual cases) be stretched just a little wider and construed to encompass not only defences to possession proceedings on the basis of Art. 8, but also any human rights challenge to a clearly established property right? Is it always the case that the Convention looks to property law itself, rather than to its application to specific facts? Lord Hope, at para. 81, referred to the applicant local authorities' "right to vindicate their right, as owners of the land, to exclusive occupation of the properties". That is what a squatter is doing in applying for registration, or in resisting possession proceedings brought by the former owner whose title has been extinguished – for in adverse possession cases of this kind, it is the *squatter* who is owner, by virtue of the legislation.

The House of Lords' decision in *Kay;Price* related explicitly only to Art. 8: it cannot be regarded as binding authority to the effect that in *any* human rights challenge to property rights the question of balance and of hardship to the individual cannot be examined. Nevertheless it must be regarded as highly persuasive, or at the very least indicative of the view their lordships would take were an adverse possession case involving an Art. 1/Protocol 1 challenge ever to reach them. They would surely hold that the legislation is, according to the Grand Chamber, human rights compliant, that the balancing exercise has already been done in the legislative process, and that the courts may not re-open it in individual cases.

The case for reform

The somewhat negative conclusions of the last paragraph should not blind us to the extent to which the *Pye* saga must be a catalyst for reform. The gift that the *Pye* litigation has given is an opportunity to re-evaluate adverse possession. There seems to be little scope, if any, for the courts to inquire whether the legislation strikes a fair balance in a particular case. But the legislature for Northern Ireland and for the Irish Republic can still address the prior

34 Amendments to the Caravan Sites Act 1968.

question: does the legislation serve a legitimate aim, and does it do so in a proportionate manner? England and Wales has very recent legislation, but even this should not escape scrutiny in the light of the issues thrown up by *Pye*.

The litigation forced the courts to look closely at the requirements for adverse possession. These have been fluid, to say the least, over the years. The physical aspects of possession are now relatively clear;[35] but the confusion inherent in the requirements that the squatter does not have to intend to own, only to possess, but must intend to exclude the world at large "including, so far as practicable, the paper owner" came to a head in the Court of Appeal decision in *Pye* that Graham did not have sufficient intention to possess. The contrast between that finding and those of the High Court and Court of Appeal is striking. One of the trends in adverse possession law over the years has been the courts' wish, from time to time, to raise the barrier that the squatter must surmount; we find it difficult to forgive those who trespass against us, the courts no less than the rest of us. Every now and then the barrier is pushed a bit too high, so as to frustrate the purpose of the legislation, and the House of Lords' analysis restores order in this respect.[36]

That of course was what had happened in *Leigh* v *Jack*,[37] and again in *Wallis' Cayton Bay Holiday Camp Ltd* v *Shell-Mex and BP Ltd*.[38] The implied licence idea introduced in the latter case was expressly overruled by the Limitation Act 1980;[39] the more subtle curb upon the squatter in *Leigh* v *Jack* survived, strictly speaking, until *Buckinghamshire CC* v *Moran*.[40] The attempt to revive that rule, in *Beaulane Properties Ltd* v *Palmer*[41] must now be regarded as *per incuriam*. The Grand Chamber's decision in *Pye* removes any reason for reinterpreting the legislation and makes clear that *Beaulane* was founded on an erroneous application of human rights law. Instead, the law as to the requirements for adverse possession stands as it stood immediately after the House of Lords' decision in *Pye*.[42]

In England and Wales we have moved on from there. So far as registered land is concerned the law is now as stated in the 2002 Act, except where the limitation period expired before the coming into force of that Act.[43] That reform was undertaken in the light of proposals made by the Law Commission for England and Wales, in a joint project with the Land Registry.[44] The Commission identified[45] four reasons often given for the law on adverse possession:

35 *Buckinghamshire CC* v *Moran* [1990] Ch 623 is now the leading authority.

36 [2003] AC 419 at 435–43.

37 See above n. 16.

38 [1975] QB 94.

39 Sch. 1, para. 8(4).

40 [1990] Ch 623, *per* Slade LJ at 639 and Nourse LJ at 645F. The Republic's courts have followed this decision: J C W Wylie, *Irish Land Law* 3rd edn (Dublin: Butterworths, 1997), p. 1089.

41 See n. 15 above.

42 For a profound analysis of the requirements for adverse possession: see O Radley-Gardner "Civilized squatting" (2005) 25 *Oxford Journal of Legal Studies* 727–47.

43 Subject to the transitional provisions contained in Sch. 12. It is noteworthy that s. 11(4)(c) provides that on first registration after the coming into force of the new statute, the registered proprietor will hold his or her newly registered title subject, inter alia, to rights acquired under the Limitation Act 1980 (c. 58) *of which he or she has notice*. Thus, the owner of unregistered land who does not know that he or she lost a field to a squatter 20 years ago and registers the title now can regain that field (provided, one supposes, that the squatter has not first registered his or her own title to the field). This seems a perfectly straightforward deprivation of the title of the squatter and it is hard to think of a justification of it apart from academic tidiness. The point has been made before – E Cooke, "The Land Registration Bill 2001" (2002) *The Conveyancer* 11 – but has not yet been raised by real people.

44 Law Com no. 271 (n. 11 above).

45 See n. 26 above.

(i) because it is part of the limitation of actions, and encourages owners not to sleep on their rights;

(ii) because if ownership and use of land are out of kilter, the land may become unmarketable;

(iii) because an innocent squatter who was simply mistaken about ownership, may have spent money on the land; and

(iv) to facilitate investigation of title to land – the requisite age of a good root of title to unregistered land need only be a few years longer than the limitation period.[46]

The commission rightly noted that point (iv) has no application when title is registered. With that justification disposed of, they took the view that the other points were of minor importance. Point (i), too, fades into insignificance when registration provides certainty to the world and is supposed to guarantee security of title to the owner. Point (ii) was considered to be of minor importance and covered by the provisions relating to overriding interests; and point (iii) can often be picked up by other principles, such as proprietary estoppel.

So the Law Commission, and the legislature, felt it reasonable virtually to eliminate the possibility of acquiring title to land by adverse possession. The circumstances in which a squatter can be registered as proprietor are restricted to instances where the registered proprietor has no objection; where the squatter has an equity by estoppel; where the squatter has some other entitlement, for example, under a will or intestacy; or where the squatter has made an innocent and reasonable mistake about boundaries.

Earlier commentary has focused on the fact that this reform may go too far in favour of the registered proprietor. Other legislatures, for example, the Australian states, have not all abolished the limitation of actions to recover registered land.[47] At the very least, it may be said that adverse possession plays a vital role in registration systems which do not operate a system of fixed, surveyed boundaries.[48]

On the other hand, it was observed after the Chamber decision in *Pye*, when the Grand Chamber decision was awaited, that alongside those concerns that the new law went too far in suppressing the squatter there must also be concerns that the new law went too far in the squatter's favour, by giving the registered proprietor insufficient protection. Was it enough to give the squatter 65 business days to respond to the registrar's notice of the squatter's application?

The Grand Chamber's view is that it is; and I have argued that the decision in *Kay;Price* means that the courts of England and Wales, and of Northern Ireland, should not go behind the legislation in an individual case. Nevertheless there are reasons why the legislature might at some stage review the very radical change made in the 2002 Act and ask if it goes too far in either direction and if it might therefore be tweaked. It might well be influenced

46 This is Martin Dockray's point, in his renowned article "Why do we need adverse possession" (1985) *The Conveyancer* 272; in the writer's view this point was the major driver of the 2002 reform to adverse possession. Dockray's point was simple and persuasive: the major reason for the law on adverse possession was intimately linked with the deduction of title in unregistered land; therefore it is (almost) unnecessary where title is registered.

47 The reference to Australia is deliberate; true, a number of European jurisdictions also allow for title to be acquired by possession, but European registration systems are conceptually different from the English and Commonwealth systems. These two are rather stronger systems, in which registered title is supposed to prevail over unregistered, and there is little or no possibility of a "true owner" off register. So the point to be made is that acquisition of title by adverse possession cannot be said to be fundamentally incompatible even with registration systems akin to ours.

48 Commonwealth systems typically do; the English and Irish systems do not.

by its own argument in the Grand Chamber: that without the possibility of acquiring title by adverse possession, land may be left unused. This is slightly different from the Law Commission's point (ii), above, where the concern was unmarketability. It may be that insufficient weight was given to that point by the Law Commission; and the Government's point may also have to be thought through. We currently have legislation allowing local authorities to use, but not to acquire, unoccupied properties for housing;[49] but these provisions may be ineffective because of the heavy duties placed upon the authorities to maintain the property in the interests of the owner. It may be that, in a jurisdiction where land is scarce and housing a problem, the ability to acquire title by adverse possession is truly needed. And that takes us to the pressing social concerns highlighted by Lorna Fox and Neil Cobb in their article "Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002".[50] They raise the problems of the homeless, who have in recent years been able to have recourse to adverse possession, and who may actually be rather more deserving than the landowners whose neglected properties they occupy. They suggest that morality does not always run in one direction – in contrast to the view taken by the Law Commission, which seemed to view squatting as immoral and, also, as it turns out, to the view taken by the second dissent in the Grand Chamber decision in *Pye*.

So, I suggest that the legislative story of adverse possession in England and Wales is not yet over.

These issues are even more live in Northern Ireland and the Republic, where the steps taken by the English legislature in the 2002 Act have not been taken. It seems unlikely now that the precise terms suggested by the Irish Law Reform Commission will find their way into the new Irish legislation; but there are strong arguments that some provision might perhaps be made for the protection of owners who are in danger of losing their land inadvertently.[51] Reform cannot now be said to be required under the European Convention, but if reform is ever considered for Northern Ireland then that is one of the factors that should be considered. Alongside it will doubtless be the considerations that swayed the English Law Commission; and, in the other direction, the public interest in keeping land in use and in not allowing land ownership to fall out of kilter with use. An important consideration must also be the traditional use made of adverse possession in Northern Ireland and in the Republic in sorting out disputes on intestacy; a matter of which the judiciary might not, perhaps, be able to take judicial notice but which must be an important consideration for government.

So *Pye* is over. The issues surrounding the usefulness of the law relating to adverse possession remain live. But it is suggested that those are matters for the various legislatures of the United Kingdom and Ireland and not for the courts; which may be a matter either for relief or for regret to today's audience.

49 Housing Act 2004, ch. 2.

50 (2007) 27(2) *Legal Studies* 236.

51 Una Woods, paper delivered at the conference of the Society of Legal Scholars, 2007.

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The boundaries of governance in the post-modern world

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Abstract

We discuss the challenge of corporate governance and its regulation in the post-modern world. In so doing we explore the complex web of recent regulation that has developed out of a mix of political ideologies and business scandals. We highlight a series of identifiable issues at the interface between the regulation of corporations, its practice and its theory, and conclude with a discussion of future directions for governance research, as well as methodological issues implicit in process studies of governance.

The challenge of corporate governance

So frequent and damaging are corporate failures,[5] or at least so it seems, it is almost a cliché to state that corporate governance is a critical legal, economic, managerial and societal issue. Under the precepts of capitalism and globalisation, defrauding, deceiving or ignoring the wishes of minority investors counters the received wisdom that investor protection is vital to financial development and economic growth. Fraudulent behaviour, deceit or the exposure of minority investors to self-interested directors, large shareholders or the markets, discourages participation, limits the availability of equity to firms dependent upon external finance, and so constrains financial growth.[6] For example, one study found

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5 G Probst and S Raisch "Organizational crisis: the logic of failure" (2005) 19(1) *Academy of Management Executive* 90–105.

6 C Mayer, "Corporate Governance: A policy for Europe" (paper presented at the Annual Congress of the Swiss Society of Economics and Statistics, University of Bern, 2003).

that investors were willing to pay 18 per cent more, on average, for shares in American or British firms with "strong" corporate governance practices than for a firm in a similar competitive position, but with a weak governance profile.[7] Moreover there is empirical evidence to support the contention that good corporate governance is significantly and positively associated with long-term shareholder wealth.[8]

Notwithstanding this economic imperative, the social and environmental irresponsibility of some corporations has seen the emergence of a large, vocal and, occasionally, violent protest movement, the central objects of whose wrath are company directors, regulators and legislators. Paradoxically, amongst the most devout capitalists there is a healthy body of opinion that shares the view of those they regard as "anarchists" in that they believe that the "malefactors of great wealth" must be reined in.[9] Consequently, current corporate governance reforms are driven by both politics[10] and shareholder activism.[11]

In this paper we examine, evaluate and criticise theories of corporate governance and approaches to its regulation. We identify a series of issues with governance and regulation. We suggest a series of important research themes based on our critique and propose an alternative "process" approach to researching and theorising in corporate governance.

A short history of corporations and their governance

The early primacy of the public good

Governance in the public interest was the accepted doctrine in Western countries until the 19th century. Until then, it was the royal or state prerogative that gave "corporations" the right to conduct business, and private economic interests had no rights. Public stock corporations promising colonisation and the exploitation of the colonies' resources to the public benefit could petition the state for a charter. However, whilst individuals could own shares in corporations and sell them, serving shareholder interests was not the primary purpose of corporations.[12]

The Dutch East India Company was the first corporation to be granted the right of perpetual existence in 1623, followed by the British East India Company in 1654.[13] In both cases, fully transferable shares were the principle mechanism of ownership, but central to their charters was the ". . . integral purpose of serving public interests".[14] In 17th and 18th-century America, entrepreneurs adopted similar corporate forms in establishing enterprise around property speculation, primary industries, utilities and transport,[15] although these early corporations were few in number and closely regulated[16] Notwithstanding this tight

7 P Coombes and M Watson, "Three surveys on corporate governance" (2000) *McKinsey Quarterly*, 74, 75–6.

8 M Anson, T White and H Ho, "Good corporate governance works: more evidence from CaIPERS" (2004) 5(3) *Journal of Asset Management* 149.

9 I M Stelzer, "The corporate scandals and American capitalism" (2004) 154 *Public Interest* 19–31, 31.

10 P A Gourevitch, "The politics of corporate governance regulation" (2003) 112(7) *Yale Law Review* 1829–80.

11 G Carriere, A Cowen, J A Marco, D Monson, F Pievani and T Rasker, *European Corporate Governance: A changing landscape*, 50th Anniversary Research Project October Celebrations (Cambridge, MA: MIT Sloan School of Management, 2002), pp. 7–16.

12 M M Blair, *Reforming Corporate Governance* (Georgetown: Georgetown University Law Centre, 2003), pp. 14–20; J Hood, "Do corporations have social responsibilities?" (1998) 48(11) *The Freeman* 680–4.

13 Blair, *Reforming Corporate Governance* (n. 12 above), p. 15.

14 J A Cohan, "'I didn't know' and 'I was only doing my job': has corporate governance careened out of control? A case study of Enron's information myopia" (2002) 40 *Journal of Business Ethics* 275–99, 292.

15 Blair, *Reforming Corporate Governance* (n. 12 above), pp. 14–15.

16 Hood, "Do Corporations" (n. 12 above).

control over this small group, the incorporation (through special legislative act) of enterprise was further developed in the early 18th century as a means of

> . . . holding property for some public, charitable, educational, or religious use, so that such property could not be owned by the individuals who . . . might be managing the organization or charged with making decisions about the use of the property . . .[17]

The primacy of shareholder rights

Following independence, American states extended the notion of corporation to self-incorporation, although it remained fixed upon the provision of the public good. However, at the turn of the 18th century, self-incorporation under some states' corporate laws allowed the emergence of firms whose central purpose was to make money for their shareholders – a new governance paradigm had emerged. This concept went largely unchallenged until the case of *Dodge* v *Ford Motor Company*.[18] The court held that even Henry Ford was accountable to the shareholders of "his" motor company, and could not make stakeholders in the company benefactors over and above shareholders.[19] The court did make it clear that corporate benefaction could pass legal scrutiny provided that it had a legitimate relationship to corporate profits, and this finding was codified in subsequent cases. Whilst the primary case law is restrictive, the law built upon it does give corporate managers great discretion. However, this case established the precedent that corporations are directly responsible only to shareholders.

This principle came under threat during the Great Depression. For example, General Electric (GE) promoted stakeholders' interests (shareholders, employees, customers and the general public) as a means of surviving the slump.[20] The rationale for GE's approach was that shareholders' long-run profit could be enhanced by satisfying the needs and expectations of other stakeholders.[21] This and other examples led to the initiation of the shareholder:stakeholder dialectic that continues to this day, characterised by the respective positions that corporations were either "responsible only to their stockholders"[22] or "must not only profit [their] stock holder[s], but must also engage in social service".[23] The former position held and still holds sway with the judiciary, whilst the latter, with its strong societal foundations predating *Dodge* v *Ford Motor Company*, found favour with popular opinion, and still does. The debate turns upon the interpretation of what constitutes the "fiduciary responsibility" of management. To advocates of shareholder primacy this seems to mean placing trust in managers to maximise return on investment solely in the best interests of shareholders. To advocates of stakeholder primacy this is anathema, since they hold fiduciary responsibility to encompass not just private, but public trust. An alternative view is that the representation of economic value added or market value added, as shareholder value, is not complete, since it does not take into account the consequences for all

17 Blair, *Reforming Corporate Governance* (n. 12 above), p. 20.

18 170 NW 668, Michigan Supreme Court, 1919.

19 Hood, "Do Corporations" (n. 12 above).

20 L E Preston and H J Sapienza, "Stakeholder management and corporate performance" (1990) 19(4) *Journal of Behavioral Economics* 361–75.

21 H Hummels, "Organizing ethics: a stakeholder debate" (1998) 17(13) *Journal of Business Ethics* 1403–19.

22 Cohan, "I didn't know" (n . 14 above), p. 292; A A Berle, "Corporate powers as powers in trust" (1931) 44 *Harvard Law Review* 1049; A A Berle, "For whom corporate managers are trustees: a note" (1932) 45 *Harvard Law Review* 1365.

23 Cohan, "I didn't know" (n. 14 above), p. 292; E M Dodd, "For whom are corporate managers trustees?" (1932) 45 *Harvard Law Review* 1145.

stakeholders, as demanded by the efficiency principle.[24] Moreover, this focus is not compatible with the conceptualisation of a firm as a nexus of contracts, since insisting on the primacy of shareholders excludes any number of additional and imported contracts with stakeholders.[25] Paradoxically, one of the chief protagonists in the early debate went on to highlight the passivity of 1930s shareholders, who, in effectively abdicating control and responsibility to managers, "surrendered the right that the corporation should be operated in their sole interest".[26]

The resurgence of stakeholders

As corporations grew, a supplement to the shareholder argument emerged, as some authorities argued that the increased size and power over society of corporations meant that their social responsibilities needed to be reassessed. In the controversial case of *Smith Manufacturing Co* v *Barlow*,[27] shareholders challenged a donation made by managers to Princeton University. In finding in favour of Smith Manufacturing, the court held that the shareholders

> whose private interests rest entirely upon the well-being of the corporation, ought not to be permitted to close their eyes to present-day realities and thwart the long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure.[28]

This decision and others, as well as new state statutes, recognised the legitimacy of corporate philanthropy, implicitly endorsing calls for the primacy of other social goals above the claims of shareholders. From the 1960s through to the 1980s, the stakeholder concept was popular among consumerists, environmentalists and social activists. Corporate executives also used it as a defence against takeovers in the 1980s. For example, in the case of *Paramount Communications* v *Time Inc*,[29] the court allowed Time's directors to reject Paramount's takeover offer even though that offer maximised shareholders' financial value, denying the absolute primacy of the shareholder model. This was followed in *Credit Lyonnaise Bank* v *Pathe Communications Corporation*,[30] when the court further promoted the stakeholder model on the basis that the directors do not owe duties to any single interest group but to the corporation as a whole and the community of interests that the corporation represents. This reinvigorated the primacy of stakeholders.[31]

European corporate governance

Corporate governance systems across Europe vary. In Britain and Ireland, common-law-based corporate law enforces a regime similar to that in North America. Herein the emphasis is on the firm as a legal entity largely beholden to its investors. In continental Europe, enterprise law dominates, focusing upon the enterprise as an economic or social unit, and so explicitly including its stakeholders. However, it is ambiguous in its

24 P Milgrom and J Roberts, *Economics, Organization and Management* (London: Prentice Hall, 1992).

25 G Charreaux and P Desbrières, "Corporate governance: stakeholder value versus shareholder value" (2001) 5 *Journal of Management and Governance* 107–28.

26 A A Berle and G C Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1932).

27 97 A 2d 186 and 98 A 2d 581, New Jersey 1953.

28 Hood, "Do corporations" (n. 12 above).

29 571A 2d 1140, Delaware Chancery Court, 1989.

30 WL 277613, Delaware Chancery Court, Dec 30, 1991.

31 M M Blair, *Ownership and Control: Rethinking corporate governance for the twenty-first century* (Washington DC: Brookings Institution, 1995).

definition of "stakeholder",[32] although it includes mandatory protections for employees, creditors and even shareholders notably absent from US state law or appearing only in the federal securities regime.[33]

However, despite this fundamentally different legal base, a longitudinal study of British managerial mindsets undertaken between 1980 and 2000 indicated a sharp increase of managerial emphasis on stakeholder interests and a drop of emphasis of shareholder values in 2000 compared with those in 1990. Most of the managers attached importance to stakeholders in 2000 compared with only 50 per cent in 1980.[34] Arguably this does not represent an absolute predominance of stakeholder forces, real managerial consideration or intrinsic moral value in business operations, as the stakeholder theorists often claim. Evidence shows that British stakeholder groups' influence on and care over corporate reports and performance did not increase, but in fact decreased between the 1970s and the early 1990s.[35] Large empirical investigations also suggest that corporate social performance does not necessarily result in positive corporate financial performance.[36] In fact, massive media coverage largely influenced the socially perceived importance of stakeholders' interests in the 1990s due to academic and political concerns about the issue of corporate social responsibility, short-termism and the negative consequences of the takeover movement in the 1980s.[37]

In continental Europe, the enterprise system effectively confers concentrated ownership by banks and other institutions. As a consequence, stakeholder relations are commonly complex. The health of their lending relationship (occasionally to the detriment of shareholder value) is generally cemented by their holding of seats upon the boards of their clients. Governments or labour unions, in pursuit of economic or social goals, often exert considerable power and influence over management. This negotiated balance, between shareholder and other stakeholder interests, is arguably offset by issues around accountability, transparency and flexibility, ultimately leading to alleged difficulties in response to changing competitive conditions.[38]

Governance in continental Europe, like general management[39] is also further divisible between Germanic firms (headquartered in Germany, the Netherlands, Scandinavia, Switzerland and Austria) and Latin firms (France, Belgium, Italy, Spain, Portugal and Greece). Germanic governance is characterised by the heavy involvement of banking officials in

32 E Wymeersch,. "Elements of comparative corporate governance in Western Europe", in M Isaakson and R Skog (eds), *Aspects of Corporate Governance* (Stockholm: Juristforlaget, 1994); H W De Jong, "The governance structure and performance of large European corporations" (1997) 1(1) *Journal of Management and Governance* 5–27; S S Rehman, *Competitiveness and Corporate Governance in the EU* (Washington, DC: George Washington Center for the Study of Globalization, 2004).

33 W Carney, "The political economy of competition for corporate charters" (1997) *Journal of Legal Studies* 26; D J Greenwood, *Democracy and Delaware: The puzzle of corporate law* (Utah: University of Utah, College of Law, 2003), pp. 309, 320–5.

34 R Mansfield, M Poole and P Mendes, *Two Decades of Management* (London: British Institute of Management, 2001).

35 S Letza and C Smallman, "Est in aqua dulci non invidiosa voluptas. In pure water there is a pleasure begrudged by none" (2001) 12(1) *Critical Perspectives on Accounting* 65–85.

36 J Griffin and J F Mahon, "The corporate social performance and corporate financial performance debate" (1997) 36(1) *Business and Society* 5–32.

37 E Berglof, "Reforming corporate governance: redirecting the European agenda" (1997) 12 *Economic Policy* 91–123; A Gamble and G Kelly, "Shareholder value and the stakeholder debate in the UK" (2001) 9(2) *Corporate Governance* 110–17.

38 Rehman, *Competitiveness* (n. 32 above).

39 R Calori and F Seidel, "The dynamics of management systems in Europe", in R Calori and P de Woot (eds), *A European Management Model: Beyond diversity* (London: Prentice Hall, 1994), pp. 55–78.

corporate decision-making, employee influence on business policy, and the role of a limited number of dominant shareholders, who exert considerable influence on management.

Latin corporations are marked by even larger and more dominant shareholders as well as some bank influence. They also form strong networks or financial groups. There is generally little employee influence, with highly trained management operating in strict hierarchies, lacking the consensual decision-making of Germanic firms.[40]

A corroding chain of regulatory reform?

Given the convoluted legislative background, the enduring failure of legislators, professional bodies and corporate governance theorists to develop coherent regulatory and governance models that explain and highlight opportunities equitably to constrain corporate or market excess to the satisfaction of business and society is, perhaps, of little or no surprise. Post-modern business life is increasingly complex,[41] and opportunities for corporate fraud, the abuse of managerial power, and social and environmental irresponsibility are manifold. Worldwide legislators and regulators have moved to curb illegal, immoral and amoral boardroom behaviours.[42] In America since the late 1980s, a series of reforms has altered the role and number of independent, non-executive directors; split the dual role of chief executive officer (CEO) and chair; and limited the role of executive directors in determining their own compensation.[43] Additionally, scandals at Enron, Worldcom and others[44] have forced the hand of the authorities and the Sarbanes-Oxley Act[45] has changed the governance landscape with its requirement for improved corporate accountability, stringent disclosure, an increased role for independent directors, and a much higher profile for auditors and the Audit Committee.[46] Moreover, the New York Stock Exchange[47] and the American Stock Exchange[48] have each changed their listing requirements to emphasise the importance of the independence of non-executive directors and their role in corporate governance, audit and compensation committees. As a consequence, boards in the US are undergoing considerable change in leadership,

40 De Jong, "The governance structure" (n. 32 above).

41 U Beck, *The Brave New World of Work*, P Camiller (trans.), (Cambridge: Polity Press, 2000); C B Carter and J W Lorsch, *Back to the Drawing Board: Designing corporate boards for a complex world* (Cambridge, MA: Harvard Business School Press, 2004), pp. 15–39.

42 A Florini, "Business and global governance: the growing role of corporate codes of conduct" (2003) 21(2) *Brookings Review* 4–8.

43 Carter and Lorsch, *Back to the Drawing Board* (n. 41 above), p 2.

44 C L Wade, "Corporate governance failures and the managerial duty of care" (2002) 76(4) *St John's Law Review* 767.

45 Public Law 107-204, 107th Congress, enacted 30 July 2002.

46 M E Clark, "Hamstrung or properly calibrated? Federalism and the appropriate role of government in the post-Sarbanes-Oxley world" (2004) 1(4) *International Journal of Disclosure and Governance* 385; P-M Boury and C M Spruce, "Auditors at the gate: section 404 of the Sarbanes-Oxley Act and the increased role of auditors in corporate governance" (2005) 2(1) *International Journal of Disclosure and Governance* 27; R Romano, "The Sarbanes-Oxley Act and the making of quack corporate governance" (2005) 114(7) *Yale Law Journal* 1521; M Toda and W McCarty "Corporate governance change in the two largest economies: what's happening in the US and Japan?" (2005) 32(2) *Syracuse Journal of International Law and Commerce* 189; M Yakhou and V P Dorweiler, "Corporate governance reform: impact on accounting and auditing" (2005) 5(1) *Corporate Governance* 39.

47 NASDAQ, *Summary of NASDAQ Corporate Governance Proposals 1* (2003); NYSE, *Amendment No. 1 to the NYSE's Corporate Governance Rule Proposals* (New York: New York Stock Exchange, 2002); NYSE, *Corporate Governance Rule Proposals Reflecting Recommendations from the NYSE Corporate Accountability and Listing Standards Committee*, as approved by the NYSE Board of Directors (New York: New York Stock Exchange, 2002).

48 AMEX, *Enhanced Corporate Governance Rules* (SR-Amex-2003-65) (New York: American Stock Exchange, 2003).

membership and performance evaluation. The potential effects of these changes are not yet fully understood,[49] leaving a number of questions about board effectiveness unanswered.[50]

In Europe, a significant number of influential proposals, reports and codes have been produced in recent years in an attempt to resolve corporate governance issues.[51] Overall there is a trend to independent oversight. For example, the role of non-executive directors on one-tier boards was considerably strengthened by the French Revised Principles of Corporate Governance[52] and the British Combined Code.[53] The reform continues in both countries, with an ongoing debate between bodies representing different elements of French industry[54] and further research into the role of non-executive directors in Britain.[55] There is also a perceptible trend towards the adoption of distinct CEO and board chairs,[56] the effectiveness of which is disputed.[57] The heightened strategic profile of German supervisory boards marks an attempt to employ an important property of Anglo-American singular boards.[58] However, German corporate governance remains firmly grounded in co-determination, just as France is constitutionally obliged to maintain its flexible model of labour participation. These circumstances mean that higher standards of independence may be difficult to achieve. Across wider Europe that common theme is the conduct of audit committees.[59]

49 Romano, "The Sarbanes-Oxley Act" (n. 46 above).

50 E E Lawler and D L Finegold, "The changing face of corporate boards" (2005) 46(2) *MIT Sloan Management Review* 67.

51 K J Hopt, *Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron*, Law Working Paper 05/2002 (Brussels: European Corporate Governance Institute, 2002); K J Hopt and P C Leyens, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy*, Law Working Paper 18/2004 (Brussels: European Corporate Governance Institute, 2004).

52 Vienot I, *The Boards of Directors of Listed Companies in France* (Paris: Conseil National du Patronat Français & Association Française des Entreprises Privées, 1995); Vienot II, *Report on the Committee of Corporate Governance* (Paris: Association Française des Entreprises Privées & Mouvement des Entreprises de France, 1999); D Bouton (chair), *Promoting Better Corporate Governance in Listed Companies* (Paris: Association Française des Entreprises Privées & Mouvement des Entreprises de France, 2002).

53 A Cadbury (chair), *Report of the Committee on the Financial Aspects of Corporate Governance* (London: Gee, 1992); R Greenbury (chair), *Directors Remuneration*, report of a study group chaired by Sir Richard Greenbury (London: Gee, 1995); R Hampel (chair), *Corporate Governance*, report of a committee chaired by Sir Ronald Hampel (London: Gee, 1998); N Turnbull, *Internal Control: Guidance for directors on the Combined Code* (London: The Institute of Chartered Accountants in England and Wales, 1999).

54 AFEP and MEDEF, *The Corporate Governance of Listed Corporations: Principles for corporate governance based on consolidation of the 1995, 1999 and 2002 AFEP and MEDEF's reports* (Paris: Association Française des Entreprises Privées & Mouvement des Entreprises de France, 2003); AFG, *Recommandations sur le gouvernement d'entreprise* (Paris: L'Association Française de la Gestion Financière, 2004).

55 D Higgs, *Review of the Role and Effectiveness of Non-Executive Directors* (London: Department of Trade and Industry, 2003); K G Corley, "Examining the non-executive director's role from a non-agency theory perspective: implications arising from the Higgs report" (2005) 16(s1) *British Journal of Management* S1–4.

56 Hopt and Leyens, *Board Models* (n. 51 above).

57 J W Lorsch and A Zelleke, "Should the CEO be the chairman?" (2005) 46(2) *MIT Sloan Management Review* 71.

58 T Baums, *Corporate Governance Rules for Quoted German Companies* (Frankfurt am Main: German Panel on Corporate Governance, 2000); G Cromme, *German Corporate Governance Code* (Düsseldorf: Government Commission, 2002); G Cromme, *German Corporate Governance Code* (Amended) (Düsseldorf: Government Commission, 2003).

59 Hopt and Leyens, *Board Models* (n. 51 above); R Smith, *Audit Committees Combined Code Guidance* (London: Financial Reporting Committee, 2003).

At the European Union level the European Commission has commissioned a series of consultative documents[60] and is in the process of implementing an action plan[61] that "devotes special attention to a series of corporate governance initiatives aiming at boosting confidence on capital markets".[62]

Another general policy objective is the development of a corporate governance regime that improves productivity and encourages innovation.[63] However, as is the norm in Europe, considerable disagreement over the nature of corporate governance is staying the hand of reformers. The major issue relates to firm and territory: should firms operate under the regulations of the country in which they are registered and have their headquarters or should they be obliged to meet the demands of the country where the majority of their operations are based?[64] Furthermore, the principle of "subsidiarity",[65] which allows EU Member States to implement pan-European directives as they see fit, also allows them considerable latitude in the implementation of so-called "common" standards.[66]

Outside the European Union, following a number of scandals, the Swiss Business Federation, Economiesuisse, and the Swiss Stock Exchange published codes of best practice and guidelines on corporate governance.[67] Elsewhere codes of corporate governance have been introduced across the developed and developing world, for example, in Korea,[68] Japan,[69] and in Australia.[70]

In Japan, governance reform was partly initiated by high-profile scandals, but more so by the need to improve decision-making and to reform operations and organisational structures in order to remain competitive with China, Europe and the US. Shareholder structures have also changed of late, with institutional investors and individuals now holding sway above the formerly dominant keiretsu.[71]

Each of these corporate governance initiatives is undoubtedly well intended and well founded. Each aims, to varying extents, to enhance corporate governance, improve duties and standards of care, and level the international trade playing field, among other objectives.

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60 E.g. J Winter, J M Garrido Garcia, K J Hopt, J Rickford, G Rossi, S Christensen and J Simon, *Report of the High Level Group of Experts on a Modern Regulatory Framework for Company Law in Europe* (Brussels: Commission of the European Communities, 2002).

61 DG Internal Market, *Synthesis of the Responses to the Communication of the Commission to the Council and the European Parliament: "Modernizing company law and enhancing corporate governance in the European Union – a plan to move forward"*, COM (2003) 284 final of 21 May 2003, Internal Market Working Document (Brussels: Commission of the European Communities, Directorate General, 2003).

62 EC, "Company law and corporate governance: Commission presents Action Plan", press release IP/03/716 (Brussels: European Commission, 2003).

63 EC, *Progress on Financial Services (10th Report). Turning the corner: preparing the challenge of the next phase of European capital market integration* (Brussels: European Commission, 2004).

64 D Wójcik, *Convergence in Corporate Governance: Empirical evidence from Europe 2000–2003*, WPG 04-19 (Oxford: Oxford University Economic Geography Research Group, 2004), p. 1.

65 K v Kersbergen and B Verbeek, "Subsidiarity as a principle of governance in the European Union" (2004) 2(2) *Comparative European Politics* 142–62.

66 S Spivey, "Corporate governance and the role of government" (2004) 1(4) *International Journal of Disclosure and Governance* 307, 311–12.

67 SWX, *Directive on Information Relating to Corporate Governance* (Corporate Governance Directive, DCG), 1 July (Zurich: Swiss Exchange, 2002); SWX, *Commentary re Corporate Governance Directive* (Zurich: Swiss Exchange, 2004).

68 J-C Kim, *Code of Best Practice for Corporate Governance* (Seoul: Committee on Corporate Governance, 1999).

69 TSE, *Principles of Corporate Governance for Listed Companies* (Tokyo: Tokyo Stock Exchange, 2004).

70 ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (Sydney: Australian Stock Exchange, 2003).

71 Toda and McCarty, "Corporate governance change" (n. 46 above), pp. 191–2, 199.

Each has to some extent had some impact on financial efficiency, investors' risk, corporate oversight and ultimately on competition. However, the scandals still occur, companies (even the seemingly successful) still file for bankruptcy[72] and there is much to be said against poor regulation and its attendant costs – particularly those accruing to investors and the public. Moreover, regulatory costs to firms are considerable,[73] and there is a great deal of discontent with some reforms, particularly in Britain, amongst senior industrialists. Of recent British reforms, the Higgs Report[74] has been singled out as "ludicrous" and a "new high in lows" with its recommendations for raising the profile of non-executive directors. The report is further criticised for its "one-size-fits-all" template.[75] This illustrates the endless controversy over the balance between laissez-faire and strict regulation. Can governance and governance regulation in its orthodox form allow firms to operate effectively whilst defending minority investors and the public good and simultaneously allowing the markets to make money?[76]

Issues with the governance orthodoxy

Perhaps the single major legal issue with the current orthodoxy is that under current corporate law worldwide, corporations may cut costs (and increase profit) at the expense of the public good.[77] A clear example of this is the case of Yorkshire Water (a British utility), which, in spite of faltering service quality in the mid-1990s, continued to guarantee dividends to its shareholders.[78] At the limit, the share maximising principle implies that directors should "violate the rules when it is profitable to do so".[79] In *Miller* v *American Telephone & Telegraph*,[80] the court found that illegal acts, whilst committed to benefit the corporation through its future value, may amount to a breach.[81] Permissive limited liability law invites corporations to externalise costs; without such encouraging law, directors might be less inclined to take advantage of them. In continental Europe, the law provides mandatory protection for employees, creditors and shareholders. However, this does not seem to have inconvenienced the more committed corporate criminals.

In its current form, corporate law informs how managers make value judgments, relating principally to share value maximisation at the cost of other values, and corporate governance and its regulation founders because of this. This is because governance models reduce the complexity of judgment in governance almost to the absurd: either

72 Probst and Raisch, "Organizational crisis" (n. 5 above).

73 I P Dewing and P O Russell, "Post-Enron developments in UK audit and corporate governance regulation" (2003) 11(4) *Journal of Financial Regulation and Compliance* 309–22; Mayer, "Corporate Governance" (n. 6 above); R H Gifford and H Howe, "Regulation and unintended consequences" (2004) 74(6) *CPA Journal* 6–9; Stelzer, "Corporate scandals" (n. 9 above).

74 Higgs, *Role and Effectiveness* (n. 55 above); Corley, "Examining the non-executive director's role" (n. 55 above).

75 Dewing and Russell, "Post-Enron developments" (n. 73 above); R V Aguilera, "Corporate governance and director accountability: an institutional comparative perspective" (2005) 16(s1) *British Journal of Management* S39–53.

76 Gourevitch, "The politics" (n. 10 above).

77 G Lenssen, L V D Berghe and C Louche, "Responding to societal expectations" (2005) 5(3) *Corporate Governance* 4.

78 Letza and Smallman, "Est in aqua" (n. 35 above), p. 69.

79 F H Easterbrook and D R Fischel, "Antitrust units by targets of tender offers" (1982) 80(6) *Michigan Law Review* 1155–78; F H Easterbrook and D R Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991), pp. 37–8.

80 507 F 2d 759, 1974.

81 K Greenfield, "Ultra vires lives" (2001) 87(7) *Virginia Law Review* 87, 1279–379, 1291–5.

shareholder value maximisation or stakeholder benefit maximisation; and this has been so since at least the 1930s.[82]

Corporate governance scandals are generally cast as economic crises. Hence, the regulatory drive focuses primarily on economic and the associated financial regulation. However, this primary focus does not appear adequately to acknowledge the "true" organisation and function of the post-modern economy and society, nor does it accommodate the formation and mutation of values and preferences that occur in and between individuals and institutions. Values including, but additional to, wealth maximisation are partly endogenous to economic and legal systems, and economic and legal systems and their performance are partly functions of people's values.[83] Economy and society are irrevocably interconnected[84] and feed off and build upon each other's experiences.[85] By this argument corporate governance is not simply about the economic allocation of wealth, it is fundamentally about political choice.[86] And here is the fundamental weakness of current theories, in that their focus is on wealth maximisation or distribution in an abstract and fallacious world of markets and property, with perfect information; it is not on decision-making in the real, complex, uncertain and value-laden post-modern world of organisations, and people.

The shareholder perspective recognises the single identity and personality of the corporation, which reinforces the private property rights of the shareholder and a "nexus of contracts" approach. The conceptualisation of the corporation as an individual either reduces the firm to the individuals who comprise it (the aggregate theory of corporate personality) or defines the firm as an individual itself (entity theory). Paradoxically, these inherently contradictory conceptions have the view of the firm as an "institution" in need of protection from government, in order that they may in turn protect civil society and citizens.[87] The contractual conceptualisation of the firm defines corporations as "private entities of concern mainly to those who do business with them",[88] and is grounded in the

82 M A O'Sullivan, *Contests for Corporate Control* (New York: Oxford University Press, 2000); A Kakabadse and N Kakabadse, *The Geopolitics of Governance* (Hampshire: Palgrave, 2001); A Friedman and S Miles, "Developing stakeholder theory" (2002) 39(1) *Journal of Management Studies* 1–21; P R P Coelho, J E McClure and J A Spry, "The social responsibility of corporate management: a classical critique" (2003) 18(1) *Mid-American Journal of Business* 15–24; P R P Coelho, J E McClure and J A Spry, "The social responsibility of management: a reprise" (2003) 18(2) *Mid-American Journal of Business* 51–5; Greenwood, "Democracy and Delaware" (n. 33 above); F R Post, "A response to 'the social responsibility of corporate management: a classical critique'" (2003) 18(1) *Mid-American Journal of Business* 25–35; F R Post, "The social responsibility of management: a critique of the shareholder paradigm and defense of stakeholder primacy" (2003) 18(2) *Mid-American Journal of Business* 57–61; C Smallman, "Exploring theoretical paradigms in corporate governance" (2004) 1(1) *International Journal of Corporate Governance and Ethics* 27–94; X Sun, S R Letza, M Dibben and C Smallman, "Theories of Corporate Governance: A Critical Perspective" (paper presented at the Australian and New Zealand Academy of Management, University of Otago, Dunedin, New Zealand, 2004).

83 A Ben-Ner and L Putterman (eds), *Economics, Values and Organization* (Cambridge: Cambridge University Press, 1998).

84 B Kim and J E Prescott, "Deregulatory forms, variations in the speed of governance adaptation and firm performance" (2005) 30(2) *The Academy of Management Review* 414–25.

85 M R Dibben and C Smallman, "Ignoring Convention? Reframing process thinking in organizational analysis" (paper presented at the First Organization Studies Summer Workshop on Theorizing Process in Organizational Research, Santorini, Greece, 2005) at: www.egosnet.org/journal/dibben_smallman_ignori1.pdf (accessed 19 October 2005).

86 Greenwood, "Democracy and Delaware" (n. 33 above).

87 A De Tocqueville, *Democracy in America*, A Goldhammer (trans.) (New York, NY: Library of New York, 1835/2004).

88 Greenwood, "Democracy and Delaware" (n. 33 above), p. 5.

principle that "because the choices [of firms] do not impose costs upon strangers to the contracts, what is optimal for the firms and investors is optimal for society".[89]

Hence, the corporation becomes a construct of multiple contracts, which are played out on some market or another. Our issue with this conceptualisation is, once more, that it is too simple. Real world contracts are not truly and fully negotiated between equals. Rather, involvement in contract may be unconscious (or at best partly conscious). Contract terms are not generally negotiated but are given or assumed, and even the most well-negotiated contracts cannot guarantee that they will not impose costs on strangers.[90] The key in governance through contract is its reliance on perfect markets which do not exist in reality. Moreover, by nature of their construction at a point in history, rather than the present, contracts are always incomplete.[91] Simply, the writing of a truly comprehensive contract is prohibitively costly since it is impossible to account for all future eventualities at the time of drafting,[92] negotiate with all interested parties (hence conscious and unconscious involvement), construct the content in a way that it will always be enforceable,[93] and gather all information relevant to the contract.

The conception of the corporation as property (an asset or thing owned by an individual or group) focuses upon agency theory[94] whereby agents manage property on behalf of their principals (the owners); but do they act in the best interests of their principals? There are two key problems with this concept: organisations are comprised of physical and intangible assets (intellectual property), but what binds these assets together in a social network is not defined; and in law shareholders do not generally have the rights ordinarily associated with the role of owner (or principal). Consequently, "the . . . agents lack a principal and the corporate property lacks an owner . . . protecting the corporation does not protect the humans associated with it . . .".[95]

Agency theory also asserts that individuals will only work towards organisational goals that serve their own economic interests. However, it is persuasively arguable that "in successful organizations, workers identify with the organization . . . [and] they take on the organization's objectives as their own".[96]

Hence, based on the limitations of neoclassical economics: ". . . [any explanation of] organizational behavior solely in terms of agency . . . [which] ignore[s] key organizational mechanisms like authority, identification and coordination . . . [is] . . . seriously incomplete".[97]

Our issue with the economic orthodoxy in respect of corporations is its focus on resource allocation, the concept of the firm as a production function and its macro-analytic approach. Perhaps this economic conceptualisation of the firm might be better served by an examination through the "lens of contract" which better focuses upon gains from trade,

89 Easterbrook and Fischel, *The Economic Structure* (n. 79 above), p. 6.

90 G Gilmore, *Death of Contract* (Columbus, Ohio: Ohio State University Press, 1974).

91 Blair, *Reforming Corporate Governance* (n. 12 above), p. 65.

92 O E Williamson, "The institutions of governance" (1998) 88(2) *American Economic Review* 75–9.

93 O Hart, "Corporate governance: some theory and implications" (1995) 105 *The Economic Journal* 678–89.

94 K M Eisenhardt, "Agency theory: an assessment and review" (1989) 14(1) *Academy of Management Review* 57–74; S Ghosal, "Bad management theories are destroying good management practices" (2005) 4(1) *Academy of Management Learning and Education* 75–91; J Hendry, "Beyond self-interest: agency theory and the board in a satisfying world" (2005) 16(s1) *British Journal of Management* S55–63.

95 Greenwood, "Democracy and Delaware" (n. 33 above), p. 7.

96 J E Stiglitz, "Symposium on organization and economics" (1991) 5(2) *Journal of Economic Perspectives* 15–24.

97 H A Simon, "Organizations and markets" (1991) 5(2) *Journal of Economic Perspectives* 25–44.

conceives the firm as a governance structure, and takes "a more micro analytic construction . . . more amenable to the lessons of organization theory".[98]

Conflating elements of these concepts exacerbates their fundamental weaknesses. For example, the property model conflicts with the market model because agents as fiduciaries work to an ethical code other than that of the contractual market place[99] In spite of all of these issues, the shareholder model supports the principal–agent relationship and the s. 14 (UK Companies Act 1985) contract position, which takes a narrow perspective on directors' duties clearly identifying the separation of ownership and control and the primary position of seeking to enhance shareholder value. Moreover, limited liability firms are protected, and thus the shareholder model is a conflation, however flavoured, of all these concepts of the corporation. Given all of this, it ". . . is most curious that despite the lack of both face validity and empirical support, agency theory continues to dominate academic research on corporate governance".[100]

The stakeholder position allows for a broad range of stakeholder interests and responsibilities. These could include interests of employees, a broader social entity measure in the application of directors' duties, and a social stewardship influence on the role of non-executive directors and on the nature and duration of CEO contracts. However, in essence, stakeholder theory is an argument for admitting more contractual arrangements (for example, with employees), more principals[101] and more individuals to the body corporate. Stakeholder theory "simply" expands the financial notion of share into a much broader sense of "joint experience",[102] so multiplying the problems of shareholder theory, since:

> A manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Faced with a demand from either group, the manager can appeal to the interests of the other.[103]

For some authorities,[104] the shareholder:stakeholder choice represents polarised positions. They believe that, in reality, a wider range of intermediate models exist, such as a finance model, a stewardship model, a stakeholder model and a political model. However, others disagree and suggest that these splinter groups are merely aspects of the main two models.[105] Whatever the "truth", it is clear that current analyses of corporate governance focus on evaluating and judging the superiority of these main models and are often falsely

98 O E Williamson, "Examining economic organization through the lens of contract" (2003) 12(4) *Industrial and Corporate Change* 917–42.

99 *Meinhard* v *Salmon*, 249 NY 458, 1928.

100 Ghosal, "Bad management" (n. 94 above), p. 81.

101 J Heath and W Norman, "Stakeholder theory, corporate governance and public management: what can the history of state-run enterprises teach us in the post-Enron era?" (2004) 53 *Journal of Business Ethics* 247–65.

102 Smallman, "Exploring theoretical paradigms" (n. 82 above); M Bonnafous-Boucher, "Some philosophical issues in corporate governance: the role of property in stakeholder theory" (2005) 5(2) *Corporate Governance* 34.

103 Easterbrook and Fischel, *The Economic Structure* (n. 79 above).

104 Blair, *Ownership and Control* (n. 31 above); J P Hawley and A T Williams, "Corporate Governance in the United States: The rise of fiduciary capitalism – a review of the literature" (first prize in LENS 1996 Corporate Governance Paper Competition); K Keasey, S Thompson and M Wright, "Introduction: the corporate governance problem – competing diagnoses and solutions", in K Keasey, S Thompson and M Wright (eds), *Corporate Governance: Economic and financial issues* (Oxford: Oxford University Press, 1997).

105 S R Letza and X Sun, "Corporate governance: paradigms, dilemmas and beyond" (2002) 2(1) *Poznan University Economic Review* 43–59.

partisan or antagonistic.[106] This reveals a substantial problem with current corporate governance theorising, since dominant theories describe and analyse only a few governance forms,[107] and reflect neither ". . . the observed variety in economic life"[108] nor the interaction between industry, government and society,[109] and do not allow for cultural influences on government.[110]

Conclusion

In this article we have discussed the challenge of corporate governance and its regulation in the post-modern world. We began by exploring the history of corporations and their governance, and established the differences between Anglo-Saxon (US, Britain and Ireland), continental European and other systems of governance. These different approaches essentially revolve around legal systems and national cultures.

We have also explored the miasma of recent regulation that has developed out of a mix of political ideologies and business scandals. This has contributed to the development of a global wave of corporate governance reform, the substantive effects of which are not yet clear. The issue here is that developing practice or regulation, with a paucity of knowledge about real process and grounded in ideology, is fraught with problems relating to imbalanced assumptions about people and institutions, leading from bad theory to poor practice.[111]

We then highlighted a series of identifiable issues at the interface between the regulation of corporate governance, its practice and its theory. Our analysis shows that no single model or structure of corporate governance and its regulation can work at all times since: "We do not have a perfect choice between market and hierarchy, we only have a choice between imperfect markets and imperfect hierarchies as well as imperfect combinations of both."[112]

Moreover, the dialectic theoretical orthodoxy is at best questionable.[113] Recognition of these issues, alongside the changing nature of economy and society, suggests that we need to rethink corporate governance theory and that, in so doing, we must move beyond the conventional static[114] and poorly contextualised models that have dominated to date.[115]

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106 Simon, "Organizations" (n. 97 above); Charreaux and Desbrières, "Corporate governance" (n. 25 above); DTI, *Modern Company Law for a Competitive Economy: Final report* (London: Department of Trade and Industry, 2001); Coelho et al., "The social responsibility: a classic critique" (n. 82 above); Coelho et al., "The social responsibility: a reprise" (n. 82 above); Post, "A response" (n. 82 above); Post, "The social responsibility" (n. 82 above);. Heath and Norman, "Stakeholder theory" (n. 101 above).

107 A Pye and A Pettigrew, "Studying board context, process and dynamics: some challenges for the future" (2005) 16(s1) *British Journal of Management* S27–38.

108 A Grandori, "Governance structures, coordination mechanisms and cognitive models" (1997) 1(1) *Journal of Management and Governance* 29–47, 29.

109 A Midttun, "Policy making and the role of government: realigning business, government and civil society: emerging embedded relational governance beyond the (neo) liberal and welfare state models" (2005) 5(3) *Corporate Governance* 159; P Smith Ring, G A Bigley, T D'Aunno and T Khanna, "Perspectives on how governments matter" (2005) 30(2) *The Academy of Management Review* 308–20.

110 P Cornelius, "Good corporate practices in poor corporate governance systems: some evidence from the Global Competitiveness Report" (2005) 5(3) *Corporate Governance* 12.

111 Ghosal, "Bad management" (n. 94 above).

112 C Wolf, *Markets and Governments* (Cambridge, MA: MIT Press, 1988).

113 Ghosal, "Bad management" (n. 94 above); D C Hambrick, "Just how bad are our theories?" (2005) 4(1) *Academy of Management Learning and Education* 104–7; J Pfeffer, "Why do bad management theories persist? A comment on Ghosal" (2005) 4(1) *Academy of Management Learning and Education* 96–100.

114 C F Sabel, "Beyond principal-agent governance: experimentalist organizations, learning and accountability" (2004) *Wetenschappelijke Raad Voor Het Regeringsbeleid* 154–88.

115 M Huse, "Accountability and creating accountability: a framework for exploring behavioural perspectives of corporate governance" (2005) 16(s1) *British Journal of Management* S65–79.

To conclude, we discuss future directions for governance research and methodological issues in studying governance and finish with some parting thoughts on the importance of a process approach to governance theorising.

Future research directions

The first issue in corporate governance research we highlight stems from our limited understanding of what goes on inside boardrooms and in directors' minds. Both the stakeholder and shareholder models focus upon external impacts based around a static view of the corporate entity. Neither model looks at the process of governing as the evolving sum of experiences[116] of those who govern.

Perhaps, an approach that focuses upon process will allow the research community to understand fully and properly the complexities of governing, and to assess the implementation of best practice or deep causation in decision making (particularly in crisis-prone corporations).

A second research direction lies in the area of developing a deeper understanding of directors' knowledge, experience and skills, and the effects of these upon behaviour, particularly in decision-making processes. Some of this type of research has occurred, but its findings, whilst valuable, are limited by methodology focused on variance analysis and, as such, are far from definitive or significant. Such research is also important if we are to build a picture of the state and nature of the "talent pool".

A third important research direction is regulation. We have a comprehensive descriptive understanding of regulatory regimes, but we have no means of assessing the value or effectiveness of differing regimes other than through comparative research, which is sadly often "hijacked" by ideological posturing. Moreover, regulation thus far has been largely the province of legal, political, economic and financial scholars. Whilst this work is valuable, it is perhaps past time for organisational analysts to assess the managerial implications of differing regulatory regimes and, particularly, the processes of different forms of regulation and their roles as change vectors. More specifically in regulation, we need to take a look at the process of legislative analysis, design and development, perhaps taking lessons from the creativity and innovation literature? We also need to look at the interaction and roles of regulators, particularly seeking understanding of the structure of institutional power, and a conception of governance regulation that facilitates rather than prescribes or controls.

Fourth, there is a requirement for a comparative and comprehensive assessment of cultural influences on governance and whether or not the drive towards convergence in regulation and corporate governance practice is warranted.

Finally, whatever research direction we follow as corporate governance researchers, we cannot continue to fail to take context into account in our work, especially where we are dealing with corporate governance at its interface with society.

Research in corporate governance requires an approach that will clarify similarities and differences among theories, in order to facilitate theoretical integration and to generate a comprehensive understanding of governance. This requires a rigorous epistemological base,[117] built upon an ontology that is more in keeping with

116 Dibben and Smallman, "Ignoring Convention" (n. 85 above).

117 Ghosal, "Bad management" (n. 94 above); Hambrick, "Just how bad are our theories?" (n. 113 above); Pfeffer, "Why do bad management theories persist?", (n. 113 above).

understanding governing processes. We argue that the requirement is for an approach that accommodates a "fluxful", changeable and emergent post-modern world, emphasising reality as inclusively processual.[118]

118 A N Whitehead, *Process and Reality* (Cambridge: Cambridge University Press, 1929/1978); N Rescher, *Process Metaphysics* (Albany, NY: State University of New York Press, 1996); R Chia, "A Processual Perspective on Corporate Governance" (paper presented at the British Academy of Management Annual Conference, 2001); H Tsoukas and R Chia, "On organizational becoming – rethinking organizational change" (2002) 13 *Organization Science* 567–82; Dibben and Smallwood, "Ignoring Convention?" (n. 85 above).

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Re-examining the benefits of charitable involvement in housing the mentally vulnerable

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Introduction

The traditional social perception of charitable endeavour is a positive one. Charities are perceived to be an essential component of social provision[1] and make a significant contribution to civil society.[2] They develop "new services . . . [plug] gaps in delivery . . . and often focus on meeting the needs of the disadvantaged and socially excluded".[3] Indeed, charities are being embraced as a necessary aspect of a vibrant and effective third sector, which provides "a new third way"[4] for public service provision, harnessing "the sector's strengths to challenge and stimulate new ideas, complement . . . shared objectives and take forward the development of social policy generally".[5] This vision of a shared approach to service provision between the public, private and third sector, with central government in an enabling role, is apparent in all spheres of current public service provision.[6] The focus of this article, however, is not to consider the important ramifications of the *third way* on the social housing sector.[7] It is beyond the remit of this paper to conduct a theoretical and

* We are grateful for ESRC funding under a one-year funded project, Housing the Mentally Vulnerable: The Role of Charities (Award Ref: RES-000-22-0286). We would also like to thank Jean McHale, Michael Dougan, Fiona Beveridge and Robert Thomas for their helpful comments. The usual disclaimers apply.

1 See HM Treasury, *Exploring the Third Sector in Public Service Delivery and Reform: A discussion document* (London: TSO, 2005), ch. 1 (hereinafter referred to as *Exploring the Third Sector*).

2 A distinction should be recognised between the civil and civic society. Chanan suggests that civic society and participation concerns vertical participation relating to governance, e.g. local strategic partnerships, and a civil society concerns horizontal participation which relates to community activity e.g. at a faith group (G Chanan, *Searching for Solid Foundations* (London: ODPM, 2003)). In this paper, a broad definition will be adopted and both civil and civic society will be used as interchangeable descriptors.

3 FCO, *Implementing the Cross Cutting Review on the Role of the Voluntary and Community Sector in Service Delivery* (London: FCO, 2004).

4 Rt Hon. Alan Milburn MP, "Let charities run public services", *The Guardian*, Thursday, 6 May 2004.

5 Rt Hon. Paul Boateng MP, *The Role of the Voluntary and Community Sector in Service Delivery – A Cross Cutting Review* (London: HM Treasury, 2002), p. 3.

6 For an authoritative exploration of the contemporary state of the social housing sector, and the academic and policy debates which underpin it, see D Cowan and M McDermont, *Regulating Social Housing: Governing decline* (Abingdon: Routledge-Cavendish, 2006).

7 For an exhaustive survey of the welfare state see P Malpass, *Housing and the Welfare State: The development of housing policy in Britain* (London: Palgrave Macmillan, 2005). In relation to the problems of housing the vulnerable and other groups, see, e.g. P Malpass, *Housing Associations and Social Policy* (Basingstoke: Macmillan, 2000).

contextual analysis of housing policy[8] and alternative systems or solutions beyond the involvement of charities; this has been explored in the voluminous literature on social housing elsewhere.[9] Instead, this article seeks to explore the role played by charities alone[10] in providing housing and housing services to vulnerable groups, although the discussion should be of wider interest to all those concerned with service delivery and policy for vulnerable individuals.

The genesis of this paper arose from an ESRC-funded empirical research project, entitled Housing the Mentally Vulnerable: The Role of Charities.[11] The qualitative data was sought by carrying out a series of 34 structured and semi-structured interviews with charitable housing associations, housing and mental health support groups, and legal experts.[12] In exploring the nature and scope of charitable involvement in housing this group, the work revealed that charities play a very important, and surprisingly extensive, role. Coupled with concern in the sector that charities might be struggling with the increased demands of provision in many different spheres including housing,[13] this prompted questions as to whether such significant charitable involvement in housing the vulnerable is as beneficial to users and providers as it first appears.

It is important to state from the outset that this paper will not seek to argue that charities are poor housing and support providers; such an argument would be difficult to sustain in the face of clear evidence to the contrary.[14] Similarly, charitable organisations will not be compared with other housing providers to consider which might provide a better level of service; the service charities provide is recognised as both important and worthwhile.[15] This paper does not suggest that these activities should be curtailed or that charities should be removed from service provision and replaced by other bodies. The aims are more modest.

This paper simply seeks to re-examine the benefits that charities bring to housing the mentally vulnerable in context. While it is not contested that many benefits will derive from charitable involvement, such as greater social cohesion and more responsive services, these benefits cannot simply be taken for granted. It is a trite proposition that some charities are better run, and provide a better service, than others; variability across any sector or group of similar organisations is to be expected. In practice, it is suggested that some of the benefits that the sector brings to the vulnerable may get lost or diluted in direct provision, either due to these organisational variations or because of the demands placed on organisations running such a housing service. Although many of the difficulties faced in

8 See D Cowan, *Housing Law and Policy* (London: Macmillan, 1999). For an update from 1999, see D Mullins and A Murie, *Housing Policy in the UK* (London: Palgrave Macmillan, 2006).

9 Cowan and McDermont, *Regulating Social Housing* (n. 6 above); Malpass, *Housing and the Welfare State*; and Malpass, *Housing Associations* (both n. 7 above).

10 Charities, as distinct from other not-for-profit or non-governmental organisations, enjoy fiscal and other advantages from their registration as charities – this is explored below.

11 Award Ref: RES-000-22-0286.

12 See W Barr and N Glover-Thomas, *Housing the Mentally Vulnerable: The role of charities* (Liverpool: Charity Law Unit, 2005). This report, hereinafter referred to as *The Report*, presents an analysis of the findings and some recommendations for good practice. It is freely available to download in a variety of formats from the Charity Law Unit website: www.liv.ac.uk/law/clu.

13 See Charity Commission, *Stand and Deliver: The future of charities delivering public services* (February 2007). This piece of research, which publishes the findings of a survey of over 3800 charities, can also be accessed at the Charity Commission's website: www.charitycommisison.gov.uk.

14 The very success of the charity (and wider voluntary) sector in providing key services is part of the attraction for increasing their role in public service provision (see nn. 1, 3, 4 and 5 above). See also ACEVO, *Replacing the State: The case for third sector public service delivery* (London: ACEVO, 2003).

15 See *The Report*, chs 3 and 5, *passim*.

housing the vulnerable, such as joint working, are germane to any provider, charitable or otherwise, some aspects will have a particular resonance or impact on charities.[16] Moreover, it cannot be guaranteed that those charities which currently provide benefits will always manage to do so. This article will explore the possibility that for many charities the increasing demands on them to provide services may be more than their infrastructure and resources can withstand. It will be argued that, while charities offer an excellent and necessary supplementary housing service, any further extension to their role could be potentially damaging to the charities themselves and the tangible benefits associated with charitable involvement may be lost if greater pressure is placed upon them.

In order to set the context for discussion, it is necessary to provide a sketch of charities and the social housing sector, before considering the very tangible benefits of charitable involvement in housing the vulnerable, both at societal level and at the level of provision.

The role of charities

For the purposes of this paper, and the research project which prompted it, the term "mentally vulnerable" comprises those suffering from clinically recognised mental disorders, such as schizophrenia; those with a form of organic brain malfunction, such as dementia or brain damage following injury; and those with a learning difficulty.[17]

The contemporary framework of social housing provision is the subject of a rich vein of academic writing across a variety of disciplines, and the authors cannot hope to add anything of value to this body of work here.[18] It is already well documented that the social housing sector, which provides support for the mentally vulnerable, is shrinking and is increasingly being viewed as a "sector of last resort",[19] and that, within it, provision for the vulnerable is complex.[20] The influence of policies such as community care,[21] mean that it is now a matter of record that there is a paucity of suitable housing stock,[22] and that housing and support services are inadequately funded.[23] It is also well documented that social housing provision has become fragmented, with local authorities discharging housing duties through registered social landlords (RSLs) or non-registered housing associations

16 E.g. charity governance can be problematic, and this may weaken an organisaton in responding to the demands of joint working, as internal disputes may take precedence over the need to build strong working relationships. This is explored in full below.

17 This definition, which is non-exhaustive and does not cover all groups falling within s. 1(2) of the Mental Health Act 1983, deliberately excludes those with "psychopathic" disorders; otherwise known as personality disorders.

18 It should be noted that the focus of this piece is based on the English housing sector. While the scope and nature of the jurisdiction, and the applicable housing law, is different in Northern Ireland, the particular issues relating to housing the mentally vulnerable are likely to be the same, so that the differences will be small. If a comparative approach were sought, it would be more illuminating to evaluate a more distinctive and further removed approach to social housing and charity, such as in the US, where the scale and nature of responses will differ in substance rather than detail.

19 C Kiddle, *The Impact of the Large-Scale Voluntary Transfer of Local Authority Housing Stock on the HA Sector*, Sector Study 17 (London: Housing Corporation, 2002), p. 8. See Cowan and McDermont, *Regulating Social Housing* (n. 6 above) for an exploration of the debates surrounding the very existence of the social housing sector.

20 For an overview of the framework, see N Glover-Thomas and W Barr, "Housing an individual: property problems with the mentally vulnerable" in A Hudson (ed.), *New Perspectives on Property Law, Human Rights and the Home* (London: Cavendish, 2003).

21 For a general discussion of the implementation and operation of the community care policy, see S Richards and R Smith, *Community Care: Policy and practice* (London: Palgrave Macmillan, 2003).

22 See D Cowan, "Accommodating community care" (1995) 22 *JLS* 212.

23 There have been a number of new initiatives and funds to underpin service provision, including the Supporting People Fund, and the Futurebuilders Fund. For a clear history of these developments see Malpass, *Housing and the Welfare State* (n. 7 above) and Cowan, *Housing Law and Policy* (n. 8 above).

rather than directly housing individuals. Market pressures have meant that most medium to large housing providers have become general housing providers,[24] so that special needs are met either by smaller, more specialist providers, or by agencies or bodies working to provide services alongside housing.

The differing needs presented by the mentally vulnerable require expensive and individually tailored support services, administered either as floating support in mainstream accommodation or through supported housing projects.[25] Some individuals will require long term-care in a supported environment, while others may move through a spectrum of needs and services to reach the goal of independent living in a self-contained environment. Matching the vulnerable to housing is the job of a number of agencies, including social services, local health authorities, support agencies, such as homelessness charities, or even other housing providers; particularly where a placement does not currently work.[26]

So, what is the role of charities? While it might be thought that charities are only of residual importance in this sector, as many housing associations have thrown off charitable status in recent years,[27] it is in the role of specialist provider of services to the mentally vulnerable that they retain importance. Research demonstrates that 90 per cent of services to the mentally disordered are provided through housing associations or charities, with only 10 per cent direct involvement by local authorities themselves.[28] Specifically, the ESRC project found that charities provided a wide spectrum of housing and housing support services to the mentally vulnerable, from supplying housing and all accompanying services, through to simply providing the support to other organisations.[29] These services ranged across a broad range of need, from offering temporary accommodation to providing more permanent arrangements and/or services. Nevertheless, despite many organisations occupying multiple roles or running numerous projects, the predominant role identified was as housing manger and/or service provider to housing associations.

It is therefore as service providers and/or partners to other housing bodies and as direct service providers that the role of charities is best understood and it is in this broad sense that housing charities will be referred to here.

Finally, for the purposes of this discussion, what are charities? Charitable bodies[30] are organisations which are distinct from the voluntary sector at large.[31] They are registered

24 See J Alder and C Handy, *Housing Associations: The law of social landlords* (London: Sweet & Maxwell, 2002).

25 For an analysis of the funding of support services and the difficulties faced in providing these supported housing projects, and some suggestions to meet these concerns see H Carr, "'Someone to watch over me': making supported housing work" (2005) 14(3) *SLS* 387.

26 See *The Report*, pp. 47–9 for a list of the bodies involved in housing the vulnerable.

27 See further D J Hughes and S Lowe, *Public Sector Housing* (London: Lexisnexis, 2000). Currently, there are 392 charitable housing associations registered with the Charity Commission, not including almshouses or provident societies which are exempt charities within Sch. 2 of the Charities Act 1993.

28 ODPM, L*ocal Authority Supporting People Returns for England on Supply of Housing and Support Services*, (London: ODPM, 2002).

29 *The Report*, ch. 3.

30 The majority of charities are set up as trusts, but a charity can, however, take a variety of forms, not limited to the trust – see further J Warburton (ed.), *Tudor on Charities* 9th edn (London: Thomson Sweet & Maxwell, 2003). The Charities Act 2006 introduces a new form or vehicle for charitable companies – the Charitable Incorporated Organisation (CIO) – see Charities Act 2006, ch. 8, s. 34. Some sections of this legislation (including CIOs) are not yet in force; a full implantation plan can be found from the Office of the Third Sector website: www.cabinetoffice.gov.uk/third_sector/law_and _regulation/implementation_aspx.

31 The third or voluntary sector, as a whole, is estimated at 500,000 organisations in Britain, of which charities are a much smaller proportion – see *Exploring the Third Sector* (n. 1 above).

with the Charity Commission[32] and enjoy the fiscal and other advantages associated with charitable status.[33] To be eligible for registration, such organisations must be of charitable character; they must have as their object a recognised charitable purpose,[34] must be for the benefit of the public[35] and be wholly and exclusively charitable.[36] It is the legal relationship between the giver and recipient of charity that the law protects, not the act of giving.[37] Charities may also not change their objects without the consent of the Charity Commission, unless their objects are already sufficiently well drafted to allow flexibility in fulfilling their charitable purposes.[38]

In the past, the importance and value of charities have been severely questioned; this stems from as far back as 1978, when the Wolfenden report was commissioned to consider the future of the charity sector following the establishment of the welfare state.[39] It concluded that charities remained an important force for societal good. Recent initiatives[40] have focused on improving and modernising charities and charity law,[41] but the core concept of charities has survived intact.

Benefits of charitable involvement in housing

Societal benefits

Charitable activity, in any field, is perceived as largely beneficial, allowing for a healthier society with greater social cohesion.[42] Similarly, all charities contribute to civil renewal and are an essential component of social provision. Housing charities thus share in these structural characteristics of charitable endeavour. To evaluate meaningfully these social

32 Unless they were exempt under Sch. 2 of the Charities Act 1993. This section has been amended by the Charities Act 2006, ss. 11–14 and Sch. 5. These sections ensure that such charities are now monitored for their compliance with charity law; in the housing sector this will be the job, in most cases, of the Housing Corporation acting as regulator.

33 For an excellent summary of these advantages, see P Luxton *The Law of Charities* (Oxford: OUP, 2001), ch. 2.

34 The Charities Act 2006, s. 2, introduces a statutory definition of charitable purposes, listing 15 different purposes, replacing the enduring "four heads" from *Commissioners for Special Purposes of the Income Tax* v *Pemsel* [1891] AC 531. The latest statutory definition, contained in the Charities Act 2006, does not significantly alter the basis of the definition, but modernises the heads of charity to include activity which has already been recognised either through the case law or the decisions of the Charity Commissioners at registration.

35 Public benefit will no longer be presumed for any charitable purpose and must be proved in all cases for a charity to be registered and function as a charity – Charities Act 2006, s. 3. The Charity Commission is working towards a definition of public benefit for all purposes (s. 4) and is aware that "one size will not fit all".

36 This requirement means that a charity must act within its defined charitable purposes, and must not engage in non-charitable activity – for a good exploration, see Warburton, *Tudor on Charities* (n. 30 above).

37 Luxton, *The Law of Charities* (n. 33 above).

38 See, generally, Warburton, *Tudor on Charities* (n. 30 above).

39 Report of the Wolfenden Committee, *The Future of Voluntary Organisations* (London: HMSO, 1978).

40 See, e.g. the Charity Commission, Review of the Register: www.charity-commission.gov.uk/publications/ccpubs2.asp.

41 At the time of writing, the Charities Act 2006 is mostly partly in force. See the Charity Commission website for a detailed summary of the impact of these changes: www.charity-commission.gov.uk/spr/charbill.asp.

42 It must, however, be noted that these elements which have been identified as core benefits from charitable activity are not set in stone nor are they uncontested as potential benefits. There remains an ongoing unsettled debate particularly around social capital and social cohesion. For a more detailed analysis of these concepts, see F Fukuyama, "Social Capital and Civil Society" (paper presented at IMF Conference on Second Generation Reforms, 1999), available at: www.imf.org/external/pubs/ft/seminar/1999/reforms/fukuyama.htm; and P Bernard, *Social Cohesion: A critique*, CPRN Discussion Paper no. F|09 (Ottawa: CPRN, 1999), p 2.

benefits it is necessary to consider charitable involvement in the creation of strong communities, measured through social capital and social cohesion.

Social capital and charitable involvement

The central premise of social capital is that social networks have value. Social capital refers to the collective value of all social networks and recognises the benefits that arise from reciprocal working and cooperation and relationships of trust within a community.[43] Putnam considers social capital to be "networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit".[44] Fukuyama, however, suggests that social capital should not be simplistically interpreted as only offering benefits to society but rather that social capital should be measured in terms of both the creation of negative and positive externalities.[45] Where a group of organisations and bodies create a support network for those in need, on the face of it, this can only be a positive endeavour.[46] Groups, organisations and other bodies have the potential for encouraging internal cohesion from within, for example, employees and volunteers may have a different view of a charitable organisation to a mere donor. This internal cohesion may be brought about at the expense of those who are not part of the organisation. The achievement of positive externalities is essential in the creation of a beneficial form of social capital that can have a marked effect upon social welfare. Thus, where charitable and other voluntary sector organisations manage to achieve a "radius of trust",[47] which results in positive externalities, then a form of social capital is created that binds communities together and offers a framework of support to more vulnerable members of society. The type of housing support and activity undertaken by charities dealing with the mentally vulnerable is, in theory, a clear expression of this.[48]

Examples of the potential positive externalities[49] that such work can create include outreach efforts which seek to bring vulnerable individuals together and to reduce levels of isolation that are common among such groups, as "where social trust is often low, the activities of third sector organisations can help to build pockets of trust and cooperation, leading to a positive cycle of social capital development".[50] The Office for National Statistics confirmed this view in 2001.[51] On a less direct level, the existence of social capital which has been brought about by positive externalities contributes to a variety of social changes, such as lower crime rates, better and higher educational achievements, greater equality of income and better health.

Social cohesion and the creation of strong communities

A consensus on the definition of "social cohesion" remains illusory[52] and subject to continuing academic debate. Nonetheless, it is almost universally accepted that anything which may increase the level of social cohesion is viewed as a beneficial element to a

43 A C Brooks, "Does social capital make you generous?" (2005) 86 *Social Science Quarterly* 1.

44 R D Putnam, "Bowling alone: America's declining social capital" (1995) 6 *Journal of Democracy* 65, p. 67.

45 Fukuyama, "Social capital" (n. 42 above).

46 J Coleman, "Social capital in the creation of human capital" (1988) 94 *American Journal of Sociology* 95.

47 Fukuyama, "Social capital" (n. 42 above).

48 See *The Report*, ch. 3, pp. 23–36, which details the extent and nature of the various housing services offered by charities to this client group.

49 H Begum, *Social Capital in Action* (London: HCVO, 2003).

50 *Exploring the Third Sector* (n. 1 above), p. 41.

51 Social Analysis and Report Division, *Social Capital – A review of the literature* (London: Office for National Statistics, 2001).

52 C Beauvais and J Jenson, *Social Cohesion: Updating the state of the research*, CPRN Discussion Paper no. F|22 (Ottawa: CPRN, 2002).

healthy, civil society. The agreed constituent elements are: "common values and civic culture; social order and social control; social solidarity and reductions in wealth disparities; social networks and social capital, and territorial belonging and identity".[53] From this, a socially cohesive society (and therefore something all societies should seek to be) is one where common values are shared among individuals that allow them to identify common aims and share codes of behaviour through which to conduct their relations with one another. Such a society is likely to have a higher degree of social interaction within the communities that make up society as a whole.[54] The Council of Europe[55] views social cohesion to comprise a sense of belonging: to a family, a social group, a neighbourhood, a workplace, a country.

The simple existence of the charitable sector is deemed, for the most part, to have a positive role to play in a socially cohesive society. Nevertheless, the Joseph Rowntree Foundation found in 1999 that in four disadvantaged communities across Britain (Teeside, Liverpool, East London and Nottingham) social cohesion or the lack of it was not the primary reason behind difficulties that tended to be experienced. Rather, problems tended to stem from poverty which led to community commitment diminishing.[56] Poverty and other similar social problems are commonly tackled by charitable organisations and it is this, arguably, which fuels the view that charitable and voluntary sector organisations are an essential component to the creation of strong communities. Housing the vulnerable is one such area of obvious need being met. For example, without the involvement of housing charities, some mentally vulnerable individuals fall through the statutory gaps[57] and become homeless or disenfranchised from appropriate care and support.[58]

Volunteering, which is at the heart of community involvement in charities, also has an important role to play. The *Volunteering Code of Good Practice* defines volunteering as actions which consist of: a) the commitment of time and energy for the benefit of society; b) an expression of citizenship; c) undertaken freely and by choice, without concern for financial gain. However, where individuals volunteer their services to organisations there is a clear quid pro quo in terms of the giving and receiving of benefit. Services offered free of charge to charitable organisations allow them to operate at a low cost and enables the flow of funding to be directed to the provision of services rather than to fund the organisation's infrastructure. A volunteer may also benefit in several ways.[59] For example, "volunteering has a clear, positive benefit to the labour market and economy"[60] as it enables the development of an individual's self-esteem, through the giving of new experiences, allowing the development of new skills and providing an important source of confidence

53 Beauvais and Jenson, *Social Cohesion* (n. 52 above), p. 2.

54 A Kearns and R Forrest, "Social cohesion and multilevel urban governance" (2000) 37 *Urban Studies* 995, p. 999.

55 Council of Europe, *A Report on the Brainstorming Session Held in November 1999 on "Education for Democratic Citizenship and Social Cohesion"* (1999) p. 2, see http://culture.coe.fr/postsummit/citizenship/concepts/erap99_60.htm.

56 See Joseph Rowntree Foundation, *Social Cohesion and Urban Inclusion for Disadvantaged Neighbourhoods* (York: JRF, 1999).

57 Problems with a satisfactory legal definition of "homelessness" and a conflict between the priority need (s. 189) and intentional homelessness (s. 191) provisions under the Housing Act 1996 (unresolved by the Homelessness Act 2002) contribute to a situation where some mentally vulnerable individuals slip through the current statutory duties to be housed – see Glover-Thomas and Barr, "Housing an individual" (n. 20 above) for a more in-depth discussion.

58 *The Report*, pp. 6–8.

59 *Exploring the Third Sector* (n. 1 above), *passim*.

60 Ibid., p. 41.

and social contact.[61] Housing charities, as with all others, will have volunteers as part of the workforce, whether behind the scenes in the administration of the organisation, or in providing the services themselves.

Benefits at the level of provision

In addition to the wider benefits to society, charities are also regarded as beneficial contributors to service provision itself. This involves examining some of the major characteristics of charities; in particular the fact that they are perceived as value driven, trusted, independent, responsive, innovative and fill recognised gaps in provision. Evidently, these characteristics are applicable to any charity; however, their distinctiveness marks the difference between charities and other housing providers, who do not have charitable status and thus do not enjoy such features.

Value-driven

Charitable organisations focus upon social, economic and cultural objectives that benefit society. Charities are often described as "value-driven"[62] in that they exist to promote and reflect their values or objectives rather than to make profit, reinvesting any operating surpluses to enhance service provision. This approach enables charities to bring different aspects of society together, drawing on the participation of volunteers, encouraging social cohesion and community participation. Similarly, the focus of charitable organisations is primarily on the needs of those they seek to serve. This, in conjunction with the "value-driven" approach, enables practical support to be offered at ground level to those in need. Indeed, data suggests that the nature and duration of housing and the support offered by charities to the mentally vulnerable is tied directly to the functions and key objectives of the charitable organisation.[63]

Trusted

Charities are also generally perceived as trustworthy organisations. It is said that "trust is the voluntary sector exchange rate",[64] and is connected to the core ethos and social objectives of many charities. An effective charity is seen as accountable, not only because it accounts to regulators who can exercise direct sanctions against recalcitrant organisations,[65] but also because it "is accountable to the public and other stakeholders in a way that is transparent and understandable".[66] In taking account of the needs of users as stakeholders, charities are providing a "voice" to them, by ensuring their needs are met in service provision.[67] Charities also play a role in providing "choice" to users, as the existence of an alternative service by a charity, and the possibility that it might be taken up in preference to a service from a non-charitable body, acts as a motivating factor to the non-charitable body to take account of the needs of users when designing and delivering services.[68]

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61 Voluntary Sector National Training Organisation, *Voluntary Sector Workforce Development Plan* (London: VSNTO, 2001). Report available at www.vsnto.org.uk/development%20plan.pdf.

62 *Exploring the Third Sector* (n. 1 above), para. 2.6.

63 *The Report*, p. 23.

64 NCVO, "Blurred vision" (1998) (1) *Research Quarterly*, January.

65 P Day and R Klein, *Accountabilities for Five Public Services* (London: Tavistock, 1987).

66 Charity Commission, CC60, *The Hallmarks of an Effective Charity* (London: Charity Commission, 2004).

67 See Public Administration Select Committee, *Fourth Report of Session 2004–05: Choice, voice and public services* (London: House of Commons, 2005), pp. 49–51.

68 A Blackmore, H Bush and M Bhutta, *The Reform of Public Services: The role of the voluntary sector* (London: NCVO, 2005), p. 17.

It is these factors which contribute to the importance and effectiveness of the charity "brand",[69] as charities "have a strong public image . . . Just knowing that an organisation is a charity is often enough to give the public confidence to donate money to it."[70] Housing charities are dependent on donation funding, alongside more direct funding streams,[71] so the importance of trust and brand remain essential.

Responsive

Another recognised aspect of charitable organisations is their ability to focus upon the users of their services and respond to their needs. Charitable organisations are generally directed by the desire to meet the needs of and to improve the well-being and opportunities available to those who receive their services.[72] Charities are often established and run by those with direct experience of a particular need or disadvantage, allowing them to reach out to others more effectively, and even encourage current users of the service to facilitate its delivery in the future. Charity workers at both grass-roots and organisational levels often have a special understanding of, and commitment to, the needs of the community the charity seeks to serve. The ways in which charities are organised may also allow greater responsiveness to the needs of its clients. They often have fewer structural constraints in terms of their aims and the way in which they can carry these out, and because other "organisations often have multiple goals and stakeholders, and can have a more informal or 'ambiguous' organisational structure, this may allow them to respond better to users with multiple disadvantages".[73] This is evident in housing the vulnerable, as charities can provide additional specialised services, including training or work schemes, developed to meet specific user needs.[74] Moreover, the involvement of users in the operation of these housing organisations[75] and the fact that many organisations have evolved to meet changing needs in the housing sector[76] convincingly demonstrate this key aspect of their appeal.

Innovative

Charities are recognised as pioneers in the establishment of new approaches to social problems and are said to innovate in two particular ways: by finding better ways to deliver a service (process innovation) and by developing new services in response to need (product innovation).[77] This capacity to innovate stems from the comparative freedom charities have to take risks, without which there is very little innovation.[78] The commercial or "for-profit" sector is the more natural home of innovation, as market forces demand that organisations take risks as they may otherwise face merger with more aggressive and innovative rivals.

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69 Strategy Unit, *Private Action, Public Benefit* (London: TSO, 2002), ch. 6, "Building public trust and confidence and supporting the sector in improving performance".

70 Strategy Unit, *Private Action*, p. 14.

71 *The Report*, pp. 50–3.

72 S Domberger and P Jenson, "Contracting out by the public sector" (1998) 13 *Oxford Review of Economic Policy* 67.

73 D Billis and H Glennerster, "Human services and the voluntary sector: towards a theory of comparative advantage" (1998) 27 *Journal of Social Policy* 79.

74 *The Report*, pp. 29–30.

75 C Cooper et al, "Community involvement, housing and equal opportunities", in C Cooper and M Hawtin (eds), *Housing, Community and Conflict: Understanding resident "involvement"* (Aldershot: Arena, 1997).

76 *The Report*, p. 27, which demonstrates that some housing organisations have splintered into smaller, more focused groups or have evolved or changed their focus to meet new needs or follow new funding priorities. There are questions, however, over the legality of some of these actions, which are explored below.

77 *Exploring the Third Sector* (n. 1 above), p. 31.

78 M Bolton, *Voluntary Sector Added Value. A discussion paper* (London: NCVO, 2004).

However, in relation to social welfare, pursuit of profit and the need to streamline costs in service delivery, often results in reduced service and stifles innovative thinking or approaches by for-profit organisations. An example of this is the failure of the for-profit sector to provide a sustainable private rental housing market to deal with social housing as an alternative to the public sector, despite direct government incentives to do so.[79] Charities, on the other hand, given their focus and responsiveness, tend to see process and product innovation in service delivery as important goals. In relation to housing the mentally vulnerable, there is clear evidence of such innovation – the empirical data demonstrate process innovation as methods are developed by some charities to enhance joint working to the benefit of service provision for their beneficiaries.[80] Product innovation is also present within this sector as many providers also offer additional services, owing to the particular needs of their vulnerable client group.[81]

Filling service gaps

The final characteristic of charities that directly benefits service users is the charities' role in filling gaps in existing service provision, however caused; politics and social agendas do not impinge on the need to deliver the required service to an otherwise disenfranchised group. Some commentators argue that filling gaps in service provision is beyond the remit of charities,[82] but charitable organisations have undoubtedly been viewed as bodies which have met social needs that are not provided through other means, as their historical role in housing demonstrates. It may be argued that filling service gaps for many charities is a clear part of their practical role and one which, if ignored, would be counter to their charitable objectives and motivation.

In housing the vulnerable, this gap-filling role is evident. The conflict between the priority need and intentional homelessness provisions under existing homelessness duties on local authorities means that many individuals with difficult or challenging behaviour fall through the statutory net and are classed as "intentionally homeless",[83] meaning that there is no duty to rehouse the individual, just to provide temporary accommodation and assistance in locating housing.[84] Coupled with the implementation of the community care policy – which ignored the need to provide adequate housing support[85] and has contributed to a paucity of suitable stock for social housing – clear service gaps have emerged, to deal with which charities have either changed their objects, merged or been created.[86]

Re-examining the benefits

The potential advantages of charitable involvement already outlined are, it is suggested, based on the concept of the model charity – the expertly run and financed charitable organisation which innovates and plays a deliberate and focused role in enhancing service provision and wider community interests, benefiting social capital and cohesion. In fact, many charities do not meet this ideal, but may show different beneficial characteristics, though not all at once. Charities are not perfect, nor is the housing environment in which

79 See S Merrett, *Owner Occupation in Britain* (London: Routledge & Keegan Paul, 1982).

80 *The Report*, ch. 4.

81 *The Report*, p. 29.

82 Milburn, "Let charities" (n. 4 above).

83 See N Glover, "Mental health and housing: a crisis on the street?" (1999) *Journal of Social Welfare and Family Law* 327.

84 Housing Act 1996, s. 190(2).

85 Glover-Thomas and Barr, "Housing an individual" (n. 20 above).

86 *The Report*, p. 27.

they have to work and it is these realities which can potentially dilute the benefits already identified. It is worth remembering that the following discussion is not intended to suggest that charities should not provide housing to the vulnerable or should be replaced by other organisations, but simply to explore how tangible the benefits of charitable involvement actually are at the level of service provision and to identify any areas of concern for any increased role in the future.

To look beneath the surface of the benefits already considered requires a discussion of provision on the ground, which has been grouped into four themes: problems in creating social capital; achieving social cohesion; considering the reality of the value-based charity; and, finally, an exploration of the public perception of charities and the charity "brand". This established, some conclusions about the impact of increasing pressure on charities to act as a vehicle of housing provision for the vulnerable can be explored.

Social capital – reciprocity and the creation of social networks

One of the benefits which flows from social capital is the creation of social networks, through co-operation and reciprocal working, binding people and values together. This depends on charities having an effective, well-motivated and stable workforce, of either volunteers or paid employees/trustees. In conjunction with this, effective joint working practices must be established within the sector in order for seamless service provision to be possible. Without this, the building blocks of successful social networks are absent, because the necessary skills and "community" spirit within and without the organisation are lacking.

Staffing issues

If a charity is to create or maintain effective social networks, it is a trite proposition that it requires a stable workforce to do so. Of course, this is true of any housing provider, not just charities, but staffing issues are particularly problematic for the charity sector as a whole. Existing research has found, for example, that staff turnover in voluntary organisations was at 20 per cent per annum, more than for all other employment sectors.[87] This creates instability, as continuity is lost, jeopardising established interpersonal relationships within and without the charity sector.

There can also be major issues in recruiting effective, skills-led staff. Paid charity employee wages can be lower than competing private industry or public sector organisations,[88] but the level of skills required, and the demands on staff to complete jobs, are no less than those required in companion sectors. In the housing context itself, many charities find it intensely problematic to recruit and retain staff with appropriate levels of training, experience and commitment to the organisation's charitable objects.[89] This arises because of the particularly stringent skills and experience required to deal effectively with mentally vulnerable users, poor salaries in comparison to public and private sector workers, and worker stress in dealing with difficult clients and balancing competing needs.[90]

Recruitment and retention can be an even greater issue in relation to volunteers, who are viewed as the lifeblood of many charities and volunteering, with its associated benefits, is a crucial element to the creation of social capital. For example, the relatively minor role of

87 K Dullahide, L Ellarby and K Smith, *People Count* (London: Compass Partnership, 2000).

88 Charities have recognised this as a problem, but still face difficulties in being competitive – see P McCurry, "Salary review: rich rewards?" (2003) *Voluntary Sector Magazine*, 7 November.

89 *The Report*, p. 47.

90 Ibid., p. 47.

volunteers in the hierarchy of decision-making processes in many charities adds to feelings of discontent or exclusion and may hasten exit,[91] so that skilled volunteers may be lost to related roles in the public or private sector where pay and employment benefits are greater.[92]

The combined effect of these staffing issues can result in problems in the provision of direct-line services by charities, either in the short term or, if unchecked, they may lead to serious damage in the longer term with the charity unable to provide some or all of its intended services. At the level of the mentally vulnerable individual, it may also mean that people with whom vulnerable adults have built up individual trust and rapport may move on, and it may take considerable time to achieve a similar level of service with a replacement provider, even where the skills base is the same or better. At organisation level, recruitment and retention can frustrate efforts to engage with the wider community and other organisations, affecting relations with partner providers, and thus have a negative impact on achieving effective networks.

Indeed, the fact that charities are essentially value driven, as identified above, might occur at the expense of matters of equal importance to service delivery, particularly the staffing issues identified. Some charities may not invest in infrastructure in the same manner or extent as a commercial organisation, preferring to spend on direct services for users. If this is so, competitive wages, training opportunities, recognisable appraisal mechanisms, transparent grievance procedures and clear retention policies may be entirely lacking or present in a rudimentary form which compounds resentment, affects retention and exacerbates disputes.[93]

Employment disputes are also a very common feature within charities, as research demonstrates that charities are twice as likely to become involved in employee disputes[94] and employment tribunal cases are double the level of private and public sector organisations.[95] There is no reason to suspect that this is any different in relation to housing charities. Triggers for these disputes may include poor personnel policies,[96] a lack of clarity over dividing lines between roles in the workforce[97] and uncertainty as to the status of individual workers as either volunteers or employees.[98] Disputes, and potential litigation, relating to the last of these can be particularly wasteful in terms of both time and financial resources, and can impact both on motivation of the workforce within charities and the potential benefit of low running costs that using volunteers can bring.[99]

Professionalisation

One clear demand on modern charities is the need to professionalise, in order to compete with rival charities and private organisations, and to differentiate their service, as well as to

91 D Morris, *Disputes in the Charitable Sector* (Liverpool: Charity Law Unit, 2003), p. 22.

92 See *The Report*, pp. 46–7.

93 Morris, *Disputes* (n. 91 above), pp. 22 and 26.

94 Ibid.

95 I Cunningham, "Sweet charity! Managing employee commitment in the UK voluntary sector" (2001) 23 *Employee Relations* 226.

96 Morris, *Disputes* (n. 91 above). This is particularly a problem for smaller charities, or those which have undergone a sharp rise in employee numbers (e.g. on merger).

97 This is particularly true in the division between job descriptions for paid staff, volunteers and independent contracts – see Morris, *Disputes* (n. 91 above), p. 23 and ch. 4 generally.

98 The presence of any form of payment (e.g. an honorarium) may transform what the charity believes to be a volunteer into an employee, with the consequent legal statutory rights – see D Morris and J Warburton, *Legal Issues in Charity Mergers* (Liverpool: Charity Law Unit, 2001).

99 See M Restall, "Righting wrongs" (2002) *Volunteering Magazine*, March.

improve internal governance.[100] Charities are forced to take account of market factors, including funding opportunities, potentially to expand the service they offer thereby widening any gaps with rival organisations. In social housing,[101] this "professionalisation" has crucially led many charities to abandon charitable status altogether while those that remain charities have done so either to use charitable funds to replace willing volunteers with paid, professional employees or to delegate certain specialised functions to other organisations.[102] In many cases, those organisations which have been deregistered as charities are now not-for-profit organisations, rather than private organisations, that have been forced to become more commercially or professional orientated owing to reduced state housing and public funding and to increased competition and diversification of activities instigated by housing associations.[103] This raises some interesting questions over the mooted positive externalities of charities working jointly with other agencies through participation and consultation.[104] The increasing trend towards professionalisation would indicate that competitive, market tendencies are potentially prevailing within the sector and rather than joint working practices being encouraged in order to provide a seamless and comprehensive service, charities may be focusing their aims and internalising their activities to the detriment of social capital formation and the creation of social networks.

Multi-agency working

Professionalisation may have a potentially damaging impact upon joint working. Yet, despite this, the concept of joint working to facilitate public service delivery has become central in policy development over recent years.[105] Within health and social care, a clear shift away from central provision is evident, being replaced by authorities commissioning services from other sectors.[106] This move towards service outsourcing necessitates the harnessing of joint working practices; effective joint working between agencies depends upon viable delivery processes, social networking and cooperation between agencies, active within service delivery and management.[107] Effective joint working aids the creation of social capital because where communication channels are open and agencies are achieving their delivery aims, a rich network of cooperating providers is likely to be present within the service framework.

Nevertheless, recent research indicates that relations across organisations are not so easy to establish and frequent miscommunication can lead to serious problems, prompting the conclusion that effective joint working between agencies is more of an aspirational goal

100 See, e.g. D Morris and J Warburton (eds), *Charities, Governance and the Law: The way forward* (Oxford: Keyhaven, 2003).

101 For an empirical exploration of problems of governance within housing bodies generally, see D Cowan, M McDermont and J Prendergrast, *Governing and Governance: A social housing case study*, Working Paper no. 06/149 (Bristol: CMPO, 2006).

102 Ironically, charities themselves are the delegatees in relation to services for the mentally vulnerable, as many of the ex-charitable RSLs are general providers only – see *The Report*, ch. 3.

103 M. Lewis, "Non-profit housing agencies: 'reading' and shaping the policy agenda", in M Harris and C Rochester (eds), *Voluntary Organisations and Social Policy in Britain* (London: Palgrave Macmillan, 2000).

104 It also suggests, perhaps, that the limits imposed by charity law and regulation are too stringent to allow for competition in the wider housing environment, but that is an issue for further study elsewhere – see, e.g. *Charities and Not-for-Profits: A modern legal framework* (London: NCVO, 2003).

105 Home Office, *The Compact*, Cm 4100 (London: TSO, 1998).

106 Carr, "Someone to watch over me" (n. 25 above), pp. 387–408.

107 J Secker and K Hill, "Broadening the partnerships: experiences of working across community agencies" (2001) 15 *Journal of Interprofessional Care* 341.

than a practical reality.[108] In the words of Staite and Martin: "Working together is not easy."[109] That this affects charities in delivering housing to the vulnerable is clearly evidenced by the research, which demonstrates that there are some very real barriers which make it immensely difficult to enhance and maintain effective social networks and co-operative working. Briefly stated, these include inadequate forums to meet and discuss cases, mistrust of the different professionals involved, limited communication and an unwillingness to disclose information, time constraints, and different professional cultures feeding into the meeting of different professional goals and agendas.[110] These problems are compounded by current policy initiatives, which seek to enhance multi-agency working by focusing almost exclusively on organisational cooperation, without recognising the importance of the individual in inter-professional relationships.[111] Currently, joint working within the context of housing provision and the mentally vulnerable seems far from perfect. If the "joined-up approach"[112] in public service delivery is to remain a top policy priority, improvements will be needed to respond to and counter the barriers to joint working that currently exist. Obviously, such problems are generic to any housing provider working in this sector, and are not charity specific. Nonetheless, the impact should not be overlooked.

Having considered the practical difficulties which exist in realising social capital and, at an operational level, related problems associated with direct service provision within some charities, it is necessary next to consider whether housing charities aid social cohesion in practice.

Social cohesion – links between charities and the wider community

Elements of a socially cohesive society are greater community confidence, self-esteem and social engagement. Charities play a significant role in this area. However, this involvement by charities must be measured against practical experience, with recognition that some harmful influences exist which may damage social cohesiveness.

Antisocial behaviour and the community

One such factor is the divisive impact of antisocial behaviour on communities; a well-publicised phenomenon and one that is a major issue for all housing providers.[113] Owing to some common behavioural traits associated with and exhibited by many mentally vulnerable individuals, such as delusional beliefs, hallucinations or behaviour linked to personality disorders, antisocial behaviour can be a particular issue for this group.[114] Research[115] demonstrates that behaviour can range from simple noise pollution, through a

108 There are numerous examples of research exploring the difficulties and barriers to achieving good multi-agency working. See, e.g. National Audit Office, *Delivering Efficiently: Strengthening the links in public service delivery chains* (London: NAO, 2006); and B Hannigan, "Joint working in community mental health: prospects and challenges" (1999) 7 *Health and Social Care in the Community* 25.

109 C Staite and N Martin, "What else we can do? New initiatives in diversion from custody" (1993) 157 *Justice of the Peace* 280.

110 *The Report*, pp. 47–9.

111 B Hudson, "Interprofessionality in health and social care: the Achilles' heel of partnership?" (2002) 16 *Journal of Interprofessional Care* 7.

112 J McHale, "Standards, quality and accountability – the NHS and mental health: a case for joined up thinking?" (2004) 4 *Journal of Social Welfare and Family Law* 369.

113 For an excellent analysis of some of the problems and concerns around existing anti-social behaviour as well as a definition of which behaviours are covered, see H Carr, *The Anti-Social Behaviour Act 2003* (Bristol: Jordans, 2004).

114 See, e.g. Cabinet Office Social Exclusion Unit, National Strategy for Neighbourhood Renewal, *Report of the Policy Action Team 8: Antisocial behaviour* (London: Cabinet Office, 2000).

115 See, further, C Hunter, *Tackling Anti-Social Behaviour* (London: Lemos and Crane, 2002).

lack of awareness of the impact of individual actions, to more serious criminal offences such as arson. Therefore, management of antisocial behaviour is something common to all housing providers, not just charities, and there are several remedies available, depending on the nature of the occupation arrangement involved.[116] It is possible to overcome these issues, but it is not always easy to do so.[117] The Law Commission has recognised the difficulties in managing anti-social behaviour from a provider's perspective, and has proposed new powers to deal with such issues in the future.[118]

Of perhaps greater concern to social cohesion is the prevalence of antisocial behaviour emanating from the community itself towards mentally vulnerable occupiers,[119] rather than the converse. The occurrence of this behaviour – which can perhaps be explained by factors such as non-optimal placement of mentally vulnerable tenants, or a lack of engagement with the local community[120] – nevertheless raises doubts as to whether there is always an identifiable consensus between community values and the values of a charitable (or other) organisation carrying out its objects. More explicitly, where a charity seeks to house a person with challenging behaviour, an objective which it sees as a social good, this view may not be shared by the host community. If this is so, the placement may, in fact, be divisive, reducing social interaction and damaging social connectivity. Similarly, concentration of vulnerable groups in distinct housing schemes can create additional social problems, such as drug-related crime; the presence of a vulnerable group can encourage exploitation and provide a captive market,[121] all factors which can undermine cohesion, creating a blame culture within the community. Again, the same will be true for any housing provider wishing to place a mentally vulnerable individual within the community, but there is perhaps not the same discord with the ethos and objects of the organisation that persists within charities. This is one of the realities of provision to this vulnerable group, and, again, although charities cannot change the environment within which they operate, the impact that antisocial behaviour may have cannot simply be ignored.

What the above demonstrates is that there is a potential disparity between the views of the individuals who collectively comprise a community and the views of policy makers or service providers. Particularly, what might be deemed in the best interests of the community in a normative sense does not necessarily translate to the demographic and social picture of particular, individual communities. For example, a decision by a local authority and charitable partners to place a hostel in a particular location may reduce community choice, as, whatever the views of the community inhabitants, the hostel could still be established.[122]

This suggests that there may be a major difference between social cohesion as an instrument of social planning in the hands of policy makers and others and social cohesion as a concept on the ground. Charities, in providing services to the mentally vulnerable, may find themselves caught between these two competing positions and be correspondingly

116 See, in context, W Barr and N Glover-Thomas, "Housing reform – a better deal for the mentally vulnerable?" (2005) 60 *Conv* 207.

117 Hunter, *Tackling Anti-Social Behaviour* (n. 115 above).

118 Law Com. no 6781-11, *Rented Homes Bill 2006*, s. 51.

119 *The Report*, p 55. See, also, E Silver, "Race, neighbourhood disadvantage, and violence among persons with mental disorders: the importance of contextual measurement" (2000) 24 *Law and Human Behaviour* 449.

120 *The Report*, p. 55.

121 Ibid., p. 55.

122 While it is true that planning regulations allow for public objections to be aired, where a positive duty exists to create housing for vulnerable groups, it is arguable whether in the majority of cases such objections would be sustained. See, however, *The Report*, p. 58, which suggests that planning regulations can allow discrimination by communities against the vulnerable.

unable both to provide the actual services they wish to or, indirectly, to produce the tangible benefits of social cohesion. That this will be true of any housing scheme for the vulnerable, whether run by a charity or not, is not the issue, as charities are one of the key vehicles for this type of housing service.[123] However, what it does demonstrate is that the nature and outcome of a given activity as carried out by a charity may raise questions as to the perceived benefits of charitable involvement per se.

The value-driven charity

The picture of the value-driven charity and the benefits that derive from it are characteristics of the aforementioned model charity. Such thinking ignores the practical influences and pragmatic decisions that charities are forced to make on a daily basis.

Pragmatic drivers

It is clear that in the challenging environment in which charities often work, and no more so than in housing provision for the vulnerable, it is important for charities to be flexible in how they provide services. The same could be said of any housing provider, but charities are subject to particular strictures imposed by charity law; most significantly that a charity is set up for certain, legally approved, purposes (technically, objects).[124] A charity that operates outside its stated objects is acting in breach of trust and the ultimate sanction would be that the charity be investigated and/or deregistered by the Charity Commission.[125] It is of prime importance that a charity's objects are wide enough to allow flexibility, as changing objects is neither simple nor guaranteed.[126] For many extant charities, their object clauses are restrictive.[127] This means that to act pragmatically charities often work on the margins of acceptability; carrying out a particular service or adopting a specific policy because it is in the best interests of the organisation or the users even if is just inside or outside accepted practice or a legal framework. Research into housing the mentally vulnerable highlights this very clearly, with charities seeking repossession against groups to move them on, even when they should not strictly do so: "There might be a legal position that we shouldn't actually do that . . . but we can't do that otherwise we would close down."[128]

Similarly, this position was echoed in relation to the adoption of short-term or introductory occupation arrangements;[129] charities sometimes chose to employ them in direct defiance of housing corporation guidance or the wishes of their housing stock owner.[130] This is pragmatism in its purest form, but it does carry potential concerns that charities might be in breach of the law and the governing trustees might find themselves liable for allowing the charity to act in breach.[131] Whatever the direct legal consequences of such actions might be, the willingness of charities to work on the fringes of acceptability

123 ODPM, *Local Authority* (n. 28 above).

124 Warburton, *Tudor on Charities* (n. 30 above).

125 See, generally, Luxton, *Law of Charities* (n. 33 above). Ss. 6 and 7 of the Charities Act 2006 clarify the powers and jurisdiction of the Charity Commissioners.

126 Broadly, charities require the approval of the Charity Commission to allow for a change in objects, and this can be a time-consuming and expensive procedure, which does not guarantee success – see Luxton, *Law of Charities* (n. 33 above), *passim*.

127 *The Report*, pp. 77, which recommends that charities have wide object clauses to allow for changes in practice, as this was found to be the case with many of the data sample – see chs 3 and 4, *passim*.

128 Ibid., p. 68.

129 For an excellent summary of the complexity of the current legal framework on occupation arrangements, see Law Commission, *Renting Homes* (London: HMSO, 2003).

130 *The Report*, pp. 60–2.

131 Luxton, *Law of Charities* (n. 33 above).

might be negatively perceived by the public, if such behaviour is challenged in the public domain through the Charity Commissioners. Furthermore, it might sully the reputation of charities as a partner in joint-working processes, or may, indeed, trigger or exacerbate disputes within charities themselves.[132]

Conversely, a lack of pragmatism and the strict pursuit of the stated charity objects can also lead some organisations to adhere to a particular form or method of delivery to meet those values, thereby obviating the benefits of innovation and responsiveness inherent in charitable activity. Loyal observance of traditional values can lead to conventional modes of delivery. The ability of a charity in these circumstances to adapt to changes in policy and funding can ossify; charities may continue to provide a particular service, even where direct funding for it is removed or changes in law or care practice make it impracticable to continue this form of delivery. It may be contended that, in housing provision, adherence to issues beyond the law as noted above is not pragmatism, but an inability to change practice to meet the demands of changing provision. This is particularly so if charities attempt to run a service for which funding is no longer available, due to changes in funding regimes.[133] Of course, observance of outdated delivery methods would not be unique to charities, but in following their values, it is not unreasonable to suggest that the problem may be more prevalent in charitable organisations.

Influence of board members

The presence of values as a driver for charitable organisations can sometimes be as much of a weakness as a strength. These values frequently have at their origin the personal energies or motivations of the charity's founder members: these people may still be involved in the management decisions of charities and may be resistant to changes in practice or loss of control, even if objectively the changes are in the best interest of the charity.[134] In contrast, dominant personalities within a charity may have sufficient influence to carry forward their own personal agendas, which may or may not be in the best interests or reflect the values of the charity.[135] Combating the dominant direction and influence of such individuals may depend upon the size and nature of the charity and its governing trustees or board, but more significantly depends upon whether principles of good internal governance are in place.[136] In common with issues around employee disputes, this is not always the case. Potential solutions include time-limited appointments to the board and improvement in guidance for board members.[137] In the absence of such controls and protocols, the charity may not be working in the best interests of its users and this could contribute to internal disputes and the staffing issues as discussed above.

132 This is particularly true where the practice relates to issues of employment law – see Morris, *Disputes* (n. 91 above).

133 Under the Supporting People funding initiative, mentally disordered individuals, who have been detained under the Mental Health Act 1983 and discharged with after-care services under s. 117(2), will no longer be funded for housing services, as was the position in the past. Existing charities who have continued to try and house this group without additional sources of funding have run into severe difficulties – *The Report*, p. 51.

134 This is described as the "founder syndrome" – see B O'Hagan, "Giant step for small charities" (2002) *Third Sector Trustee*, June.

135 Morris, *Disputes* (n. 91 above).

136 The charity sector produces a magazine on issues of charity governance, called *Governance*, details of which can be found at: www.charitygovernance.co.uk/home/8.

137 See, e.g. D. Dalton, "The recruitment and retention of trustees: a perspective from the voluntary sector", in Morris and Warburton, *Charities, Governance and the Law* (n. 100 above), ch. 3.

The sector is alive to concerns over governance, which are more far-reaching than the isolated example highlighted here.[138] One tangible effort to improve standards has been the adoption of a voluntary code of practice on governance,[139] produced by the Governance Hub, which sets out best practice for trustees based on seven guiding principles.[140] While compliance with the code is not mandatory, organisations that do so can evidence this in annual reports to the Charity Commission. This provides, in essence, a "kite-marking" system, but as yet there are no compelling statistics as to the current take-up rate of the code, or more particularly how many housing charities have adopted it. Indeed, adherence to the code provides no guarantee of avoiding governance issues and such disputes are still a daily feature of the charity landscape.

Funding and investment

Even where a charity is true to its values, and not the personalities of its governing body, and keeping a weather eye on peripheral or subordinate issues in service provision, there is a danger of institutional drift. Values change, and at an organisational level, this can be driven by a plethora of external factors. Many charities have merged or refocused their objects to meet different needs arising from changes in funding.[141] Whether this alteration has been approved through the mechanisms of charity law, which requires the approval of the Charity Commission to the change of objects, is questionable, and the necessary paperwork or management approval may be absent. In such a case, it is difficult to support a contention that a choice to change the values of the organisation has actually been made; rather, it seems as if the charity has drifted towards a new set of values.

Funding can have a pernicious influence on the ability of charities to carry out functions, either through dictating new avenues of service by providing money to support them or by compromising the ability of charities to carry out activities by reducing the levels of funding available.[142] Long-term planning of service delivery is severely restricted, owing to the fragility of funding streams and the constant pressure on charities to adapt services and locate new financial support to continue. For example, variable and short-term funding which is typically restricted to yearly distribution reduces an organisation's ability to engage in longer-term planning; payment for the provision of services is frequently made in arrears requiring the organisation to establish means to fund an initial service start-up; frequently, full cost recovery is avoided so that the charity finds itself out of pocket when the funder fails to meet all the costs which relate to service provision; and funders have tended to overlook the wider benefits, such as social cohesion and the growth of community spirit, that accrue from using charities and/or third-sector organisations in service provision and, as a result, do not place a monetary value upon these wider benefits.

The change in government practice within the sector from giving block grants to charities to making them tender for bids, the "contract culture", has had a profound effect

138 For a good discussion of the issues, see the collection of papers in Morris and Warburton, *Charities, Governance and the Law* (n. 100 above).

139 *Good Governance: A code for the voluntary and community sector* (July 2005). A free copy of the code (and a summary) can be obtained from the Governance Hub website at: www.governancehub.org.uk.

140 Broadly, these principles, which include measures such as managing risk, ensuring equality and diversity, strategic direction and open communication, are designed to offer a complete governing ethos for organisations which choose to adopt the code.

141 One charity was formed as an offshoot of an existing organisation to tackle the lack of specialist mental health service provision offered by housing associations, following their focus on general provision – *The Report*, p. 26.

142 Ibid., pp. 51–3.

on the way charities conduct business. Garton observes that the cumulative effect of charities' involvement with the contract culture has been that funders enjoy too much influence in the operation of charities, and co-operation in the charitable sector is weakened by charities competing with each other.[143]

Funding is a constant problem for housing charities both in terms of obtaining initial capital in order to initiate housing projects and finding ongoing funding for the management of housing provision.[144] More specifically for the vulnerable, evidence suggests that Supporting People funding, which is the current Government's solution to funding of support services, "is about the charitable housing body performing according to a given set of criteria rather than trying to work with the individuals who come to them with a recognised need".[145] The autonomy of charities in decision making is not aided by what charities perceive as their relatively weak bargaining position in securing funding, even though there is evidence to suggest that this is more perception than reality.[146] Given such concerns, can it really be said that charities are value driven alone, or are they in the best position to deal with funding issues?

There is considerable cause for concern. Research commissioned by the charity regulator, the Charity Commission, into public service delivery by charities found that many charities are increasingly dependent on state funding to carry out their services; for example, just over one-third of the over 4000 charities surveyed obtained 80 per cent or more of their income from this source.[147] More importantly, only 12 per cent reported that they obtained full cost recovery, with over 43 per cent indicating they do not obtain full cost recovery for any service they deliver.[148] The survey also concluded that this dependency and underfunding could combine to undermine the ethos and autonomy of organisations, as well as destabilising the charities themselves.[149]

One source of funding which charities enjoy above other organisations is, of course, income from voluntary donations or fundraising; voluntary income constitutes about 55 per cent of the total income of the top 500 charities.[150] Whether fundraising is a feature of a housing charity will be dependent upon the characteristics of the particular charity, as, for many charities, the major source of income will be local authority funding or by bid (for sources such as Supporting People income), but fundraising will still remain important. Public donations set charities apart from other third-sector organisations, and highlight the essential nature of public trust in charities, for without these donations, many charities would simply struggle to survive.

The public perception of trust in charities

It has already been observed that public trust in charities underpins charitable activity across the sector. This is significant as without trust public confidence in charities and public

143 J. Garton, "Charities and the state" (2000) 14 *Trust Law International* 93. For an exploration of these issues in practice, see D Morris, *Charities and the Contract Culture: Partners or contractors? Law and practice in conflict* (Liverpool: Charities Law Unit, 1999).

144 See, generally, P Malpass and H Aughton, *Housing Finance: A basic guide* (London: Shelter, 1999).

145 *The Report*, p. 52.

146 See Blackmore et al., *Reform of Public Services* (n. 68 above), pp. 10–14.

147 Charity Commission, *Stand and Deliver* (n. 13 above), p. 6.

148 Ibid., p. 10.

149 Ibid., p. 23.

150 C Pharoah and S Street, *Dimensions 2000: An update on CAF's top 500 fundraising charities* (Tonbridge: Charities Aid Foundation, 2001).

donations to them will decrease. It remains to be seen whether housing charities do, in fact, enjoy high levels of public trust or whether this too differs in practice on the ground.

The importance of public trust

Charities and its regulators are, as already discussed, aware of the need to protect the charity "brand". Nevertheless, it has been recognised that for individual charities, lack of performance indicators, such as charity league tables, means that regulation of charities and reporting mechanisms must be clear, robust and easily accessible if public confidence is to be maintained and means of improvement are to be provided.[151] Similarly, organisational and public perceptions of charities are also coloured by the fact that there is too much replication in the charity sector: 'The public thinks that there are too many charities; businesses think that there are too many charities; funders think that there are too many charities.'[152]

At organisation level, the issue of branding to ensure a distinctive character and the creation of a positive image in the public mind is becoming increasingly important, mirroring practice in the commercial sector. Nevertheless, charities must be aware of the potential pitfalls behind branding, for example, re-branding may carry with it a negative public perception that money is being wasted on internal charity administration rather than going towards fulfilling its objects.[153]

Housing charities dealing with the vulnerable face an additional problem, especially where they provide or supplement services alongside other providers, rather than acting as sole providers. This relates to the public perception of whether such charities are viewed as independent of government.[154] The public's opinion of whether a given charity is independent is also essential. Charities must not simply be independent, but must be seen to be independent, as public concern is motivated by the fact that public monies are given to charities either directly or in the form of tax relief. This situation explains why the private sector is never accused of not being independent, no matter how closely it works with government.[155] It is here that public perception of charities is demonstrated to be "fickle",[156] as the

> public . . . appear to have "blurred vision" when it comes to VCOs [Voluntary and Community Organisations] . . . high expectations exist alongside a perception that "proper" charities are and should be amateur . . . [and] . . . the freedom and flexibility of VCOs to determine how best to meet their aims also means that the sector is largely unregulated.[157]

That this perception exists, against clear evidence of regulation in the sector, suggests at best that charities and interest groups must be more proactive in championing the sector, and at worst that such ingrained beliefs will be extremely difficult to surmount.

Poor perceptions of charities are not helped by the reality of clear weaknesses in the current regulatory and accountability frameworks. One such weakness is the lack of

151 The Charity Act 2006, which received the Royal Assent on 8 November 2006, introduces a number of amendments to existing charity law – see the Charity Commission website for a detailed summary of the impact and history of the Act at: www.charity-commission.gov.uk/spr/charbill.asp.

152 W Barr and J Warburton "Charity mergers – property problems" (2002) 66 *Conv* 531.

153 See, e.g. P Hankinson and C Rochester, "The face and voice of volunteering: a suitable case for branding?" (2005) 10 *International Journal of Nonprofit and Voluntary Sector Marketing* 93.

154 A Blackmore, *Standing Apart, Working Together: A study of the myths and realities of voluntary and community sector independence* (London: NCVO, 2004), p. 17.

155 Blackmore, *Standing Apart* (n. 154 above).

156 Ibid., p. 23.

157 NCVO, "Blurred vision" (n. 64 above), p. 25.

information sharing between regulators, which means that the same information is frequently duplicated at the expense of charities. Following recognition that the current mechanisms for accountability are weak,[158] the Charity Commission, as principle regulator, has sought to make improvements in regulatory practice, including the adoption of the five principles – recommended by the Better Regulation Task Force – that their work will be transparent, accountable, consistent, proportionate and targeted.[159] There is, however, deep disagreement within the charity sector as to what appropriate regulation should be and what the role of the Charity Commission is within that framework. The Charity Commission's vision of itself as a modern regulator[160] has drawn considerable criticism from the National Council for Voluntary Organisations (NCVO), one of the leading voices of the voluntary sector. The major concern is that "in carrying out these roles the commission will become too closely associated with the sector, potentially undermining public confidence in its role and in charity as an independently regulated activity".[161] While it is doubtless true that the NCVO as an organisation has some self-interest in keeping the commission out of a lobbying role for charities, the underlying conflict between the two proposed roles and the likely public reaction to it are difficult to dispute.

Of even greater concern is the suggestion that close working relationships between charities and government will lead to public confusion as to the identity of charity trustees and a loss of public confidence in charities. The net result would be that "[t]he spirit of the gift will be weakened by the prospect that any gift is a gift to the Chancellor of the Exchequer".[162] The clear impact of this could be that donations to charity might decline – the public would not want to feel they are paying twice for the same service. If the public perception of charities is already misguided, even though there is a clear recognition that they are a necessary part of society and do a valuable job, how much more skewed will the image become when charities and the state are working together under the same service provision umbrella?

Theory in practice: the modern decline in charitable giving

In the wider charitable context, the increasingly negative public perception of the value of charities is amply demonstrated by a modern decline in charitable giving. It is speculated that a third of adults in 2005 were "not in the habit of giving to charity and a great deal of giving potential lays dormant much of the time".[163] Many of the factors that lie behind this have been identified,[164] including negative attitudes towards the helping of others and towards charitable organisations as a result of apparently intrusive fundraising methods, the use of for-profit enterprises in the collection of donations and the perceived (un)trustworthiness of the charitable organisation in the way in which it carries out it's functions. This recognition has not arrested the decline.

158 The Charity Act 2006 introduced a new Charity Tribunal, which may help regulation.

159 Charity Commission, Charity Working at the Heart of Society – The way forward 2005–2008 (London: Charity Commission, 2005).

160 Ibid.

161 See B Pratten, *Response to the Charity Commission Strategy, "Charity Working at the Heart of Society – The Way Forward 2005–2008"* (London: NCVO, 2005).

162 C MacLennan, "Local government and charities" (2005) *PCB* 241, 247.

163 S Hibbert and T Farsides, "Charitable giving and donor motivation", *ESRC Seminar Series: Mapping the public policy landscape* (London: ESRC/NCVO, 2005), p. 2.

164 A Sargeant and E Jay, "Reasons for lapse: the case of face-to-face donors" (2004) 9 *International Journal of Nonprofit and Voluntary Sector Marketing* 171.

According to the Henley Centre, confidence in voluntary and charitable organisations has vastly reduced since the mid-1980s.[165] "In 1996 the number of people having 'a great deal' or 'quite a lot' of confidence in charities stood at 33%"; better than the church (25 per cent), the Government (11 per cent) but worse than the NHS (40 per cent), banks (46 per cent) and the police (58 per cent).[166] In 2000, the NCVO "expected that public trust in voluntary organisations' motives [would] decline" and Hibbert's recent research has confirmed this.[167] This means that there is a significant tranche of British society unwilling or inactive within the charitable process, which at least raises some interesting questions as to the perceived relevance and value that is attached to the activities of charities in the provision of services and the meeting of unsupported social needs.

Whether this translates directly to housing charities for the vulnerable, as many derive their operating income from other sources, it does at least demonstrate that there are some major concerns within the sector about trust and confidence. Indeed, research into public service delivery by charities, of which housing forms a part, suggests that where funding instead comes from the state, there are similar concerns over independence, autonomy and public trust.[168] Taken with the factors identified above, this suggests that not all charities may enjoy the level of public support that is commonly assumed.

Looking forward

The foregoing analysis has suggested that, while charities do make an important and worthwhile contribution to service delivery for the mentally vulnerable, there are a number of factors and processes which may dilute these benefits, or reduce their significance. Similarly, some of the issues explored suggest that charities' infrastructure and resources are stretched. It remains to consider the position in the future, in which an increasing role for charities in direct public service provision is envisaged.

The major new housing policy initiative is to involve charities and the wider third sector directly in discharging public service functions by focusing on the quality of provision, rather than the sector which provides it.[169] This approach focuses on the state acting as a provision enabler, and supplying housing through partnership and joint working. What is new is that charities will be expected to provide public services directly, rather than supplement them as in the past. The decision of the Charity Commission, that charities may use funds to pay for services that a public body[170] provides, sets the legal platform to allow charities to become major providers of public services. In allowing a departure from their traditional role of innovating service provision or filling the gaps left in public provision, this marks an important change from past practice. The question which needs to be explored is whether they should be so involved and what this means in relation to the future of provision for the vulnerable.

This single most important issue, it is suggested, is whether charities' infrastructure can meet the increased demands of public service provision and whether structural fragmentation is an inevitable result. It is also clear that several associated difficulties exist such as, whether there are effective funding regimes, the question of multi-agency working

165 Henley Centre, *Planning for Social Change 1996/97* (London: Henley Centre, 1997).

166 Ibid., p. 7.

167 Hibbert and Farsides, *Charitable Giving* (n. 163 above).

168 Charity Commission, *Stand and Deliver* (n. 13 above), para. 2.1.

169 See, e.g. Home Office, *Working with the Third Sector* (London: TSO, 2005).

170 See Charity Commission, Decisions of the Charity Commission For England and Wales, Applications for Registration (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust, April 2004. Originally, charities could only supplement what the public authority provided.

and whether reliance on a multi-tier system of service provision ultimately results in a fragmented system which is of benefit to none. It is clear that should reliance upon charities to provide public services continue, the nature and shape of the charitable sector will change significantly. The Charity Commission acknowledged that particularly the medium-sized charities would struggle the most to compete for sustainable public funding, while small charities will continue to offer supplementary services and large charities will be the dominant public service providers in the sector. It is anticipated that not all charities harnessed to provide public services will have the structural capacity or resources to meet the demands of public service delivery and, for these charities, very difficult times are expected ahead. The Government has acknowledged the potential shortfall in charitable infrastructure and has made commitments to bolster this in the future. However, the Charity Commission observes that "the achievement of government targets to increase the level of charities' participation in public service delivery will depend heavily on the successful implementation of these commitments".[171] Whether such targets will be met, is, of course, speculative, and is not guaranteed.

Of equal significance, the increased role of the third sector in housing provision in partnership with government also has the potential to strain the independence of charitable organisations beyond recognisable limits. Charity Commission research has found that the level of involvement charities have in public service delivery is influencing the public's perception of the independence and governance of charities. When charities carry out activities or provide services primarily for funding purposes, or where a public authority exercises significant control over decision-making, these situations can suggest that charities are no longer directed by their objects or are free from outside influences. The smallest hint of this can result in the key benefit of independence being immediately lost.[172]

It is difficult, in this context, not to see current policy trends in a negative light; rather than growing state provision to meet what charities have been doing better, it is delegating provision to charities as the current champion of such services, without thinking through the implications. This is, arguably, strategic delegation, not planning. There is currently a necessary informal partnership between state provision and charities, even if it does not work as well as one might like. Extending this beyond this partnership to make charities a major arm of service provision, rather than an important and necessary supplementary service, seeks to destroy that balance. Charity Commission evidence suggests this is so, and calls for greater control and thinking on this issue.[173]

On the other side of the housing equation, the number of people with recognised mental illness and vulnerabilities is increasing.[174] It does not require a leap of reasoning to suggest that the housing needs are also going to grow, particularly against a background of a paucity of suitable housing stock.[175]

What this article has sought to demonstrate is that, while such problems cannot be ignored, increasing charity involvement in this area is not a replacement for much needed strategic thinking to ascertain the exact nature of the problem and any appropriate responses that might be needed. Policy makers need to stand back and recognise that problems of this kind cannot be overcome by making small, peripheral changes to

171 Charity Commission, *Stand and Deliver* (n. 13 above), p. 22.

172 Ibid., p. 20.

173 Ibid., p. 23.

174 At some point during their lifetime, 1 in 4 adults are expected to suffer a mental disorder. In 2004, it was established that 1 in 10 children in Great Britain have a mental disorder; a worrying statistic for the future (Department of Health).

175 *The Report*, p. 32. See also Glover-Thomas and Barr, "Housing an individual" (n. 20 above).

individual elements. Indeed, in particular, such change may damage the whole sector whose strengths the state seeks to yoke.

Concluding thoughts

It is difficult to know what possible system could be designed to replace the fragmented tapestry of provision which currently exists for mentally vulnerable individuals and into which charities provide so much of the support. Indeed, it may be that there is no alternative to the current system, and that, while imperfect, the existence of charities and other specialist providers is the key to provision for the most vulnerable in society. This piece has not sought to provide the shape to any overall solution to the needs of the vulnerable in housing. At the very least, further research and energies should be directed to finding better methods of supporting both charities and other providers. Some factors worthy of consideration include methods of improving joint working practices, creating a centralised data repository, establishing a body which deals with the housing needs of the mentally vulnerable alone, and the creation of an advocacy service that aids communication and understanding between users and providers.[176] Without these there is a very real danger that the quality of provision currently available to the mentally vulnerable will further deteriorate over time. The weaknesses outlined above will only increase and there are limits to what even the best charities can achieve when it is the system itself that is at fault.

176 Some of these suggestions are considered in *The Report* to help providers improve the current situation, see ch. 5. Obviously, this is a response to inadequacies within current practice rather than an attempt to suggest components of a new system.

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A statute of unintended consequences? The impact of the Charities and Trustee Investment (Scotland) Act 2005 on non-Scottish charities operating in Scotland

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Introduction

The central question addressed by this article is whether the provisions of the Charities and Trustee Investment (Scotland) Act 2005[1] as to "foreign" or "non-Scottish" charities – that is, charities established outside Scotland – are satisfactory. The article concludes that they are not. Explaining that conclusion will involve saying something about the background to the Act and the policies behind it, outlining the key features of the supervisory regime set up by the Act, including the Scottish "charity test", and examining the "foreign charities" provisions in the light of the Act's policy objectives. That in turn will involve considering those provisions from the standpoint of non-Scottish charities themselves, particularly charities established in England and Wales, and suggesting that the requirement of dual regulation may have the unintended effect of discouraging such charities from engaging in beneficial activity in Scotland. As a postscript the article considers how a different approach based on mutual recognition might have made beneficial operation in Scotland more attractive to charities established outside the jurisdiction, and recommends adoption of such an approach in amending legislation. It is suggested that a similar approach might recommend itself to those legislating for charities' supervision in Northern Ireland and the Republic of Ireland.[2]

Background

The 2005 Act is an Act of the Scottish Parliament. The Parliament may legislate for the "creation, operation, regulation and dissolution of charities" in Scotland and for the fiscal treatment of charities at the level of local taxation, but it has no power to legislate for tax relief for charities at United Kingdom level, since that is a matter reserved to the Westminster Parliament.[3] This is an important limitation, because the previous regulatory arrangements

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1 Hereinafter "the Act" or the "2005 Act" as the context requires. The Act's main regulatory provisions came into force on 1 April 2006.

2 See Charities Bill (NIA Bill 9/07); Charities Bill (No. 31 of 2007).

3 Scotland Act 1998, s. 30, Sch. 5, Pt II, Heads C1 and A1.

for "charities" in Scotland, set up under Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,[4] and now replaced by the 2005 Act system, were inextricably bound up with tax relief for charities under United Kingdom legislation. Scotland has its own common law equivalent of the English charitable trust, the public trust,[5] but rather than build on the common law to produce a truly indigenous system of supervision for non-profit bodies constituted for public benefit,[6] the 1990 Act instead took the technical English definition of charity as the basis of its entirely statutory system of supervision of "Scottish charities". The English definition of charity had originally been introduced into the law of Scotland through the medium of United Kingdom taxing statutes: under such statutes tax relief for bodies with "charitable purposes" is granted, in Scotland as in England and Wales, by reference to the technical meaning of "charitable" in English law.[7] The 1990 Act adopted the simple device of defining a "Scottish charity" for regulatory purposes as a body recognised by the Commissioners of Inland Revenue as charitable for tax relief purposes[8] – as charitable, in other words, in the sense of the term in English law.

The arrangement had its advantages: it meant that there was a common definition of charity across the United Kingdom for both tax and regulatory purposes,[9] and that bodies in Scotland which enjoyed the benefits of United Kingdom charitable tax relief were subject to official supervision as "charities" in the same way as their counterparts elsewhere in the United Kingdom.[10] The Scottish Parliament might have retained the device in the 2005 Act but chose not to,[11] opting instead for its own "charity test" as a way of identifying bodies eligible for registration as "charities" in Scotland. The charity test remains, however, a derivative of the English definition. The intention of the Scottish legislature was that the test should be "very similar [to] and compatible with" the revised definition of charity then being proposed for England and Wales (and for United Kingdom tax purposes) in the English Bill which was to become the Charities Act 2006.[12] In the result, the charity test is, indeed, very like the English definition of charity provided for by the 2006 Act, yet significantly different.

The same is true of the new Scottish charities system as a whole: it is an attempt to replace the rudimentary 1990 Act system, which almost from its inception had been criticised as inadequate,[13] with something closer to the much longer-established and more sophisticated system of charities' supervision in England and Wales, but with variations peculiar to Scotland. The hybrid Anglo-Scottish character of the 2005 Act is attributable in

4 Hereinafter the "1990 Act".

5 See Lord Ross et al., "Trusts, trustees and judicial factors" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 24 (Edinburgh: Law Society of Scotland/Butterworths, 1989), paras 85–9.

6 See P Ford, "Supervising charities: a Scottish-civilian alternative" (2006) 10 *Edin LR* 352–85.

7 *Special Commissioners for the Purposes of Income Tax* v *Pemsel* [1891] AC 531, as explained in *IRC* v *City of Glasgow Police Athletic Association* [1953] AC 380, *per* Lord Reid at 403. For current relieving provisions from direct UK taxation, see, e.g. Income and Corporation Taxes Act, s. 505; see also n. 59 below.

8 1990 Act, s. 1(7). There was also a requirement of territorial connection with Scotland. The Inland Revenue is now incorporated in HM Revenue and Customs (hereinafter HMRC).

9 See, latterly, Charities Act 1993, s. 97(1), and Charities Act (Northern Ireland) 1964, s. 35.

10 As recommended in the Woodfield Report: Sir Philip Woodfield, *Efficiency Scrutiny of the Supervision of Charities* (London: Home Office and HM Treasury, 1987, para. 144.

11 Policy Memorandum issued with the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) (hereinafter "Policy Memorandum"), para. 53.

12 Hereinafter the "2006 Act". See Policy Memorandum, para. 53. The English Bill and the Scottish Bill initially ran in parallel through their respective parliamentary processes, but the English Bill was derailed by the 2005 general election with the result that the Scottish Bill reached the statute book first.

13 See Scottish Council for Voluntary Organisations, *Faith and Hope in Charity?* (Edinburgh: SCVO, 1994).

part to its attempt to marry the recommendations of a report of the Strategy Unit of the Cabinet Office for the regulation of charities in England and Wales[14] with those of an earlier report specific to Scotland, the report of the Scottish Charity Law Review Commission, chaired by Ms Jean McFadden.[15] Arguably, the Act falls between the two stools of faithful imitation of a system tried and tested south of the border and construction from first principles of a genuinely Scottish alternative.[16] What matters in practice, however, is whether the legislation as enacted, Anglo-Scottish hybrid though it may be, gives satisfactory effect to its declared policy objectives.

Policy of the Act

The overall policy objective of the Act is clear. It is "to establish a satisfactory regulatory regime that will encourage public confidence in charities whilst not over-burdening the charity sector with bureaucracy".[17] During the long lead-up to legislative action on the McFadden Report public confidence in the 1990 Act system had been shaken by two prominently reported charity abuse scandals[18] and it is unsurprising, therefore, that the emphasis of the Policy Memorandum issued with the reforming Bill should have been on "robust regulation" to ensure good governance and accountability.[19] There is an important facilitative dimension to the Act, certainly, arising from acceptance at policy level of "a need to assist charities to operate effectively in a modern society",[20] and, accordingly, there is provision for improved reorganisation procedures for charities and access to a new dedicated legal form.[21] The principal thrust of the Act, however, "is against the corrupt use and abuse of the word 'charity', and against the abuse of people who give their time and resources to support good works".[22] Its aim is that members of the public in Scotland should be able to contribute to "charities" in the knowledge that the recipient bodies will be subject to a rigorous system of supervision.

The benefactors of charities – those who contribute to charities as donors or volunteers – are not, of course, the only people who have an interest in the robust regulation of charities.[23] Most obviously, the beneficiaries of charities – the members of the public at the receiving rather than the contributing end of charities – have an interest in the state's ensuring that the charities which set out to help them do so in an accountable and well-organised way. Clearly, however, the interests of benefactors and beneficiaries overlap: benefactors contribute because they want to help beneficiaries, and if beneficiaries are helped honestly and effectively that is good both for the beneficiaries themselves and for the benefactors who see their contributions applied as they would have hoped. But a policy

14 *Private Action, Public Benefit: A review of charities and the wider not-for-profit sector* (London: Strategy Unit, Cabinet Office, 2002) (hereinafter "*Strategy Unit Report*").

15 *Charity Scotland* (Edinburgh: Scottish Executive, 2001) (hereinafter the "McFadden Report"). For the joint influence of the Strategy Unit and McFadden Reports, see S Cross and P Ford, *Greens Annotated Acts: The Charities and Trustee Investment (Scotland) Act 2005* (Edinburgh: W Green, 2006) (hereinafter "Cross and Ford"), pp. 6–7.

16 See P Ford, "The Charities and Trustee Investment (Scotland) Bill: falling between two stools?" (2005) 16 *KCLJ* 1–28, 5–7.

17 Policy Memorandum, para. 24.

18 See statements of the Minister for Communities, *Official Report*, Plenary Session, 28 May 2003, cols 133–6 and Plenary Session, 24 September 2003, cols 1955–8.

19 Policy Memorandum, para. 3.

20 Ibid., para. 4.

21 Ibid., paras 5, 37, and 42.

22 Remark of the Deputy Minister for Communities, *Official Report*, 9 June 2005, col. 17821.

23 For a fuller analysis see P Ford, "The Charities and Trustee Investment (Scotland) Act 2005: a stakeholder assessment" (2007) *Juridical Review* 179–219.

focus on the interests of benefactors is natural enough in any government eager to maximise the potential contribution of the voluntary sector, and charities in particular, to the delivery of public services.[24] The value to the state in encouraging public confidence in charities lies in securing the private contributions of the public as benefactors to the provision to the public as beneficiaries of services which must otherwise be funded by government.[25] The particular emphasis in the Policy Memorandum on charities, as opposed to other voluntary organisations engaged in similarly publicly beneficial activities, can be attributed to an assumption that "charities" attract a more favourable response from the donating and volunteering public than bodies soliciting support without the benefit of the label.[26] In any event, the primary intention of the Act is "to protect the charity 'brand'".[27]

Protection of the charity brand is a concern, too, of the English system,[28] but in England and Wales the importance of the "prestige" attaching to charitable status is arguably matched, if not exceeded, by the value of the concomitant tax reliefs.[29] As mentioned, however, the Scottish legislators have chosen to dissociate Scottish charitable status from charitable tax relief at United Kingdom level, so that – even though charitable taxation relief at local level is now linked directly to registration with the Scottish charity regulator[30] – the real *raison d'être* of the Act is to give the new regulator jurisdiction over bodies which make use of the charity brand in Scotland.

Scottish system of charities supervision outlined

It may be helpful at this point to sketch out the main features of the new Scottish system. As explained, its model is the system for the supervision of charities in England and Wales, adapted for Scotland in the light, in particular, of certain key recommendations of the McFadden Report.[31] Overall, the picture is one of convergence with the English system in the broad but divergence in detail.

Thus, there is a new Scottish charity regulator, OSCR,[32] modelled on the Charity Commission, yet with lesser powers.[33] The powers of the Scottish regulator are underpinned by statutory powers of intervention by the Court of Session broadly in the same way, but only broadly, as those of the Charity Commission are underpinned by the inherent powers of the High Court.[34] There is a new register of charities in Scotland, but

24 Policy Memorandum, para. 4. The new Scottish Government which took power after the 2007 elections to the Scottish Parliament has similar hopes: see statement of the Cabinet Secretary for Finance and Sustainable Growth on Local Government Finance Settlement 2008–11, *Official Report*, Plenary Session, 13 December 2007, col. 4465.

25 An estimate from 2004 put donations to Scottish charities from the general public at approximately £240 m a year, or around 12% of the sector's income: *Draft Charities and Trustee Investment (Scotland) Bill: Consultation paper* (Edinburgh: Scottish Executive, 2004), p. 36.

26 The assumption has been tested to some extent by research in England and Wales but without conclusive results: see Opinion Research Leader, *Report of Findings of a Survey of Public Trust and Confidence in Charities* (London: Charity Commission, 2005).

27 Policy Memorandum, para. 3.

28 See Charities Act 1992, s. 63, discussed below.

29 See C Mitchell, "Redefining charity in English law" (1999) 13 *Trust Law International* 21–47, 28.

30 Local Government (Financial Provisions etc) (Scotland) Act 1962, s. 4. as amended by 2005 Act, s. 75, Sch. 4, para. 2: local authorities must grant charities registered with OSCR relief from non-domestic rates at a minimum of 80%.

31 See n. 15 above.

32 Office of the Scottish Charity Regulator: 2005 Act, s. 1.

33 2005 Act, ss. 31 and 32; cf. Charities Act 1993 (hereinafter the "1993 Act"), ss. 18 and 19. References to the 1993 Act are to the Act as amended by the 2006 Act.

34 2005 Act, ss. 34–7; cf. 1993 Act, s. 16; see also *Re J W Laing Trust* [1984] Ch 143.

with different criteria for registration – over and above those incorporated in the charity test – from those applicable in England and Wales.[35] Much of the Act is devoted to provisions concerned with the monitoring and accountability of charities, each plainly inspired by originals in the English legislation but with significant differences of drafting: there are controls on charity names,[36] and on references to charitable status;[37] there is a requirement for approval by OSCR of major alterations to a charity's constitution;[38] there are obligations on charities to provide information direct to members of the public, independently of what is available on the register;[39] and there is a new Scottish accounting and reporting regime, broadly similar to the English one but by no means identical.[40]

Again, the 2005 Act sets out to reproduce by statute for the "charity trustees"[41] of charities registered with OSCR the regime of equitable duties incumbent on charity trustees in England and Wales,[42] yet in two specific respects the Scottish duties are notably different from those of the English model. The 2005 Act authorises, subject to certain restrictions, the remuneration of charity trustees for their services as such, and not only for the provision of unrelated services,[43] whereas in England and Wales the 2006 Act authorises remuneration only for services which might have been provided by a non-charity trustee.[44] And – in the view of OSCR – the 2005 Act treats the payment by a charity of the premiums for trustee indemnity insurance as a form of remuneration of the charity trustees the insurance protects, and as ruled out, in effect, for charities registered in Scotland by the restrictions applicable to other forms of remuneration.[45] In England and Wales, on the other hand, the 2006 Act grants a default authority to charities to provide indemnity insurance for their charity trustees.[46]

The facilitative objective of the Act is implemented, as mentioned, by improved reorganisation provisions and access (in prospect, at least) to a new limited liability form.[47] The reorganisation sections are modelled in part, but only in part, on the cy-près provisions of the English legislation,[48] and the new form, the Scottish Charitable Incorporated Organisation (SCIO), is a close relation, though not a clone, of the nascent English Charitable Incorporated Organisation.[49] The Act also introduces new Scottish controls on fundraising undertaken by or on behalf of "benevolent bodies", controls which replicate those applicable in England and Wales to "charitable institutions", yet not exactly.[50] The Scottish controls are,

35 See pp. 206–7 below under "Registration".

36 2005 Act, ss. 10, 11, 12; cf. 1993 Act, ss. 6 and 7.

37 2005 Act, ss. 13–15; cf. 1993 Act, ss. 5, 67 and 68.

38 2005 Act, ss. 16 and 17; cf. 1993 Act, ss. 64 and 66.

39 2005 Act, s. 23; cf. 1993 Act, s. 47.

40 2005 Act, ss. 44–6; cf. 1993 Act, ss. 41–49A and 66A. For a helpful summary of the differences see G G Morgan, "Cross-border complexities" (2007) *Charity Finance* (April) 39.

41 The term is defined by s. 106 of the 2005 Act in exactly the same way as in s. 97(1) of the 1993 Act.

42 This is the intended effect of ss. 66 and 67 of the 2005 Act: see commentary on those sections in Cross and Ford.

43 2005 Act, ss. 67 and 68: the provisions permit a person employed by a charity to act as a charity trustee.

44 1993 Act, ss. 73A and 73B.

45 2005 Act, s. 67: for OSCR's view, see: www.oscr.org.uk/trusteeindemnityinsurance.stm. The Scottish Government accepts that any restriction on indemnity insurance was "unintended" and is considering "appropriate action": see written answer by the Minister for Community Safety, *Official Report*, 22 January 2008.

46 1993 Act, s. 73F.

47 The provisions for the new form are not yet in force.

48 2005 Act, ss. 39–43; cf. 1993 Act, ss. 13–14B.

49 2005 Act, ss. 49–64; cf. 2006 Act, s. 34 and Sch. 7.

50 2005 Act, ss. 79–83 and 84–92; cf. Charities Act 1992, Pt. II and 2006 Act, ss. 67–9 and 45–66.

however, the same as their southern equivalents in that they permit, subject to regulation, fundraising from the public, not only by bodies recognised technically as charities and fully regulated as such, but also by bodies with "benevolent" or "philanthropic" purposes which are not otherwise subject to regulation under the charities regime.[51]

It is worth looking at certain of the divergences from the English model more closely, partly because they are likely to be of special concern to English and Welsh charities contemplating registration in Scotland,[52] and partly because they have produced, or threaten to produce, unintended effects which those legislating for charities in Northern Ireland and the Republic of Ireland may wish to beware of.

Registration

The policy objective of protecting the charity brand is given effect by the "key principle" of the Act that any body wishing to represent itself as a "charity" in Scotland must register with OSCR.[53] Indeed, a body only becomes a charity in Scotland – and entitled to describe itself as such – by registering.[54] In other words, a body which would qualify for registration under the charity test is not entitled to call itself a charity until it has been entered in the register. This is different from the position in England and Wales where an institution is a charity simply by virtue of having "charitable purposes" (in the English sense) and is obliged to register with the Charity Commission as a result of that status unless exempt or excepted from registration.[55] Registration creates charitable status in Scotland but in England and Wales follows it.

In Scotland, there are no exemptions or exceptions from registration,[56] apart from the very limited one in favour of non-Scottish charities contained in s. 14 of the 2005 Act and to be discussed fully below. Any body, regardless of size, or of territorial origin, which is not covered by this exception but which does call itself a charity in Scotland without registering, is liable to preventative action by OSCR and the Court of Session.[57] The corollary, however, is that no body, even one clearly eligible for registration under the charity test, is obliged to register unless it wishes to represent itself as a charity. The system assumes, in other words, that bodies will opt into the regime of supervision voluntarily in return for its concomitant advantages. Principal among these, of course, is freedom to use the charity brand, but the others, as we have seen, are automatic relief from local taxation, and availability of the new reorganisation facilities and the SCIO.[58] On the other hand, as we have also seen, registration does not bring with it charitable tax relief at United Kingdom level, which depends on a separate application to HMRC for recognition that the purposes

51 Pt 3 of the 2005 Act enlarges the default investment powers of Scottish trustees, bringing them into line with those of English trustees under the Trusts Act 2000. Pt 3 does not apply to charities as such, but charities constituted as public trusts stand to benefit incidentally.

52 See pp 219–20 below "To register or not to register?".

53 OSCR, *Guidance on Registration for England and Wales Charities* (Dundee: OSCR, 2006) (hereinafter "*Guidance on Registration*"), s. 2.

54 2005 Act, s. 106.

55 1993 Act, s. 3A.

56 Cf. 1993 Act, s. 3A. Excepted charities in England and Wales include "small charities", i.e. those with a gross annual income of less than £5000.

57 2005 Act, ss. 13, 28, 31 and 34.

58 The 2005 Act, s. 96, grants charities registered with OSCR a default power to invest in common investment funds (CIFs) established by the Charity Commission; cf. 1993 Act, ss. 24 and 25: but the 2006 Act, s. 23 limits the participation of such charities to those eligible for United Kingdom tax relief, and allows participation by bodies which are eligible for tax relief but not registered with OSCR. Accordingly, participation in CIFs is in reality an advantage of charitable status for United Kingdom-level tax purposes, not of registration with OSCR.

of the body in question are "charitable" in the English sense,[59] and is equally available to bodies not registered with OSCR. It should be remembered, too, that the value of automatic fiscal relief at local level is relative only: local authorities have power to grant discretionary relief to a wide range of publicly beneficial organisations other than charities.[60] Nor, since the fundraising system is open as much to merely benevolent or philanthropic bodies as to charities, does registration bring exclusive eligibility to raise funds from the public in Scotland. Again, a public trust may be constituted and may operate freely under the common law without any reference to OSCR or the charity test.[61]

One unintended consequence of the registration arrangements under the 2005 Act may turn out to be, therefore, that public benefit organisations in Scotland will look very carefully at the advantages and disadvantages of opting into the charities' supervisory regime before committing themselves to registration. Bodies which, under the 1990 Act, would have applied for Scottish charity status as part and parcel of obtaining United Kingdom-level tax relief may now hesitate to register with OSCR if they judge that the burdens of the regime outweigh its comparatively modest advantages.[62] It is no longer a foregone conclusion, in other words, that registration as a charity is the obvious way forward for a body seeking to confer public benefit in Scotland.

De-registration and asset lock

There is a real possibility, therefore, that a proportion of the voluntary organisations active in Scotland which under the old arrangements would have opted unhesitatingly for charitable status may choose to operate outside the ambit of the new charities regime. There is little sign so far of a change of practice along these lines,[63] but the transitional arrangements for bodies previously recognised as Scottish charities (under the 1990 Act) are such that any change is likely to impact on the overall composition of the voluntary and charities sectors only in the long term. All bodies in Scotland recognised as charitable by HMRC on 1 April 2006 were automatically entered in the new register, and there is a strong disincentive to their choosing to deregister (as they may)[64] in the "asset lock" which applies on deregistration.[65] The effect of the lock is that the assets held by a body at the moment of deregistration are held in a constructive trust for its charitable purposes as they stood immediately before deregistration and that in respect of those assets the deregistered body continues to be subject to a modified version of the principal compliance regime.[66] In short, a body removed from the register remains subject to compliance in respect of its pre-removal assets but retains none of the advantages of registration.

59 See n. 7 above. The relevant sense is now adjusted by the 2006 Act, ss. 1–3, 5(1) and (2), provisions applicable in Scotland for United Kingdom tax purposes by virtue of s. 80 of that Act. The adjustment took effect on 1 April 2008. OSCR and HMRC have, however, entered into administrative arrangements to expedite applications for UK tax relief by bodies registered with OSCR: see Joint Statement dated 19 February 2008 at www.hmrc.gov.uk/charities/oscr-hmrc-statement082202.pdf (accessed 16 July 2008).

60 Local Government (Financial Provisions, etc.) (Scotland) Act 1962, s. 4(5). See n. 30 above.

61 A public trust in Scotland is simply a trust in which "the beneficial interest is intended for the benefit of a section of the public": Ross et al., "Trusts, trustees and judicial factors" (n. 5 above), para. 6.

62 See Ford, "A stakeholder assessment" (n. 23 above), pp. 207–16.

63 OSCR dealt with over 1600 applications in the first 18 months of the new regime: OSCR, *Meeting the Charity Test: Draft guidance for consultation* (Dundee: OSCR, 2008) (hereinafter "*Draft Guidance*"), p. iii; but for the beginnings of a change in attitude among professional advisers see Tax Committee of the Law Society of Scotland, "Professional Briefing: Charities" (2008) 53(1) *JLSS* 43.

64 2005 Act, s. 18.

65 2005 Act, s. 19.

66 2005 Act, s. 19(1)–(3).

The asset lock will affect not only bodies which choose to de-register but also bodies removed from the register by OSCR because they no longer meet the charity test.[67] Those most likely to be affected are bodies established in Scotland which have been registered under the transitional provisions by virtue of having "charitable purposes" in the sense required by the 1990 Act,[68] but found subsequently by OSCR, under its recently launched "rolling review" of the register, not to meet the charity test.[69] But the asset lock will also affect English and Welsh charities which – since the asset-locking provisions have no real equivalent in the English legislation[70] – may unguardedly opt for registration unaware that opting out again may leave them with continuing compliance obligations in Scotland.[71]

Assertion of jurisdiction

The asset lock is one expression of the wider policy of the 2005 Act of asserting control over bodies which use the charity brand in Scotland. A body which registers with OSCR submits itself voluntarily to a full jurisdiction of supervision administered by OSCR with the support of the Court of Session.[72] It should be emphasised that there is no requirement that the body should have a territorial connection with Scotland. In England and Wales, on the other hand, the definition of a "charity" for regulatory purposes implies a sufficient pre-existing territorial connection to bring the relevant institution "within the control of the High Court in the exercise of the court's jurisdiction with respect to charities", the touchstone for such control being the court's ability to enforce its supervisory orders against the charity trustees.[73]

The Scottish approach opens up the possibility of a body established outside Scotland, and with no connection with the territory, submitting itself voluntarily to the jurisdiction of the OSCR. More importantly in practice, however, it also means that the 2005 Act asserts for OSCR and the Court of Session a full supervisory jurisdiction over bodies which are active in Scotland but whose main centre of operations, and whose principal assets, may be situated outside Scotland.[74] There are obvious potential difficulties of enforcement,[75] which are the main rationale for the High Court's (and the Charity Commission's) eschewing a parallel charities jurisdiction over institutions constituted with charitable purposes outside England and Wales but active within the territory.[76] The enforcement problems have been solved for Scotland, at least in relation to bodies which have their main centre of operations in England and Wales, by the United Kingdom Parliament's having conferred on the Charity Commission an auxiliary jurisdiction of intervention over bodies entered in the Scottish register which are "managed or controlled wholly or mainly in or from England and

67 2005 Act, s. 30.

68 I.e. the English sense before its adjustment by the 2006 Act: see further below.

69 2005 Act, s. 3(6). See OSCR, *Rolling Review: Pilot study report* (Dundee: OSCR, 2007) (hereinafter "*Rolling Review*"), para. 1.10.

70 Cf. 1993 Act, s. 3(4)–(6); see P Luxton, *The Law of Charities* (Oxford: OUP, 2001) (hereinafter "Luxton"), paras 10.75–83.

71 Arguably the lock affects only assets of an English or Welsh charity either situated in Scotland, or representing sums raised from the public in Scotland: see Scotland Act, s. 29(2)(a) and 101(2). There is, however, no express limitation to this effect in the 2005 Act.

72 2005 Act, ss. 28–37.

73 1993 Act, s. 96(1), as explained in *Gaudiya Mission* v *Brahmachary* [1998] Ch 341. See also the 2006 Act, s. 1; also Luxton, ch. 11, especially paras 11.01–04.

74 S. 14 excepts from registration only bodies with no significant territorial connection with Scotland: see further below.

75 Even with the benefit of the Civil Jurisdiction and Judgments Act 1982, s. 18.

76 *Gaudiya Mission* v *Brahmachary* [1998] Ch 341, *per* Mummery LJ at 350–2.

Wales".[77] Issues of enforcement aside, however, the Scottish assertion of jurisdiction involves, for non-Scottish bodies already subject to a regime of compliance in their territory of establishment, submission to a second compliance regime, the burdens of which should be kept in mind by such bodies contemplating registration with OSCR.

The "policing provisions" under which OSCR and the Court of Session may take preventative action against a body which represents itself as a charity without being entitled to do so (whether by registering or under the s. 14 exception) serve to underline the difference between the Scottish and English approaches. OSCR's powers of intervention include power to direct a body which is falsely representing itself as a charity to stop doing so, power to restrict the transactions of the body, and power to "freeze" property held by a third party on the body's behalf.[78] OSCR may also apply to the Court of Session for exercise of the court's similar but more extensive powers.[79] The English system, too, seeks to police use of the charity brand – or at least of the "registered charity" brand – but more simply, by making it a criminal offence in England and Wales for a person to solicit money or property for an institution in association with a false representation that it is a "registered charity", by which is meant a charity registered with the Charity Commission.[80] Such an arrangement permits, of course, the soliciting of funds in England and Wales on behalf of a body established in Scotland and registered with OSCR, without any requirement for secondary registration with the Charity Commission, provided no misleading claim is made that the body in question is registered in England and Wales. The key difference of approach between the two systems, however, is that the Scottish policing provisions are civil in character and assert a continuing jurisdiction of control over the offending body, whereas the English provisions merely punish the individual who perpetrates the misleading solicitation.[81]

Scottish "charity test" versus English definition of "charity"

In principle, therefore, but for the s. 14 exception, any body which wishes to call itself a charity in Scotland must register with OSCR and submit itself to the Scottish system of supervision. The gateway to registration is the charity test. The divergences between the Scottish test and the English definition of charity have, perhaps, produced the most troublesome of the unintended consequences of the 2005 Act to have become apparent so far.

As explained, the test was intended to be "very similar" to and "compatible" with the revised English definition of charity now enshrined in the 2006 Act.[82] It can be said to meet the first of these objectives in that its overall structure resembles that of the English definition, but the Scottish test is not "compatible" with the English definition if by that is meant that it is sufficiently close to enable HMRC, without demur, to recognise as charitable for tax relief purposes all bodies which have passed the charity test and are registered with OSCR, or to enable OSCR, without demur, to treat as meeting the charity test all bodies which HMRC or the Charity Commission recognise as charities in terms of the English

77 1993 Act, s. 80(1) as amended by the Charities and Trustee Investment (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2006 (SI 2006 No. 242(S.2), Sch., para. 6. It appears that the Charity Commission could take action if a body established in England and Wales but registered in Scotland failed to adhere to the Scottish compliance regime.

78 2005 Act, s. 31(2) and (5)–(7).

79 2005 Act, s. 34(2) and (5)(b)–(g). There may be difficulties of enforcement here, too, which are not solved by the auxiliary jurisdiction of the Charity Commission over bodies entered in the Scottish register.

80 Charities Act 1992, s. 63

81 OSCR's and the court's policing powers include (civil) powers of direction and interdict against individuals making false representations: 2005 Act, ss. 28(1)(e), 31(5) and 34(3).

82 See n. 12 above. The term "revised" is preferred here to "reformed" because the effect of the 2006 Act is to adjust and rationalise the definition rather than reform it in any radical sense.

definition. Compatibility in this sense is ruled out by numerous differences of detail between test and definition, some of which have only emerged as significant as OSCR has sought to apply the test in practice.[83]

Resemblances

The resemblances between the two are clear enough. Under the 2005 Act, the purposes of a "charity" in Scotland must "consist only of one or more of the charitable purposes" set out in the statute in a list drawn ultimately from the recital of "uses" contained in the preamble to the (English) Charitable Uses Act 1601.[84] So also, under the 2006 Act, a charity in England and Wales must be "established for charitable purposes only",[85] charitable purposes being purposes which fall within the "descriptions of purposes" set out in a list which shares the same origins as the Scottish one.[86] Again, under the 2005 Act, a charity must provide "public benefit in Scotland or elsewhere",[87] while under the 2006 Act a charity's charitable purpose or purposes must be "for the public benefit",[88] it being clear from the existing case law on public benefit (in principle preserved by the Act) that in certain circumstances a purpose directing the conferment of benefit outside the jurisdiction may satisfy the public benefit requirement.[89] And under neither Act is it to be presumed that any "particular purpose" or "particular description of purpose" in the relevant statutory list is for the public benefit.[90]

"Charitable purposes" element

The differences between test and definition appear, firstly, however, in their "charitable purposes" elements. There are minor variations in the substance of the two lists,[91] but more importantly the 2005 Act lacks the "safety-net" provision included in the 2006 Act which keeps within the scope of "charity" purposes treated as charitable under the pre-revisal definition but not represented in the statutory list.[92] The provisions for extending the lists to meet changing social circumstances in the future are also different. Under the 2005 Act, there may be added "any other purpose that may reasonably be regarded as analogous" to the purposes in the statutory list.[93] Under the 2006 Act, analogies may be drawn, not only with the purposes in the statutory list, but also with purposes previously established as charitable but omitted from the list; and analogising is not the only technique available for extending the list – purposes that may be reasonably regarded as "within the spirit of" the listed or other previously established purposes may also be brought within the scope of

83 Some potential divergences, but by no means all, were anticipated by those who submitted evidence to the Communities Committee at Stage 1 of the passage of the Bill: Communities Committee, *First Report* (2005) (SP Paper 301, Session 2 (2005)) (hereinafter "*Stage 1 Report*"), vol. 2, pp. 13–30.

84 2005 Act, s. 7(2): see commentary on s. 7 in Cross and Ford.

85 2006 Act, s. 1(a).

86 2006 Act, s. 2(2). Both lists draw heavily on the *Strategy Unit Report*, paras 4.12–18 and box 4.2.

87 2005 Act, s. 7(1)(b).

88 2006 Act, s. 2(1).

89 Luxton, paras 5.56–66.

90 2005 Act, s. 8(1); 2006 Act, s. 3(2).

91 The most striking difference is that the 2006 Act includes in its list (at s. 3(2)(l)), but the 2005 Act omits, "the promotion of the efficiency of the armed forces of the Crown, or the efficiency of the police, fire and rescue services or ambulance services".

92 2006 Act, s. 2(4)(a).

93 2005 Act, s. 7(2)(p).

charity.[94] In principle, therefore, the range of charitable purposes under the English definition is wider, actually and potentially, than under the Scottish test.

"Public benefit" element – activities test

There are significant divergences, also, between the public benefit elements of test and definition. The Scottish test is, overtly, an "activities test",[95] and requires OSCR to assess whether the activities undertaken by a body in pursuit of its charitable purposes actually provide public benefit – no presumption being made, as mentioned, that any particular purpose is for the public benefit.[96] On the other hand, the English definition invites an assessment of whether an institution's charitable purpose, or each of its charitable purposes where more than one, is for the public benefit in terms of the existing (but ever evolving)[97] case law on public benefit – though subject to adjustment of the pre-revisal case law to the effect that, as mentioned, no particular description of purpose is to be presumed to be for the public benefit.[98] The focus of the Scottish test, in other words, is on what the body does overall, and of the English definition on the character of each of the institution's purposes according to the accumulated (but adjusted) case law on public benefit.

The distinction may not be fully perceptible in practice, because the Charity Commission, under its new obligation to "promote awareness and understanding of the operation of the public benefit requirement",[99] is set to compare the actual activities of charities with their declared purposes to ensure that they are in fact providing public benefit, as their charitable purposes require them to do.[100] None the less, the difference of approach has the potential to lead to divergent decisions on charitable status in the two jurisdictions, since the Scottish test, by its nature, makes it difficult to predict how two bodies of the same general type will each fare at the hands of OSCR,[101] whereas the Charity Commission remains bound by the specifics of previous decisions on public benefit.[102]

94 2006 Act, s. 2(2)(m) and (4)(b). The provisions reflect the pre-revisal case law: see J Warburton et al., *Tudor on Charities* 9th edn (London: Sweet & Maxwell, 2003), paras 1-005 and 1-006.

95 For discussion of the concept in relation to the pre-revisal English definition, see C Mitchell, "Reviewing the Register", in C Mitchell and S R Moody, *Foundations of Charity* (Oxford: Hart Publishing, 2000), pp. 184–6 and 200–1.

96 2005 Act, s. 7(1)(b). Where an applicant for registration is not yet active OSCR must assess whether the activities it intends to pursue will provide public benefit. See, generally, OSCR, *Draft Guidance*, ss. 6–8.

97 See 2006 Act, s. 2(8), which takes account of a recognised feature of the pre-revisal definition: *Scottish Burial Reform and Cremation Society* v *Glasgow Corporation* [1968] AC 138, *per* Lord Wilberforce at 154E–G.

98 2006 Act, ss. 2(1)(b) and 3. Under the pre-revisal definition it was (rebuttably) presumed that a purpose falling under one of the first three of the "heads" of charity identified by Lord Macnaghten in *Special Commissioners of Income Tax* v *Pemsel* [1891] AC 531 at 560 (the relief of poverty, the advancement of education and the advancement of religion) was for the public benefit: see *National Anti-Vivisection Society* v *IRC* [1948] AC 31, *per* Lord Wright at 42.

99 1993 Act, s. 1(b)(3).

100 See Charity Commission, *Charities and Public Benefit* (London: Charity Commission, 2008), ss. G and H.

101 See OSCR's insistence in its pilot for the rolling review of the register that each charity will be reviewed on its "own merit": OSCR, *Rolling Review*, para. 1.6.

102 E.g. *Re Resch's Will Trusts* [1969] 1 AC 514 sets parameters on fee-charging and public benefit which the Charity Commission must respect in its guidance.

"Public benefit" element – case law

A further distinction in the public benefit element has already given rise to differences in practice. The Scottish test replaces the established case law on public benefit[103] – preserved, as mentioned, in the revised English definition subject to removal of the pre-revisal "presumption" – with statutory criteria to which "regard must be had" in determining whether a body provides public benefit.[104] The criteria are intended to "encapsulate" the pre-revisal case law,[105] but are expressed so generally that the quirks and nuances of the accumulated case law can scarcely be represented. It is clear that OSCR may look to the public benefit case law for persuasive guidance on the meaning of the statutory formula but is not bound by it.[106]

Already it is apparent that OSCR does not intend to apply the "poverty exception" – a long-established feature of the accumulated case law[107] – for the purposes of the charity test,[108] thus excluding from registration in Scotland certain classes of bodies accepted as charitable in England and Wales and for United Kingdom tax relief purposes, such as friendly societies constituted for the relief of their members' own poverty.[109]

So, too, OSCR's treatment of "campaigning organisations" will be different from the Charity Commission's and HMRC's. In England and Wales, and for United Kingdom tax purposes, the issue of "campaigning" will continue to be governed by the line of cases which excludes from charitable status not only political parties as such but also organisations with "political" purposes in the extended sense that they are constituted to campaign directly for changes in the law, government policy or administrative decisions, whether in the United Kingdom or abroad.[110] The 2005 Act, on the other hand, provides expressly that a body which is a political party, or one of whose purposes is to advance a political party, cannot be a charity.[111] The implication is that the Scottish Parliament, by going thus far but no further, intended to exclude from registration with OSCR only bodies with "party political" purposes, leaving open the possibility that bodies campaigning, for instance, for changes in the law on the treatment of political prisoners in a foreign country might satisfy the charity test.[112]

Ministerial control

One further element of the Scottish test marks it out as significantly divergent from the English definition. The test excludes from registration a body whose "constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or control its

103 The case law consists of the accumulated decisions of the English courts of chancery on charities and of the English, Scottish and Northern Irish courts on charitable relief under United Kingdom tax legislation.

104 2005 Act, s. 8(2).

105 Remark of the Minister for Communities: *Official Report*, Plenary Session, 9 March 2005, col. 15097.

106 Remark of the Deputy Minister for Communities: *Official Report*, Communities Committee, 2 February 2005, col. 1742. The same will apply to the Scottish Charity Appeals Panel and the Court of Session on appeals from decisions of OSCR on the charity test.

107 For a full review of the cases, see the speech of Lord Cross of Chelsea in *Dingle* v *Turner* [1972] AC 601.

108 *Draft Guidance*, s. 7.6(a).

109 *Dingle* v *Turner* [1972] AC 601, *per* Lord Cross at 617F–H.

110 *McGovern* v *Attorney-General* [1982] 1 Ch 32; reaffirmed in *Southwood* v *Attorney-General* [2000] WL 877698. See Charity Commission Board Paper No. (08) OBM 03 on *Campaigning and Political Activities by Charities*, for meeting on 31 January 2008, para. 3: the concern of the Board is to settle new guidance on campaigning which clarifies both the "freedoms and boundaries of the existing legal and regulatory framework". The commission's recent emphasis has been on freedoms, but the boundaries of the case law remain.

111 2005 Act, s. 7(4)(c).

112 *Draft Guidance*, s. 5.3.

activities".[113] This is a much stricter exclusionary condition than its equivalent under the English system and tax relief case law.[114] It was directed principally at non-departmental public bodies, which the Scottish legislators considered should not have charitable status in Scotland even though entitled to charitable tax relief at United Kingdom level.[115] It was always anticipated, however, that an exception would be made in the case of the five "national collections" institutions,[116] and the Scottish Ministers were given power to disapply the exclusionary condition by order,[117] which they duly exercised in favour of the collections. The Scottish Ministers have, however, recently announced that they are to use it again in favour of Scottish further education colleges, which have been unexpectedly found to fall foul of the condition.[118]

Unintended consequences of non-compatibility

Clearly, therefore, the Scottish charity test as enacted has not proved "compatible" with the English definition of charity in the sense hoped for by the Scottish legislators that it would produce the same results in decisions on charitable status in all but the most exceptional of cases.[119] The actual and potential divergence between the two has caused unexpected practical difficulties for two further types of body.

First, a body established in Scotland whose constitution defines its "charitable purposes" by express reference to the meaning of the term in United Kingdom taxation law – that is, according to the English definition – will fail the charity test because, since some purposes under the English definition may not be charitable under the Scottish test, the body's purposes will not "consist *only* of one or more of the charitable purposes" listed in the 2005 Act.[120] This element of the test – equivalent to the English requirement that a charity should be established for charitable purposes only[121] – is reinforced by a further provision that a body does not meet the charity test if its constitution allows it to distribute or otherwise apply its property for a non-charitable purpose at any time, even in the event of being wound up.[122] It has become apparent that the constitutions of many bodies currently registered with OSCR under the transitional provisions contain clauses which offend these provisions, since it was common under the 1990 Act arrangements to define charitable purposes by reference to United Kingdom tax legislation.[123] These bodies will be obliged to alter their constitutions – by narrowing the scope of the offending clauses to cover only purposes which would be charitable under the 2005 Act – if they are to pass the charity test when their turn for assessment comes up under the rolling review.[124]

113 2005 Act, s. 7(4)(b).

114 *Construction Industry Training Board* v *Attorney-General* [1973] Ch 173.

115 *Stage 1 Report*, vol. 1, paras 110–25.

116 E.g. the National Galleries of Scotland.

117 2005 Act, s. 7(5).

118 Announcement by the First Minister on 21 May 2008. See also OSCR, *Rolling Review*, para. 5.5.3.

119 See *Joint Position Statement* (2005) issued by HMRC and OSCR.

120 2005 Act, s. 7(1) (emphasis added).

121 2006 Act, s. 1(1)(a).

122 2005 Act, s. 7(4)(a). This provision, too, was directed at non-departmental public bodies, and its impact on other bodies seems to have been unexpected. The Scottish Ministers have power to disapply the provision by order: 2005 Act, s. 7(5).

123 The practice assured both tax relief and Scottish charity status.

124 See, generally, OSCR, *Briefing Note – Use of the terms "charitable" and "charitable purposes" in constitutions of charities in the Scottish Charity Register* (Dundee: OSCR, 2008).

Secondly, for similar reasons, the divergence excludes from registration in Scotland charities established in England and Wales whose charity trustees have discretionary powers – on a winding up or otherwise – to apply funds for "charitable purposes" generally. OSCR will read such powers appearing in the governing instrument of an English or Welsh charity as referring to charitable purposes in the meaning of the English definition, and as incompatible with the charity test, again because the range of English charitable purposes is in principle wider than the range permitted by the 2005 Act. Here, too, the solution lies – for an English or Welsh charity eager to register with OSCR – in narrowing the scope of the offending powers to cover only purposes which would be charitable under the 2005 Act.[125]

For English and Welsh charities in this position, therefore, the charity test represents a formidable hurdle to registration in Scotland. English and Welsh charities constituted with no such discretionary powers must also, of course, conform their purposes to the restrictive requirements of the Scottish test. A further unintended consequence of the divergence between Scottish test and English definition may be to act as an additional disincentive – additional to the asset lock and submission generally to the supervision of OSCR and the Court of Session – for English and Welsh charities to apply for recognition in Scotland.

"Foreign" or "non-Scottish" charities' provisions

As we have seen, it is a key principle of the 2005 Act that any body wishing to represent itself as a "charity" in Scotland must register with OSCR and submit to the Scottish regime of compliance. As also mentioned, however, there is a limited exception, under s. 14 of the Act, for "foreign" or "non-Scottish" charities.[126] A body is a non-Scottish charity for the purposes of the section if it is:[127]

(i) established under the law of a country or territory other than Scotland,

(ii) entitled to refer to itself as a "charity" (by any means or in any language) in that country or territory, and

(iii) managed or controlled wholly or mainly outwith Scotland.

Before looking in greater detail at the exception, it may be helpful to consider the policy background to the Act's arrangements for non-Scottish charities in particular. If the primary intention of the Act is to protect the charity brand, what special considerations need to be taken into account in realising that aim in relation to charities constituted and based outside Scotland?

Policy background

If it is a fundamental concern of the Act to protect benefactors in Scotland "against the corrupt use and abuse of the word 'charity'",[128] its aspiration must be that the public in Scotland should be able to contribute to non-Scottish charities, no less than to domestic ones, in the knowledge that the recipient bodies will be subject to a rigorous system of supervision. In the case of non-Scottish charities, however, there is the additional consideration that funds may be solicited in Scotland under the banner of charity with insufficient notice to benefactors that the funds raised may be applied outside Scotland.

125 See, generally, Charity Commission, *Guidance for English and Welsh Charities that Have Been Asked to Amend their Governing Documents before They Can Register in Scotland* (London: Charity Commission, 2007).

126 "Foreign" is used in the official Explanatory Notes to s. 14, but "non-Scottish" is preferred here as better suited to describe a class of bodies which in practice will mostly be established under the law of England and Wales: Explanatory Notes, para. 24.

127 2005 Act, s. 14(a).

128 See n. 22 above.

There is the further consideration that, where a non-Scottish "charity" is defined as such by reference to criteria different from those applied in Scotland under the charity test, Scottish benefactors may unwittingly contribute to causes which would not be treated as charitable in their own country.

The germ of the 2005 Act's response to these considerations lies in the McFadden Report.[129] The report focused on the treatment of "national charities", that is, cross-border charities operating both in Scotland and in England and Wales,[130] but concluded that "similar arrangements should apply to charities registered in other countries".[131] Its "guiding principle" was "that any organisation that wants to get any benefits of being a Scottish Charity – including collecting money from the Scottish public by way of public charitable collections – should be registered with [the Scottish charity regulator]".[132] What was envisaged, however, was dual registration, not dual regulation. The report proposed mutual recognition arrangements under which a body registered and regulated in England and Wales but active in Scotland would be registered in the Scottish register on an information-only basis, and vice versa. Members of the public in the "host" jurisdiction would be able to obtain basic details in their own country's register of any "guest" charity active in the jurisdiction and would be referred to the register of the country of establishment for further details.[133]

In the normal case, therefore, dual regulation would be avoided, on the basis that the compliance regime of the jurisdiction of establishment would provide a sufficient guarantee to the public of the host jurisdiction of the probity of the guest charity. None the less, it was suggested that the Scottish regulator should have discretion to require "full registration" (and by implication full compliance with the Scottish regime) for an English or Welsh charity active in Scotland,[134] presumably to cover the special case of charities not fully regulated by the Charity Commission as exempt or excepted from registration.[135] The "overriding consideration" for the McFadden Committee was that the public in Scotland should have, from one compliance regime or the other, "an assurance that charities in Scotland are being subject[ed] to appropriate scrutiny, coupled with public access to information".[136]

The report's key points of information to the public and appropriate scrutiny were taken up in the Scottish Bill as introduced, and ultimately as enacted, but the McFadden mutual recognition proposals were all but dropped in favour of a hardened policy requirement that any organisation wishing to call itself a charity in Scotland and having "significant operations" in the jurisdiction should be registered with and regulated by OSCR.[137] While it was accepted during the passage of the Bill that for charities registered with the Charity Commission this would involve some dual regulation it was anticipated that the two regulators would co-operate to minimise its impact.[138] The mutual recognition concept survived in vestigial form in the exception in favour of English and Welsh and other non-Scottish charities with no "significant operations" in Scotland permitting them to represent

129 McFadden Report, paras 3.22–8.

130 Ibid., para. 3.22.

131 Ibid., para. 3.28.

132 Ibid.

133 Ibid., paras 3.24–7.

134 Ibid., para. 3.23.

135 The relevant provision is now 1993 Act, s. 3A.

136 McFadden Report, para. 3.24.

137 Policy Memorandum, paras 27, 57 and 58.

138 Ibid., para. 57. See *Stage 1 Report*, vol. 1, paras 21, 77 and 78.

themselves as charities there, without registration with OSCR and concomitant regulation, if entitled to call themselves charities in their home jurisdiction.[139]

This is the policy to which the Act's provisions on registration and use of the charity brand, including the s. 14 exception, seek to give effect. OSCR has explained the provisions in its subsequent guidance to English and Welsh charities as:

> . . . intended to provide a level playing field for all charities operating in Scotland, ensuring fairness and consistency [and] . . . allowing the public to make informed decisions about donations to charity and providing assurance that charities are acting appropriately."[140]

The intention is, the guidance asserts, "to capture all charitable operations in Scotland within the regulatory regime", while yet recognising an appropriate distinction "between a significant operation in Scotland and an organisation which has only an occasional connection".[141]

Section 13

While the overall policy may be clear enough, the detail of the provisions themselves is by no means straightforward. The express exception for non-Scottish charities is contained, as mentioned, in s. 14 of the 2005 Act, but that section must be read together with s. 13, which it qualifies. Section 13 must itself be read in the light of the "policing provisions" restraining unauthorised use of the charity brand in Scotland.[142]

It is s. 13 which articulates the key principle of the Act that only a body registered with OSCR may call itself a charity in Scotland. Subsection (1) provides that:

> A body entered in the Register may refer to itself as a "charity", a "charitable body" a "registered charity" or a "charity registered in Scotland".

Subsection (3) goes on to provide that:

> A body which refers to itself in any of the ways described in subsection (1) is to be treated as representing itself as a body entered in the Register.

The exclusive right of bodies entered in the Scottish register to use the designations identified in subsection (1) is underpinned by the policing powers already mentioned: OSCR may investigate, and then initiate preventative action against "a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear)".[143] Subsections (2) and (4) of s. 13 contain subsidiary provisions restricting the use of the labels "Scottish charity" and "registered Scottish charity" to bodies either established under the law of Scotland, or managed or controlled wholly or mainly in or from Scotland, and these in turn are underpinned by corresponding policing provisions.[144] The main question here, however, is whether, or in what circumstances, a non-Scottish charity – in particular one established in England and Wales – may properly make reference in Scotland to the fact that it is a charity in its home jurisdiction.

Read on its own, and if full weight is given to its use of quotation marks, s. 13 seems to leave open the possibility that a body not registered with OSCR may yet refer to its charitable status in its home jurisdiction by words or phrases other than those expressly

139 Policy Memorandum, para. 58 and the Scottish Bill, s. 14.

140 *Guidance on Registration*, s. 2.

141 Ibid., s. 2.

142 2005 Act, ss. 28(1)(c), 31(2)(a), and 34(2).

143 2005 Act, s. 28(1)(c).

144 2005 Act, ss. 34(2)(b) and 34(4).

proscribed. A body registered as a charity in England and Wales might, for instance, refer to itself as a body "registered with the Charity Commission".[145] On a literal reading of the section, such a charity would not be making use of any of the protected designations and ought to be outside the scope of the deeming provision. There would be nothing to prevent it, apparently, from operating freely in Scotland – from its own territorial foothold in the country if it chose – under the banner of a non-proscribed designation announcing, indirectly at least, its charitable status in England and Wales.[146]

Section 14

If that were a correct reading of s. 13, however, the s. 14 exception would be robbed of much of its force. Section 14 seeks to implement the policy that non-Scottish charities with no "significant operations" in Scotland are excepted from registration with OSCR, yet may still call themselves charities.[147] It provides that a non-Scottish charity is entitled to refer to itself as a charity in Scotland without registering with OSCR, *provided* (a) that it does not *either* occupy any land or premises in Scotland *or* carry out activities in any office, shop or similar premises in Scotland, and (b) that when it refers to itself as a charity in Scotland it refers also to being established under the law of a country or territory other than Scotland.[148]

The point of the final condition – that an excepted body must make clear its non-Scottish origin – is, of course, that members of the Scottish public are put on notice that they are dealing with a non-Scottish charity and may make or withhold donations after enquiry as they think fit. It will be seen, however, that the test of whether a body's operations are "significant" is territorial: does the body occupy any land or premises in Scotland, or does it otherwise carry on any activities in an office, shop or similar premises in Scotland? To benefit from the exception, and to be entitled to call itself a charity without registering with OSCR, a body must dispense with all but a minimal territorial foothold in Scotland. But if a non-Scottish charity can already, under s. 13, refer to itself circuitously as a charity by a designation other than one proscribed expressly by the section, and without restriction on its use of premises in Scotland, what is the point of the s. 14 exception?

Unsurprisingly, OSCR itself interprets the combined effect of ss. 13 and 14 robustly, to the effect of requiring, without nuance, that "all charities with significant operations in Scotland" must register.[149] This is a robust reading in that it gives short shrift to circuitous references to charitable status elsewhere, treating them as a trigger to the requirement to register in Scotland no less than direct use of the charity brand,[150] but there is also a concessionary element. Section 14 itself does not contain the word "significant", but on the face of it requires that a non-Scottish charity with *any* activities in the relevant types of premises must register with OSCR if it is to use the charity label in Scotland.[151] The concession is clearly consistent with the declared policy behind the provision, and no doubt is a response to the 2005 Act's general exhortation to OSCR to "have regard to the principles under which regulatory activities should be proportionate . . . and targeted only

145 This is a phrase which the Charity Commission regards as satisfying the requirement under the 1993 Act, s. 5(2) that a registered charity must make its status as such known on relevant documentation: see Luxton, para. 2.28.

146 The Explanatory Notes, para. 22, seem to allow for such a reading.

147 Policy Memorandum, para. 27.

148 2005 Act, s. 14(b) (emphasis added).

149 *Guidance on Registration*, s. 4.1.

150 Ibid., s. 4.2.a.

151 2005 Act, s. 14(b)(ii).

at cases in which action is needed".[152] The effect is to broaden the scope of the exception, but it may be prudent for bodies intending to make use of s. 14 to bear in mind that the extension is, strictly speaking, concessionary.[153]

A final point to note is that s. 14 makes no distinction between activities directed towards fundraising and activities directed towards conferment of benefit. A non-Scottish charity with significant activities in Scotland is, accordingly, required to register with OSCR, even if it raises its funds entirely outside Scotland and engages only in service provision within the territory.

Assessment of provisions

Are these provisions as to non-Scottish charities satisfactory? Possible criticisms of drafting aside, how do they fare against the McFadden criteria of information to the public and adequate scrutiny? Of non-Scottish charities which choose to register with OSCR – thereby, of course, becoming full-blown charities under the Scottish system as well as charities in their home jurisdiction – it can be said that the public in Scotland will have exactly the same level of information about them through the Scottish register, and that they will be subject to exactly the same degree of scrutiny by OSCR, as bodies established in Scotland which choose to register.

Of non-Scottish charities which take advantage of the s. 14 exception, it can be said that the public in Scotland will be positively alerted to the non-Scottish origin of any such body in the references it makes to itself as a charity, but that otherwise the level of information available will depend on the accessibility and quality of the registration system (if any) in the home jurisdiction of the body concerned. High quality information, including information about an individual institution's purposes, will, for instance, be readily available through the Charity Commission's electronic register about charities registered in England and Wales, but equivalent information about French bodies entitled to call themselves "*charitable*" or "*caritatif*" may be harder to come by.[154] Likewise, the quality of scrutiny applied to a non-Scottish charity operating in Scotland under the s. 14 exception will depend on the supervisory arrangements in the body's home jurisdiction: a charity registered in England and Wales will be subject to a level of scrutiny very similar to that applied by OSCR, but in France no equivalent supervisory arrangements attach expressly to bodies entitled to call themselves *charitable* or *caritatif*.[155] It can be argued, however, that since the activities in Scotland of bodies covered by the s. 14 exception will always (on OSCR's interpretation) be less than "significant", any deficiencies in information or scrutiny will be of marginal importance, though this may be to underestimate the capacity of an organisation based outside Scotland for mounting a fundraising campaign, electronically or by post, from its home jurisdiction.

A more serious criticism is that the default obligation to register – incumbent on all non-Scottish charities active in Scotland other than those able to tailor their activities to the restrictive requirements of the s. 14 exception – may prove in the long run to be counterproductive. Registration in Scotland assures high levels of public information and scrutiny under the Scottish system itself, but in the case, in particular, of English and Welsh

152 2005 Act, s. 1(9)(a).

153 A further example of inventive statutory interpretation by OSCR is its reading of the phrase "an office, shop or similar premises" to include church halls: *Guidance on Registration*, s. 4.2.f.

154 See Explanatory Notes, para. 24.

155 The equivalent regime is the *utilité publique* regime, but not all *charitable* or *caritatif* organisations are recognised as *d'utilité publique*: see, generally, D Lepeltier and Y Streiff, *Associations, Fondations, Congrégations* (Paris: GLN Joly, 1994).

charities registered with the Charity Commission, duplicates public information and scrutiny already available through the English system. For the individual institutions concerned, the burdens of dual registration and dual regulation must act as a strong discouragement to activity in Scotland, whether by way of fundraising or – equally importantly from the point of view of the Scottish public – conferment of benefit. To assess whether there is a real risk of an "activity drain" from Scotland by non-Scottish charities, it may be helpful to look more closely at the options available to such bodies under the 2005 Act. Since the vast majority of non-Scottish charities likely to undertake activities in Scotland will be established in England and Wales, particular attention must be paid to the implications of the Scottish provisions for these cross-border charities.[156]

To register or not to register?

Register

In principle, a non-Scottish charity with the relevant territorial connection with Scotland – through occupation of land or premises or activities in an office, shop or similar premises – must register if it wishes to represent itself as a charity. What are the advantages of registration? As in the case of a body established in Scotland, they are access to the charity brand and, where relevant, charitable rates relief. It is questionable whether the other advantages available to bodies established in Scotland – access to reorganisation facilities and to the SCIO – are also available to non-Scottish charities,[157] but in any event English and Welsh charities have equivalent advantages to those under their own system. The disadvantages of registration, on the other hand, are the constraints of the charity test and submission to the full supervisory jurisdiction for charities under the 2005 Act.

For English and Welsh charities, as we have seen, submission to the 2005 Act jurisdiction means dual regulation, by OSCR as well as the Charity Commission. Two regulators must be satisfied, each with slightly different requirements. Perhaps the most potentially troublesome of the areas of divergence between the two systems noted earlier are the treatment of charity trustee duties, the accounting and reporting requirements, and the operation of the Scottish asset lock on de-registration.[158] OSCR and the Charity Commission have undertaken "to minimise the burden of dual regulation on cross border charities",[159] but differences in the primary provisions of the governing legislation must inevitably restrict the regulators' scope for harmonisation. For a charity registered in England and Wales, therefore, registration with OSCR will add to if not double the effort and expense of compliance.

Alternative 1 – operate within s. 14 exception

There are alternatives to registration. One would be for a non-Scottish charity to operate in Scotland without the benefit of a "significant" territorial foothold, under the s. 14 exception. An English charity, for instance, might carry out extensive fundraising operations in Scotland from across the border, by mail or email, or even by "public benevolent collection",[160]

156 The same considerations will apply, however, *mutatis mutandis*, to bodies established in Northern Ireland or the Republic of Ireland once the systems of supervision currently proposed for those jurisdictions are in place.

157 Arguably, provision for the reorganisation of bodies established outside Scotland is beyond the competence of the Scottish Parliament, so that the relevant provisions (2005 Act, ss. 39–42) should be "read down" accordingly: Scotland Act 1998, s. 29(2)(a) and 101(2). Availability of the SCIO is limited to bodies with "a principal office in Scotland": 2005 Act, s. 49(2).

158 See pp. 204–9 above under "Scottish system of charities supervision outlined".

159 Memorandum of Understanding between OSCR and the Charity Commission (2007), para. 1.1.

160 I.e. in public places or visits to two or more private houses: 2005 Act, ss. 84–92.

without making significant use of premises in Scotland. Such a charity might also bestow benefits from across the border, but a service-providing as opposed to grant-making charity might find itself severely restricted in what it could do by way of conferment of benefit without a significant territorial foothold. In any representation as to its charitable status the charity would have to refer to its non-Scottish origin, but it would be spared dual regulation.

Alternative 2 – hive off Scottish operations

A second alternative for a non-Scottish charity might be to hive off the charity's Scottish operations to a separate body constituted in Scotland and registered with OSCR. Caution would be required, however. An English charity – again, the obvious example – might well lack power to transfer assets to a Scottish charity without an application to the Charity Commission for adjustment of its governing instrument; and its charity trustees would have to divest themselves of de facto control of the new Scottish entity in order to avoid being treated by OSCR as its true charity trustees.[161] But in any event the creation of a second entity to be administered in Scotland would be likely to involve no less compliance administration overall than dual regulation of a single entity based in England.

Alternative 3 – operate as a non-registered "benevolent body"

A third alternative, though fraught with complexity, might be to operate in Scotland with the benefit of a full territorial presence, but without the advantages of the charity brand and automatic charitable rates relief, as a non-registered (non-"charity") "benevolent body".[162] The principal difficulty here would be confronting OSCR's view that a body with significant activities in Scotland which calls itself a charity outside Scotland must register in the Scottish register even if it has no intention of using the charity label in Scotland.[163] An English or Welsh charity would also wish to satisfy itself that failure to make known in Scotland its charitable status under English law would not be a breach of the publication requirements of the English legislation.[164]

Alternative 4 – non-activity in Scotland

Undoubtedly, the most straightforward alternative to registration in Scotland for a non-Scottish charity would be non-registration and non-activity in the jurisdiction. For English and Welsh charities in particular, this would be a radical but complete solution to the problem of dual regulation. The asset-locking arrangements mean that it would be wiser for a non-Scottish charity hesitant about operating in Scotland not to register in the first instance than to opt subsequently to de-register.

Conclusion

This review of the options discloses, it is submitted, a real possibility that the 2005 Act's provisions for non-Scottish charities will in the long term discourage from engagement with Scotland organisations which under the pre-2005 Act arrangements would have seen subsidiary activity in Scotland as a natural extension of their principal activities in their home jurisdiction. The advantages of registration in Scotland are heavily offset by the disadvantages, and none of the available alternatives is fully satisfactory. The problem, for

161 2005 Act, ss. 105 and 106. See OSCR, *Guidance for Charity Trustees* (Dundee: OSCR, 2006), para. 2.2.

162 2005 Act, s. 79(1). Such a body might apply for discretionary rates relief.

163 OSCR, *Guidance on Registration*, s. 4.2.a. It is questionable whether the Scottish Parliament is competent to restrict what English and Welsh charities may call themselves in England and Wales: see n. 157 above.

164 1993 Act, s. 5. These apply to charities with a gross annual income of more than £10,000. Arguably the requirement has no application outside England and Wales: 1993 Act, s. 100.

English and Welsh charities in particular, is that the dual regulation requirement does not so much "produce a level playing field" for all charities operating in Scotland as tilt the field to the prejudice of charities already subject to the burdens of compliance in an equivalent regime. Time will tell, but there must be a temptation for hard-pressed service-providing charities established south of the border to avoid the costs of double compliance by leaving the conferment of benefit in Scotland to the Scots. Ironically, such bodies might quite properly remain active in fundraising in Scotland, under the s. 14 exception, to the advantage of beneficiaries outside Scotland.

Such an outcome from the "foreign charities" provisions was not what the Scottish legislators intended.[165] As enacted, however, the provisions are manifestly inconsistent with the 2005 Act's overall policy objective of establishing "a satisfactory regulatory regime that will encourage public confidence in charities *whilst not over-burdening the charity sector with bureaucracy*".[166] For some non-Scottish charities already subject to regulation in their own jurisdiction, secondary regulation in Scotland may prove a bureaucratic burden too far. For those which do accept the burden of dual regulation, time, energy and resources will be expended on double compliance which might have been better spared for direct application to public benefit.[167]

Postscript – alternative to dual regulation

The worst of it is that the elaborate dual regulation arrangements are (it is suggested) unnecessary. Public confidence in charities might have been maintained but dual regulation avoided by adapting the English device for protecting the "registered charity" brand. As mentioned, it is a criminal offence in England and Wales to solicit contributions to an institution in association with a false claim that it is a "registered charity" – that is, a charity registered with the Charity Commission.[168] The underlying policy is that members of the public in England and Wales are put on notice: they may give to an institution held out as a registered charity in the knowledge that it is supervised on an ongoing basis by the Charity Commission, and they may give to other institutions – such as non-charitable institutions constituted for benevolent or philanthropic purposes, or for that matter bodies established in Scotland and registered with OSCR – without that protection if they wish.

Corresponding provision might have been made in the 2005 Act to put members of the Scottish public on notice that a body for which funds were being solicited in Scotland was not registered with OSCR. But the provision might also have been refined to allow, expressly, solicitation of funds in Scotland on behalf of a charity registered in England and Wales – or in any jurisdiction judged to have an adequate system of charities registration and supervision, including, in due course, those in Northern Ireland and the Republic of Ireland[169] – accompanied by a statement as to the charity's jurisdiction of origin and its status there as a registered charity. It would then be for individual members of the Scottish public to give or withhold their contributions as they thought fit in the light of the information available to them.

165 See *Stage 1 Report*, vol. 1, paras 21, 77 and 78.

166 Policy Memorandum, para. 24 (emphasis added).

167 The signs so far are ambivalent. The deadline for applications for registration from cross-border charities active in Scotland was the end of February 2007. From figures supplied by the courtesy of OSCR, it appears, as at 21 February 2008, that of just over 700 cross-border charities contacted by OSCR in advance of the deadline (as likely to be affected by the provisions) 525 had submitted applications. Of these 241 had been processed to registration, and a further 123 charities had undertaken to make changes to their constitutions to accommodate the charity test. The remaining 161 were still in correspondence with OSCR.

168 Charities Act 1992, s. 63.

169 Power to add appropriate jurisdictions by order might have been granted to the Scottish Ministers.

Such arrangements might yet be introduced in Scotland by amendment of the 2005 Act, perhaps in legislation addressing some of the other unintended consequences of the statute noted above. Such arrangements would represent a return to the spirit of the McFadden mutual recognition proposals. In an electronic age, members of the public in Scotland would have as much access to information about non-Scottish charities in one of the corresponding jurisdictions – including information about the charities' purposes, different though they might be from those authorised by the Scottish charity test – as about bodies entered in OSCR's own internet-accessible register.[170] Appropriate scrutiny would be provided through the home charities' supervision system in the relevant corresponding jurisdiction.

This, it is submitted, would be a simpler and no less effective means than dual regulation of "allowing the public [in Scotland] to make informed decisions about donations to charity and providing assurance that charities are acting appropriately".[171] As a final postscript, a mutual recognition approach along these lines might be respectfully recommended to the legislators in Northern Ireland and the Republic of Ireland, who, perhaps unaware of the potentially unfortunate consequences, are on the verge of enacting, albeit with variations peculiar to each jurisdiction, dual regulation provisions reminiscent of the current arrangements for non-Scottish charities under the 2005 Act.[172]

170 The McFadden suggestion that information-only entries for "guest" charities should appear on the Scottish register (perhaps with an electronic link to the register of the charity's home jurisdiction) could be given effect on a voluntary basis, but compulsion would involve an assertion of jurisdiction over the charities in question with the attendant difficulties. "Small charities" and other charities excepted from registration in England and Wales could bring themselves within the mutual recognition scheme by registering voluntarily with the Charity Commission: 1993 Act, s. 3A.

171 *Guidance on Registration*, s. 2.

172 Charities Bill (NIA Bill 9/07), cl. 167; Charities Bill (No. 31 of 2007), ss. 38 and 42.

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Neighbouring perspectives: legal and practical implications of charity regulatory reform in Ireland and Northern Ireland

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I Introduction

Historically, Ireland and Northern Ireland share many similarities in their approach to charity regulation. Existing legislation on both sides of the border dates from the same period (Ireland: the Charities Acts 1961–73; Northern Ireland: Charities Act (Northern Ireland) 1964, Charities Order (Northern Ireland) 1987). The common law's heads of charity are still relevant to the determination of an organisation's charitable status on both sides of the border.[1] Charity regulation is tax-driven in each jurisdiction with the Revenue Commission in Ireland and HM Revenue and Customs in Northern Ireland playing a major role in the enforcement of charity law, albeit from a purely tax perspective. Remaining oversight responsibilities for charitable organisations are spread across a number of authorities. The Police Service of Northern Ireland and An Garda Síochána adjudicate on charitable fundraising permit applications. The Attorney General acts as *parens patriae* for charities with the High Court on hand in each jurisdiction to give trustees directions and hear, inter alia, cy-près and sign manual applications. At a more functional level, the Irish Commissioners for Charitable Donations and Bequests (CCDB) adjudicate on cy-près schemes and can approve extensions to charitable trustees' powers whereas similar powers are vested in the Department of Social Development in Northern Ireland.[2]

There are other similarities between the two jurisdictions that are more negatively associated.[3] Neither jurisdiction currently has an independent statutory regulator of charities like the Charity Commission for England and Wales or its Scottish equivalent, the

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

2 See Department for Social Development, *Charities in Northern Ireland: Guide for trustees* 18th edn (2004), p. 21; see also DCRGA, The Commissioners for Charitable Donations and Bequests, available at www.pobail.ie/en/CharitiesRegulation/CommissionersofCharitableDonationsandBequestsforIreland (last accessed 29 January 2008).

3 See K O'Halloran and O Breen, "Charity law in Ireland and Northern Ireland – registration and regulation" (2000) *ILT* 6.

Office for Scottish Charity Regulation (OSCR). There is no up-to-date register of charities.[4] And although there has been much talk of the need for modernisation of charity law, particularly in the past five years,[5] neither jurisdiction had until recently embarked upon a statutory overhaul of its charity regulation in the past 20 years (in Northern Ireland's case) or 30 years (in Ireland's case).

Change is at hand, however. The Irish Charities Bill 2007, published in April 2007, lapsed with the calling of the May general election but was restored to the incoming government's legislative agenda. The Bill passed committee stage in January 2008 and report stage is due to be scheduled shortly.[6] In Northern Ireland's case, the draft Charities (NI) Order 2007 was laid before Westminster in January 2007 but the restoration of devolution in May of that year derailed the regulation's planned passage. Withdrawn as an Order in Council,[7] a replacement Charities Bill for Northern Ireland was introduced to the Northern Ireland Assembly in December 2007.[8] This Bill completed committee stage in May 2008 and is expected to receive Royal Assent in July.[9] Thus, not alone do the two jurisdictions share many similarities in past regulatory endeavours but they are destined to embark simultaneously upon charity law modernisation. Such legislative activity, however, does not exist in a vacuum and the proposed Acts will follow in the wake of similar legislation in neighbouring jurisdictions: Scotland led the way with the Charities and Trustee Investment (Scotland) Act 2005 and a year and a half later, England and Wales followed suit with the enactment of the Charities Act 2006.

We thus stand at a formative moment for charitable change on the island of Ireland. Policy ideas will soon be cast into legislative form thereby radically altering the face of common law charity, as we know it. This paper outlines some of the major changes contemplated by both jurisdictions under the separate headings of substantive law changes (that is, changes relating to the definition of charitable purpose and the test for public

4 The Irish Revenue Commissioners do maintain a list of bodies that enjoy charitable tax exempt status. The information on this list, however, is limited in nature and despite the best efforts of Revenue is not always current.

5 In Northern Ireland, the Minister for Social Development gave a commitment to review the existing charities legislation in 2000. This commitment was followed up on in 2004 with the establishment of an advisory panel to consider legislative reform options and a public consultation on the ensuing proposals occurred in 2005. The Department of Social Development carried out a further public consultation on the Draft Charities Order in 2006, amending it in light of concerns expressed to come up with the 2007 draft. Following the Irish Law Society's publication of a major report, *Charity Law: The case for reform*, in 2002, the Agreed Programme for Government committed that "a comprehensive reform of the law relating to charities will be enacted to ensure accountability and to protect against abuse of charitable status and fraud". In 2003, this commitment took the form of a public consultation paper, *Establishing a Modern Statutory Framework for Charities*, Consultation Paper (Dublin: DCRGA, December 2003), setting out the principles governing reform. A DCRGA commissioned expert's report on the responses to the consultation followed in September 2004 (O Breen, *Establishing a Modern Framework for Charities: Report on the public consultation for the Department of Community Rural and Gaeltacht Affairs* (Dublin: DCRGA, September 2004) (hereafter "Breen Report"). The Government approved and published the General Scheme of Bill in March 2006 and this scheme formed the basis for the Charities Bill, published in April 2007.

6 See Dáil Debates, Select Committee Hearings, 22 January 2008.

7 See NICVA, *Charity law reform – the situation in Northern Ireland*, 22 May 2007 available at www.nicva.org/index.cfm/section/General/key/141205CharReform (last accessed 14 September 2007).

8 See Department of Social Development, "Ritchie introduces charities regulation", press release, 10 December 2007, available at: www.dsdni.gov.uk/index/news_items/charities-regulation-introduced.htm (last accessed 13 December 2007).

9 See Northern Ireland Assembly Debates, Charities Bill, Second Stage, 15 January 2008, available at www.theyworkforyou.com/ni/?id=2008-01-15.3.2 (last accessed 29 January 2008). See also Committee for Social Development, *Report on the Charities Bill* (30/07/08R), 1 May 2008.

benefit) in Part II; and regulatory structure changes (concerning the creation of new regulators, new appeal boards and new reporting mechanisms) in Part III. In adopting this functional approach to the Bills, one can assess the proposals' likely consequences for stakeholders in charity regulation (whether the public at large or donors and, in particular, charities, beneficiaries, the state and the courts) and consider the implementation challenges that lie ahead. Although neither proposal is perfect – and there is still time for improvement – there are welcome features in both drafts that should be highlighted.

II Substantive law changes

Both the Irish Bill and the Charities Bill for Northern Ireland introduce for the first time a statutory definition of charity and a test for public benefit.

Charitable purposes – Ireland

The Irish drafters have maintained the heads of charity framework originally laid down in the *Pemsel* case:[10] keeping "the advancement of education" and "the advancement of religion" unchanged; allowing for the "prevention" of poverty in addition to its relief; and retaining the form of the fourth head "other purposes beneficial to the community" but expanding upon it to encompass 11 specific new charitable purposes, similar to those found in the English and Scottish Acts. There is now express reference in the Irish Bill to the charitable nature of advancing community welfare of young, old and disabled people; supporting community development; protecting the natural environment; promoting health; advancing art, science, culture and heritage; and integrating disadvantaged individuals more fully into society.[11] The Irish Bill will also recognise as "charitable" a body lending assistance to other charities in fulfilling their charitable purpose in an efficient or effective manner.[12]

Unlike the English and Scottish Acts, the Irish Bill excludes reference to both amateur sport and, more surprisingly, human rights in its definition of "charitable purpose". Given the existing tax reliefs for amateur sport in Ireland[13] and the consistent lack of government enthusiasm to make sport or recreation charitable,[14] this omission is not unanticipated. The exclusion of human rights, on the other hand, is somewhat more surprising. Although the initial Consultation Paper on Charity Law Reform[15] did not originally include human rights in the proposed list of charitable purposes, the public's disagreement with this policy decision[16] led the Department of Community, Rural and Gaeltacht Affairs (DCRGA) to remedy this omission in its 2006 General Scheme of Bill with an express reference to the charitable nature of the advancement of human rights.[17]

No reasons have been publicly offered for the subsequent deletion of the advancement of human rights from the published Bill. The Minister of State for Community, Rural and Gaeltacht Affairs, although promising to return to the issue at report stage, declined to

10 *Special Commissioners for Income Tax* v *Pemsel* [1891] AC 531.

11 See s. 3(8)(a)–(k) of the Irish Charities Bill 2007.

12 Committee Stage Government Amendment No. 16, inserting a new s. 3(8)(h) into the Bill.

13 See ss. 235 and 847A of the Taxes Consolidation Act 1997.

14 There is no equivalent in Ireland to the English Recreational Charities Act 1958. See O Breen, "Taxing considerations – levelling the playing fields of charity" (2001) 6(4) *Conveyancing and Property Law Journal* 76.

15 DCRGA, *Establishing a Modern Statutory Framework* (n. 5 above).

16 See Breen Report (n. 5 above), p. 21, noting that a "significant number of respondents urged that the advancement of human rights should be specifically mentioned as either a heading or sub-heading of charity".

17 See General Scheme of Bill, Charities Bill 2006 (providing in Head 3(1)(d)(v) for "the advancement of human rights, social justice, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity").

speculate on the possibility of human rights ultimately making the list other than to say the matter was being considered by the relevant departments and the Attorney General. It is trite but true to say that the issue will turn upon politics or, at least, a conception of what is "political" and whether political acts, even if not for political purposes, should qualify as charitable. In the absence of an express charitable purpose in favour of human rights, human rights organisations may find no natural home for themselves in the statute other than the broad heading of organisations supportive of "political causes". From a legal perspective, given the existence of so many human rights organisations that pursue charitable purposes, this default labelling – or even the potential for such default classification – is an altogether insufficient categorisation of the promotion of human rights in the context of charity law.

Traditionally, the common law has stopped short of deeming the promotion of "political purposes" as charitable per se.[18] The courts have interpreted "political purposes" broadly to encompass not just direct support for a political party or political candidate but also any activities that retain, oppose, or change the law, policy, or decision of any level of government domestically or in a foreign country.[19] The courts refuse to recognise political purposes as charitable because judges cannot determine whether such purposes would be for the public benefit.[20] The English courts and the English Charity Commission, however, have permitted charities – including human rights charities[21] – to lobby and to engage in political campaigning when these activities can be said to be an ancillary means for the achievement of the bodies' greater charitable objectives.[22]

Section 2 of the Irish Charities Bill denies charitable status to any "body, the principal object of which is to promote a political party, candidate or cause".[23] The exclusion of bodies promoting "political causes" – a term undefined by the Bill – has caused charities in general to fear that s. 2 will be interpreted to prevent them from lobbying in support of their charitable objectives, that is, that engagement in advocacy activities will result in their

18 See, e.g. *Bowman* v *Secular Society* [1917] AC 406; *National Anti-Vivisection Society* v *Inland Revenue Commissioners* [1948] AC 31 (HL); *McGovern* v *Attorney General* [1982] Ch 321 (Ch D) applied in *Wolf Trust's Application for Registration as a Charity* [2006] WTLR 1467 (Charity Comm).

19 *McGovern* v *Attorney General* [1982] Ch 321 (Ch D); *Webb* v *O'Doherty* (1991) 3 Admin LR 731 (Ch D); *Southwood* v *Attorney General* (2000) 80 P&CR D34 (CA). Cf. *Public Trustee* v *Attorney General (NSW) & Others*, NSW Supreme Court, 30 September 1997 (Santow J noting that "if persuasion towards legislative change were never permissible, this would severely undermine the efforts of those trusts devoted to charitable ends that ultimately depend on legislative change for their effective achievement").

20 See Lord Parker in *Bowman* v *Secular Society* [1917] AC 406, at 442: "a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift".

21 See, in particular, Charity Commission for England and Wales, *The Promotion of Human Rights*, RR12 (London: Charity Commission, January 2005).

22 See *McGovern* v *Attorney General* [1982] Ch 321 (Ch D). The Charity Commission for England and Wales published a revised guide on permissible charitable campaigning in 2004 – see *Campaigning and Political Activities by Charities*, CC9 (London: Charity Commission, September 2004). As a supplement to this revised guidance, in April 2007, the commission published "Campaigning and political activities by charities – some questions and answers" (available at www.charity-commission.gov.uk/supportingcharities/campaignqa.asp, last accessed 13 December 2007) in which it stated that: "We are aware from our work with charities that trustees sometimes exercise a considerable degree of self-censorship in undertaking campaigns, and may not be aware of the extent to which they can campaign and engage in political activities to achieve their objectives. We want charities to be in no doubt about this point."

23 Irish Charities Bill 2007, s. 2, definition of excluded body.

loss of charitable status.[24] This interpretation of s. 2, although understandable, is ill-founded. Section 2 is concerned with the objects for which a body is established. It does not exclude organisations that have *otherwise* charitable objects from using political means (such as lobbying, advocacy etc.) to achieve those charitable ends. If the principal object of an organisation is charitable, it falls outside the ambit of s. 2.[25] Given, however, the undefined nature of the term "political cause", s. 2 will make it more difficult for human rights organisations to qualify for charitable status in the absence of an express reference to human rights as a charitable purpose.

The problem with s. 2, as it stands, is twofold. First, it offers no insight into what is meant by the phrase "political cause" that, if found to be a body's principal object, results in its non-eligibility for charitable status. Ultimately, human rights organisations stand to lose the most from this. There is no direct judicial authority on the meaning or scope of the phrase "political cause" to assist the regulator in applying this concept. In a non-charity context, the High Court has interpreted the phrase "political end", drawing upon English charity case law in its exegesis,[26] but it is unclear whether the terms are synonymous. If promotion of human rights is ultimately excluded from the statutory list of charitable purposes (putting the Irish definition at odds with that of its neighbours, all of which expressly recognise the charitable status of human rights bodies),[27] organisations in this field would be well advised to set out their objects as precisely as possible in the governing instrument, relating them back to the other established heads of charity[28] and demonstrating the non-political ways in which human rights will be promoted.

A second problem with s. 2 relates to its limits. As discussed above, s. 2 is concerned solely with the purposes for which an organisation is established. It is silent on the extent to which legitimate charities may employ political means to achieve their ends. This silence in itself would not be a problem but for the fact that because the Bill does not elsewhere address the issue of acceptable political means, charities and politicians are conflating incorrectly the two notions of political purposes and political means and expecting s. 2 to

24 See statements of Michael Ring TD and Jack Wall TD during the committee stage of the Irish Charities Bill, 22 January 2008.

25 If anything, a literal reading of s. 2 would appear to extend the possibility of charitable recognition to an organisation that has the ancillary purpose of promoting a political cause – an allowance that goes further than the existing common law, which requires that charities have exclusively charitable purposes.

26 See *Colgan* v *Independent Radio and Television Commission* [1999] 1 ILRM 22 in which the High Court defined a "political end" within the context of the Radio and Television Act 1988, as being an activity that is "directed towards furthering the interests of a particular political party or towards procuring changes in the laws of this country or . . . countering suggested changes in those laws, or towards procuring changes in the laws of a foreign country or countering suggested changes in those laws or procuring a reversal of government policy or of particular decisions of governmental authorities in this country or . . . countering suggested reversals thereof or procuring a reversal of governmental policy or of particular decisions of governmental authorities in a foreign country or countering suggested reversals thereof." In reaching this conclusion, O'Sullivan J drew heavily upon the English authority of *McGovern* v *Attorney General* [1982] Ch 321 (Ch D).

27 See Charities Trustee and Investment (Scotland) Act 2005, s. 7(2)(j), listing as a charitable purpose "(j) the advancement of human rights, conflict resolution or reconciliation"; see English Charities Act 2006, s. 2(2)(h), listing as charitable "(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;"; and Charities (NI) Bill 2007, s. 2(2)(h), listing as charitable "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity".

28 Such organisations, for instance, might try to align their objectives with the charitable heads of s. 3(8)(e) the advancement of conflict resolution or reconciliation or s. 3(8)(f) the promotion of religious or racial harmony and harmonious community relations.

speak to both.[29] It is, however, important to distinguish these two separate notions of having political purposes (which are not charitable at common law) and employing political means (which, if ancillary to a valid charitable purpose, do not affect charitable status).

The 2006 General Scheme of Bill attempted to deal with the issue of political means by giving statutory legitimacy to certain levels of advocacy undertaken by charities.[30] Head 3(3) proposed that organisations whose primary focus was advocacy, lobbying or campaigning would not be considered charitable. A charity could engage in these activities, however, if they were ancillary in nature and undertaken solely in furtherance of the charitable purposes of the institution concerned. If carried out in this manner, such activities would not threaten charitable status even if they related to issues which might be considered otherwise to be political.[31] Not all charities were persuaded of the competency of the new regulator to police advocacy but not intermeddle in charitable affairs.[32] Bowing to such pressure, the DCRGA (which is the department in charge of charity regulation) removed the advocacy test from the Charities Bill 2007 on the grounds that it did not wish to restrict advocacy by charities.[33] The removal of the test, however much attributable to the short-term political need to assuage the fears of certain groups that viewed the proposed test negatively, has left a void in the Bill – a void that s. 2 cannot speak to given its concerns with political purposes rather than political means. This void is evidenced by the committee stage proceedings in which deputies repeatedly sought assurances from the Minister of State for Community, Rural and Gaeltacht Affairs that charities could continue to advocate; assurances that would

29 See, in particular, the cross-purpose comments of Minister of State for Community, Rural and Gaeltacht Affairs, Pat Carey, in response to Pat Wall TD and Michael Ring TD with regard to suggested amendments 3 and 4 at committee stage proceedings, 22 January 2008.

30 The guidance on advocacy was prompted by the responses to the public consultation on charity law reform, see Breen Report (n. 5 above), p. 20, in which respondents asked for clarity on the advocacy issue and expressed concern that a failure expressly to enshrine in the legislation the right of charities to engage in advocacy would either deny charities this right altogether or would make it difficult to decipher how much advocacy was permissible by a registered charity, without endangering its charitable status.

31 Heads of Bill, Head 3(3)–(6). This test originated from the recommendations of the Law Society's report on Charity Law (n. 5 above), p. 86, which recommended that a charity should be able to advocate for a change in the law or public policy which reasonably could be expected to help it to achieve its charitable purposes. The Law Society also envisaged that the new regulator would play a key role in providing qualitative (as opposed to quantitative) guidance to charities to assist them in differentiating between "subordinate political activities which further the predominant charitable purpose and party political or propaganda activities which are not ancillary to charitable purposes".

32 An umbrella body for charities and community and voluntary organisations, The Wheel, lobbied against the introduction of the advocacy test. In its analysis of the Heads of Bill in December 2006, The Wheel stated that: "Advocacy by organisations will only be permitted if it is ancillary to its charitable purposes (i.e. undertaken to further one of its charitable purposes). The proposed regulator will have complete discretion in relation to determining whether a charity's advocacy activity is "ancillary" – there are obvious risks here for charitable organisations that engage in significant advocacy activity." See also Kitty Holland, "New law would curtail political role of charities, forum told" (2006) *The Irish Times*, 1 December, p. 4 (a Wheel-sponsored event at which the danger of allowing the regulator a role in determining what constitutes acceptable advocacy was highlighted).

33 See DCRGA, *Principal Features of the Charities Bill 2007* (Dublin: DCRGA, April 2007) in which the department stated that "practical issues" had arisen in protecting charitable status for certain bodies that did good work on the ground, such as those dealing with families of victims of homicide or victims of abuse. In light of this factor and in light of the argument that many charitable organisations legitimately engaged in advocacy as a means to achieve their charitable purpose, though advocacy in itself was not their principal object, the department decided "not to provide for a specific provision in the Bill restricting advocacy by charities".

have been unnecessary had the advocacy test, the purpose of which was never to restrict advocacy but to give it a legal basis,[34] remained.

There is a price to be paid for the existing dearth of clear guidance on the extent to which charities may employ political means in the achievement of their charitable objects. This price is extracted in the unnecessary constraints that some charities impose on their activities for fear of crossing an unidentified border with political purposes.[35] The price is visible also in the structural efforts of voluntary organisations to segregate out their less contentious charitable purposes from charitable purposes that are achieved through advocacy and, thus, might be viewed as suspect in the absence of definitive guidelines.[36] This "carving out" of tasks for separate legal entities is an allocatively inefficient use of a charity's resources since it changes not the aims of the organisation but only the perception of its form. This artificial veneer of public respectability hides the greater debate that should be taking place on where society should draw the line regarding the use of political means to achieve charitable ends. Section 2, as it stands, is thus a lost battle. It is structured to deal with only half of a problem – political purposes but not political means – and yet it is wrongly interpreted to speak definitively to both. The practical outcome is that there is now no guidance in the Irish Charities Bill on the issue of advocacy, no power for the proposed Regulator to issue guidance on the matter, no case law in Ireland that deals directly with this issue and, therefore, no clarity in the Republic as to what political activities a charity may lawfully engage in without placing its charitable status at risk.

The Irish statutory definition of charitable purpose, when enacted, will be narrower than the English and Scottish definitions because it does not make provision for future purposes to be charitable by either analogy with the new statutory heads (as does the Scottish Act)[37] or allow for purposes that "may reasonably be regarded as . . . within the spirit of" already recognised purposes (as does the English Act).[38] The only reference to the non-exhaustive nature of the statutory definition of charity is the drafter's use of the word "includes" in s. 3(8) to the effect that elaboration upon "other purposes beneficial to the community" *includes* the 10 categories of activity listed there but presumably is not limited to these. Whether this wording will be sufficient to encourage the courts, much less the proposed charity regulator, to take a dynamic approach as to what may be considered charitable outside of these headings remains to be seen.

Despite the issues detailed above, the overall expansion of the *Pemsel* heads in the Irish Bill is to be welcomed. Given the cost of High Court proceedings, there have been few

34 See the Law Society, *Charity Law* (n. 5 above), p. 85, noting that: "If it is accepted that sometimes, to be effective, charity must not only provide relief, but must question why the system has failed the donees, thereby placing them in the situation of needing assistance in the first place, we recommend that the current absolute prohibition on political advocacy should be reviewed."

35 See K O'Halloran, *Charity Law* (Dublin: Round Hall, 2000), p. 202, commenting that "the current restrictions on political activity by charities result in some [voluntary] organisations being prevented from obtaining or retaining charitable status, or in choosing to forgo it, even though they undertake charitable work".

36 Some human rights organisations set up subsidiaries to carry out activities that would be recognised as charitable if unconnected to the political advocacy that such organisations often engage in to achieve their human rights objectives. Thus, it is common for a human rights organisation to spin off its goals relating to education, research and dissemination to a separate body and apply for charitable status for that body. See, e.g. the Trust for Civil Liberties, Human Rights and Fundamental Freedoms, the charitable arm of the Irish Council for Civil Liberties (an independent, non-governmental membership organisation working to defend and promote human rights and civil liberties in Ireland).

37 See s. 7(2)(p) of the Charities Trustee and Investment (Scotland) Act 2005 (recognising as charitable "any other purpose that may reasonably be regarded as analogous to any of the preceding purposes").

38 See the English Charities Act 2006, s. 2(4)(b) and (c).

opportunities for the Irish courts to elaborate on the scope of the common law definition of charity in Ireland. The CCDB have not played a role in this regard with the result that only the Revenue Commissioners have been actively involved in the development of a modern interpretation of "charitable purpose", albeit solely from a tax perspective and with the added disadvantage that Revenue rulings are private to the parties. The provision of a new statutory definition of charitable purpose should free most Irish charities, therefore, from the existing stagnant common law conception of charitable purpose.

Charitable purposes – Northern Ireland

The proposed Northern Irish definition of charitable purpose (found in cl. 2) follows closely the broad definition in the English Charities Act 2006 with new references included to the advancement of amateur sport[39] and human rights.[40] The Northern Ireland Charities Bill, like the English Charities Act, allows for analogies to be made to existing charitable purposes as well as analogies to the new statutory heads, thereby maintaining greater flexibility in the scope of the statutory definition of charitable purpose than either Scotland does or Ireland proposes to do.

The Northern Irish Bill also provides for a statutory definition of "religion", a definition that includes express reference to faiths that do not profess belief in a god as well as polytheistic religions.[41] This statutory definition, first seen in the English Charities Act 2006,[42] is cognisant of the multi-cultural make-up of Northern Irish society. This recognition of religious difference goes beyond the law in Ireland, where the definition of religion remains a matter of common law interpretation based primarily on belief in and worship of a supreme being. The proposed statutory definition in Northern Ireland should facilitate the registration of non-theistic organisations (for example, Humanist, Confucian, and even Buddhist organisations) as "religious" charities if they otherwise satisfy the public benefit test in Northern Ireland. Existing practice outside Northern Ireland would seem to suggest that the absence of a similar definition has not affected an organisation's ability to obtain charitable status although it may alter the purpose under which it is recognised. Thus, the Scots recognise polytheism as a valid religious charitable purpose[43] and Irish case law explicitly extends the constitutional guarantee of freedom of religion beyond monotheistic Christian religions.[44] With regard to non-theistic bodies, the practice varies: the Irish Revenue Commissioners have granted charitable tax-exempt status[45] to at least four

39 Charities (NI) Bill 2007, cl. 2(2)(g)

40 Charities (NI) Bill 2007, cl. 2(2)(h).

41 Charities (NI) Bill 2007, cl. 2(3)(a): "religion includes – (i) a religion which involves belief in more than one god, and (ii) any analogous philosophical belief (whether or not involving belief in a god)".

42 See English Charities Act 2006, s. 2 (3)(a).

43 The Charities and Trustee Investment (Scotland) Act 2005 does not define religion other than to note in s. 7(3)(f) that advancement of a philosophical belief is analogous to the advancement of religion. The Scottish register of charities lists as charitable a number of Hindu religious organisations that list advancement of religion as their primary objective. See www.oscr.org.uk/CharityIndexResultsNew.aspx#results.

44 See *Corway* v *Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484, at 502 (SC), Barrington J commenting on the standing of the Muslim, Hindu and Jewish religions under Art. 44 of the Constitution to the effect that Art. 44 "is an express recognition of the separate co-existence of the religious denominations, named and unnamed. It does not prefer one to the other and it does not confer any privilege or impose any disability or diminution of status upon any religious denomination, and it does not permit the State to do so."

45 See www.revenue.ie/pdf/charit_a.pdf, which lists bodies recognised as having charitable tax exempt status up to 7 November 2007 (last accessed 12 December 2007).

Buddhist organisations, which describe themselves as religious charities.[46] Humanism, on the other hand, is registered not under advancement of religion but rather under education in both Ireland and Scotland.[47]

A more contentious issue in Northern Ireland is likely to relate to the notion of "designated religious charities". This provision largely mirrors a provision found in the Charities and Trustee Investment (Scotland) Act 2005.[48] The Charity Commission for Northern Ireland (CCNI) may recognise a religious charity as a designated religious charity, according to cl. 166 of the Bill, if it satisfies certain conditions including, inter alia, if it has been established in Northern Ireland for at least 10 years and "has a membership of at least 1000 persons who are . . . resident in Northern Ireland". The effect of designation is to exempt designated bodies from certain provisions of the Bill, most notably those relating to the CCNI's power to appoint an interim manager, the power to remove or suspend trustees and the power to make specific directions for the protection of the charity.[49] Although designation can arise only in the case of a religious organisation that has already passed the generally applicable charity test, the existence of a two-tier approach to religious charities was viewed by some as unduly favouring the established Christian denomination religions to the detriment of minority and new faith communities.[50] In light of concerns raised during committee stage debate, the qualifying criteria for designated status in cl. 166 were subsequently revised with the elimination of a minimum membership requirement; a reduction of the establishment requirement to five years and a new requirement in cl. 16(4)(a) that enjoyment of designated religious status be expressly noted on the Charities Register.

There is one other respect in which the Northern Ireland definition of charitable purpose differs from the statutory definition in England and Wales and that is in the omission of the promotion of the efficiency of the armed forces as an express charitable heading.[51] Support of the armed forces has long been considered a charitable purpose in

46 The Dublin Buddhist Centre (FWBO); Jampa Ling Trust – Tibetan Buddhist Centre, Cavan; Tara Buddhist Centre, Dublin; and Tibetan Buddhist Religion of Ireland Dzogchen Beara Trust, West Cork. See *R* v *Registrar General ex p Segerdal* [1970] QB 697 (CA), in which Lord Denning MR viewed the religion of Buddhism as an exception to the general requirement of religion that it should involve reverence to a deity.

47 The Humanist Organisation of Ireland (HOI) is a tax-exempt organisation for charitable purposes under Irish tax law. HOI's Memorandum of Association cites as its main object the advancement of "education and in particular the study of Humanism and the dissemination of knowledge of its principles". (see www.humanism.ie, last accessed 15 January 2008). Similarly, the Scottish Humanist Academy is listed on OSCR as advancing education.

48 See Charities and Trustee Investment (Scotland) Act 2005, s. 64. Note that the Northern Irish provision adopts a lower membership threshold of 1000 residents as opposed to Scotland's requirement of 3000 members, reflecting the size of the province.

49 See Charities (NI) Bill 2007, cl. 165, disapplying cll. 33–6 to designated religious charities.

50 See the comments of Alliance MLA, Anna Lo in the second stage debates of the Charities (NI) Bill 2007 (n. 9 above), noting that: "the Belfast Chinese Christian Church in south Belfast has been in existence for less than 10 years, so it will not be granted religious charity status. The Jewish, Muslim and Baha'i communities may have established their places of worship for longer than the required 10 years, but their membership will not be as many as 1,000; again, they will not be granted designated religious charity status by the Bill."

51 Cf. English Charities Act 2006, s. 2(2)(l), providing that "the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services" is a charitable purpose. It is perhaps noteworthy that the English Charities Bill, as initiated, had no specific provision for the armed forces. The UK Government's stated position was that promoting the efficiency of the armed forces, which had been a charitable purpose for a very long time, would continue to be a charitable purpose by virtue of the last general description of charitable purposes. However, a Government amendment to include in the list of charitable purposes "the promotion of the efficiency of the armed forces of the Crown" was made on report. See HL Deb 12 October 2005, cols 296–8.

both England[52] and Northern Ireland[53] under the common law *Pemsel* headings. As Lord Lowry explained in the *Royal British Legion* case, former members of the defence forces constituted an appreciable section of the community and if the benefit bestowed on that class could be viewed as one that would:

> . . . encourage a person to join the Forces, raise his morale and efficiency while he is serving and help him (and not merely provide recreation and social intercourse) when he returns to civilian life . . .

Such a benefit could be considered a valid charitable purpose.

The exclusion of the armed forces from the statutory list of charitable purposes in Northern Ireland is not fatal to those charitable associations in light of the rider in the Charities Bill that in deciding whether a purpose is charitable recourse may be had to existing charity law and analogies thereto.[54] The CCNI will thus be able to refer to existing practice regarding the treatment of organisations set up to support the defence forces and continue to register such organisations as charities provided there is sufficient public benefit shown.[55] In this way, Northern Ireland is perhaps in a stronger position than Scotland whose Charities Trustee and Investment Act 2005 also omits specific reference to the efficiency and welfare of the armed forces as a charitable purpose.[56] Unlike Northern Ireland, the Scottish legislation limits analogies for future charitable purposes to the new statutory heads of charity without reference to existing charity law,[57] which could make it conceivably harder for such an organisation to register as a charity in Scotland. It is noteworthy that OSCR has registered at least one charity that supports the armed forces since the setting up of the Scottish charity register. Gardening Leave, founded in 2007 "to provide relief by means of therapeutic services for men and women

52 See Preamble to Statute of Charitable Uses (1601) 43 Eliz. I c. 4, referring to "releife of . . . sicke and maymed Souldiers and Marriners, . . . [and] for reliefe or redemption of Prisoners or Captives"; *Verge* v *Somerville* [1924] AC 496, at 506 (PC), in which Lord Wrenbury held a gift "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers" to be charitable (though not confined to aiding the poor) as being for purposes beneficial to the community, where "New South Wales returned soldiers" were held to be a class of the community.

53 See *The Royal British Legion Attendants Company (Belfast) Limited* v *Commissioner of Valuation* [1979] NI 138 (CA).

54 Northern Ireland Charities Bill, cl. 2(4), providing "(4) The purposes within this paragraph . . . are- (a) any purposes not within sub-paragraphs (a) to (k) of paragraph (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act (Northern Ireland) 1958 (c. 16); (b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those sub-paragraphs or sub-paragraph (a) above; and (c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within sub-paragraph (b) above or this sub-paragraph."

55 The UK Government suggested a similar approach in the House of Lords as a reason to reject the amendment to insert specific reference to support of the armed services in the English Charities Bill. However, the Lord Craig of Radley persuaded the Government to reconsider and adopt a "belt and braces" approach at committee stage, HL Debs, 28 June 2005, col. 131, arguing: "the Charity Commission's commentary on the description of charitable purposes in the Charities Bill confirms in paragraph 36: 'The defence of the realm . . . such as . . . promoting the efficiency of the armed and emergency services' remains a charitable purpose. Some may argue that that is good enough to safeguard [service non-public funds – SNPFs]. But that is not the same as having it on the face of the Bill. Others, even the Charity Commission, may find it hard to reconcile the broad sweep and intricacies of the public benefit tests for every charitable SNPF. That possibility could arise. Optimistically, I hope that this would not be the case today. But this legislation will stand for years. Views or public perceptions could change." See n. 51 above.

56 This omission may have been an oversight on the part of the Scottish Parliament. There is no discussion of the role of the defence forces in the parliamentary debates during the passage of the Charities Trustee and Investment Bill and the Bill had become an Act in Scotland before the matter was raised for the first time in the House of Lords as an issue deserving further consideration in regard to the English Charities Bill.

57 See n. 37 above and accompanying text.

(serving or formerly serving in HM armed forces) who are suffering from mental health problems [and] to educate the general public on the subject of mental health" is registered as a Scottish Charity with the objective of advancing health to beneficiaries in the disabled or mental health area.[58] The GuideStar UK database, which refers to Gardening Leave's English registration with the Charity Commission for England and Wales, however, classifies the charity under both advancement of health and "the promotion of the efficiency of the armed forces of the Crown, or of the police, fire and rescue services or ambulance services", giving the organisation a broader charitable purpose base in England and Wales than in Scotland.[59]

Public benefit – Ireland

With regard to the issue of public benefit, both jurisdictions have eschewed the English approach of leaving the test for public benefit entirely up to the regulator.[60] The Irish Charities Bill 2007 requires proof of public benefit before a purpose can be declared charitable. The test for public benefit in the Irish Bill, applicable to all non-religious purposes, requires proof of three facts: a) that the purpose in question is intended to benefit the public or section thereof; b) that any private benefit flowing from the purpose is ancillary and necessary for the achievement of the primary charitable purpose; and c) that any donor-imposed limitations on the class entitled to benefit or any charges imposed in the provision of the charitable purpose are justified and reasonable and will not limit unduly the number of persons or classes of person who will benefit.[61]

This public benefit test places greater weight on the meaning of "public" than on the meaning of "benefit". There are no criteria defining what is meant by "benefit" in s. 3. This absence marks a change from the General Scheme of Bill which required a causal connection between the activities carried out and the charitable purpose those activities were intended to advance; in essence, demonstration of benefit in all cases other than religion.[62] The Irish Charities Bill omits this provision entirely, leaving only the limitation on permissible private benefit as an implicit warning that something more than private benefit is generally required. The Bill focuses instead on the need for proof of the public nature of the benefit. To this end, s. 3(7), in common with the Northern Irish provisions,[63] abolishes the common law's historical, if anomalous, exceptions for "poor relations" and

58 See the Scottish Charity Register at www.oscr.org.uk/CharityIndexDetails.aspx?id=SC038563 (last accessed 12 December 2007).

59 See GuideStarUK registration details for Gardening Leave at www.guidestar.org.uk/gs_summary.aspx?CCReg=1119786&strquery=gardening%20leave (last accessed 12 December 2007).

60 See, in this regard, Charity Commission for England and Wales, *Public Benefit: Charities and public benefit* (London: Charity Commission, January 2008) and Charity Commission for England and Wales, *Analysis of the Law Underpinning Charities and Public Benefit* (London: Charity Commission, 2008).

61 Irish Charities Bill 2007, s. 3.

62 Head 4(2) of the General Scheme of Bill for the Charities Bill, March 2006, provided, "In determining the presence of or potential for benefit, the Regulatory Authority must have regard to: (a) the extent to which the gift may relieve or alleviate the condition giving rise to the charitable purpose, (b) whether the purpose is directed to the public or an appreciable section of the public, (c) whether any private benefit is ancillary, reasonable and necessary to the furtherance of the purpose."

63 See Charities Bill (NI) 2007, cl. 3(2): "in determining whether [the public benefit] requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit".

"poor employees"[64] by requiring that the public nature of any such gift cannot be assumed but must be proved if the charity test is to be satisfied.

One area in which the Irish public benefit test will differ from that of Northern Ireland relates to the public benefit requirement for religious charities. Section 3(4) of the Irish Bill provides that once a gift is made for the advancement of religion, that gift is regarded without further proof as being for the public benefit. The all-important determination as to whether a gift *actually* advances the religion in question is decided according to the laws, canons, ordinances and tenets of the religion concerned[65] and is not subjected to objective proof. The Dáil (the Irish Parliament) copper-fastened the Irish judicial interpretation of public benefit for religious gifts in the Charities Act 1961[66] and this interpretation lives on today in s. 3(4) of the Irish Charities Bill. Ireland's acceptance of the religious perspective[67] differs from the approach in Northern Ireland (and England) where there is an insistence on objective proof as to what constitutes public benefit for the advancement of religion.[68] This divergence is not new, but rather dates back to the late 1800s. The English courts eschew the Irish faith-based approach,[69] often seeking instead some tangible evidence of evangelism as proof of public benefit. At times this insistence has led the courts to deny charitable status to practices of some established religions that cannot produce physical evidence of benefit in court.[70] The insistence on evidence of demonstrable public benefit, however, does provide the English Charity Commission with a ready defence to cults and sects that otherwise might seek registration as charities.

A final issue of note with regard to the public benefit provisions is the absence of any statutory definition of "religion" in the Irish Charities Bill. This absence may cause the regulator greater difficulties in Ireland than in neighbouring jurisdictions because once

64 At common law, a very low threshold of public benefit is needed in cases of poverty to establish a charity. Long established anomalies include trusts to benefit one's own poor relations (*Isaac* v *Defriez* (1754) 2 Amb 595; *Re Scarisbrick* [1951] Ch 622), an anomaly extended subsequently to trusts to benefit one's own poor employees (*Spiller* v *Maude (Note)* (1881) 32 Ch D 158). Notwithstanding the personal link between donor and donee in these instances public benefit was deemed to be present.

65 Irish Charities Bill 2007, s. 3(5).

66 See Irish Charities Act 1961, s. 45.

67 See *Attorney General* v *Hall & Byrne* [1897] 2 I R 426; *O'Hanlon* v *Logue* [1906] 1 IR 247 (holding bequests for masses to be valid charitable gifts); *Maguire* v *Attorney General* [1943] 1 IR 238 (holding a bequest to establish a convent for an enclosed order of Catholic nuns to be a valid charitable gift under Irish common law); and *Bank of Ireland Trustee Co Ltd and Others* v *Attorney General* [1957] 1 IR 257, at 274–7.

68 J C Brady, *Religion and the Law of Charities in Ireland* (Belfast: *NILQ*, 1975), p. 95, noting "In the opinion of many Catholics the stairway from the Northern Ireland Court of Appeal to the House of Lords places bequests for masses in jeopardy unless the bequests are coupled with a direction for public celebration providing the element of public edification of which a court can take cognizance." See also NI Committee for Social Development, *Report on the Charities Bill* (n. 9 above), para. 35, noting: "The Committee had some sympathy with those bodies that felt that the advancement of religion should be presumed to be of public benefit but agreed that there should be no exemptions."

69 *Gilmore* v *Coats* [1949] AC 426 (HL), holding that the benefit of intercessory prayer to the public was not susceptible of legal proof and the court could only act on such proof. See also L F H Newark, "Public benefit and religious trusts" (1946) 62 *LQR* 234; J C Brady, "Some problems touching the nature of bequests for masses in Northern Ireland" (1968) 19 *NILQ* 357; J C Brady, "Public benefit and religious trusts: fact or fiction" (1974) 25 *NILQ* 174; C H Sherrin, 'Public benefit in trust for the advancement of religion" (1990) 32 *Malaysia LR* 114; H Picarda, "Religious observances and the element of public benefit" (1993) 2 *Charity Law and Practice Review* 155; C E F Rickett, "Charities: an anti-Roman Catholic bias in the law of charity?" (1990) *Conv* 34.

70 Compare the treatment of the bequest in *Re Watson* [1973] 3 All ER 678 (Ch D), in which Plowman J held that a bequest to publish the religious writings of a Mr Hobbs was charitable on the grounds that the literature although displaying no intrinsic worth had religious tendencies, with the decision of the House of Lords in *Gilmore v Coats* [1949] AC 426 (HL).

recognised as a religion, a claimant must show simply that the gift advances the religion in accordance with that religion's own laws in order for the gift to be charitable. What constitutes a "religion" therefore becomes a significant question in the determination of applications from cults, sects and new religions. The absence of statutory guidance effectively passes the buck to the regulator and the Irish courts to determine this matter.[71]

The different approaches of Ireland and Northern Ireland imply that, whereas it will be easier for non-theistic or philosophical belief organisations to come within the heading of "religion" in Northern Ireland, demonstrable public benefit will still be required before charitable registration is possible. For those organisations falling within the common law definition of religion in the Republic, registration as a charity may be easier given the lower public benefit threshold. Thus, newer religions, for example, scientology,[72] and cults or sects may be in a position to forum shop when it comes to charity registration.

Public Benefit – Northern Ireland

Northern Ireland proposes to adopt an approach very similar to that employed in s. 5 of the Charities and Trustee Investment (Scotland) Act 2005. In Northern Ireland, no charitable purpose will enjoy the presumption of public benefit per se. In determining whether a body provides or intends to provide public benefit, cl. 3(3) of the Northern Ireland Charities Bill, as amended at committee stage, provides that regard must be had to:

> (a) how any—
>
> (i) benefit gained or likely to be gained by members of the institution or any other persons (other than as members of the public), and
>
> (ii) detriment incurred or likely to be incurred by the public, in consequence of the institution exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
>
> (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

This test touches on the two main elements of the public benefit test, namely, whether there is benefit; and, whether the benefit is sufficiently public to be charitable. The proposed test, without setting a minimum threshold for benefit or in any way defining what constitutes "benefit", requires the CCNI to balance off the combined benefit likely to be enjoyed by a charity's members or private individuals minus any detriment that the public is likely to suffer against the overall net benefit that the public will enjoy as a result of the charitable activity in question. One might assume, although this is not expressly provided for in the

71 In this regard, see the committee stage amendment No. 11, offered by Jack Wall TD, to define religion as "not including any organization or cult which in the opinion of the Authority is primarily economic in nature or employs oppressive psychological manipulation of its adherents". In response the Minister of State for Community, Rural and Gaeltacht Affairs, Mr Pat Carey, although rejecting the amendment, promised to seek legal advice and to revert to the matter again at report stage.

72 In the past, the English Charity Commission refused to grant charitable status to Scientology because, in the Commission's view, Scientology's methods of auditing did not advance religion, see Decision of the Charity Commissioners for England and Wales, Application for Registration as a Charity by the Church of Scientology (England And Wales), 17 November 1999. Cf. the decision of the Australian High Court in *Church of New Faith* v *Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, which ruled that beliefs, practices and observances of the Church of the New Faith (also known as Scientology) were a religion in Victoria and thus entitled to charitable tax exempt status in that state.

Bill, that the benefit element of the test will normally be satisfied so long as the balance tilts in favour of more public than indispensable private benefit.[73]

The Scottish Charity Regulator, OSCR, has elaborated on the Scottish public benefit test from which the Northern Irish test is drawn in its recent *Guidance Note*s on the Scottish charity test.[74] The *Guidance Notes* provide that the "benefit" in public benefit can be direct, indirect, tangible or intangible in nature. For the benefit to count, an applicant organisation must demonstrate that there is a link between (a) its charitable purposes, (b) its activities in furtherance of those purposes and (c) the public benefit arising from those activities. If the link between all three is not clear, the benefit is not relevant in determining whether public benefit is present. Thus, a benefit provided to adults in a community when a school makes its playing pitches available to local sports clubs is not a relevant benefit when the charitable purpose in question is to advance the education of primary school children.[75]

The Scottish test refers to "disbenefit" as opposed to "detriment". "Disbenefit", according to OSCR, refers to harm rather than just a lack of benefit to the public. To be counted against a charity, the disbenefit must affect the public at large. Thus, neighbours of a hostel for the homeless may argue that the charity's presence causes them a disbenefit by affecting property values but this disbenefit will be viewed as a private harm and, therefore, irrelevant. In contrast, OSCR suggests that if a pigeon welfare promotion body was to distribute pigeon feed across all the squares of a city, such action might cause public disbenefit (due to increased numbers of pigeons and heightened health risks) and so might outweigh the public benefit provided by the body.[76] The OSCR guidance will have persuasive value only in Northern Ireland. Charities wishing to operate in Northern Ireland will thus need similar guidance from the CCNI as to how it intends to interpret the public benefit requirements, a fact acknowledged in the Bill itself.[77]

Default trustee powers

One final substantive law difference between Ireland and Northern Ireland relates to the statutory empowerment of charity trustees. Unlike Ireland, Northern Ireland recently updated its trusts legislation with the passage of the Trustee Act (Northern Ireland) 2001. This Act provides trustees generally with default statutory powers of investment and powers to acquire land. The 2001 Act also creates a statutory right for charity trustees to delegate certain decision-making functions while giving the Department of Social Development power to make regulations regarding remuneration of charity trustees.[78] The Charities (Northern Ireland) Bill 2007 further builds upon these provisions. The Bill allows trustees to purchase indemnity insurance out of charity funds,[79] empowers the CCNI to relieve trustees and auditors from liability for breach of trust or duty[80] and amends the 2001 Act by giving more specific guidance regarding trustee remuneration.[81] The legislative

73 The similar Scottish test adopts a holistic approach to public benefit requiring that the overall picture should be one of predominant provision of public benefit through activities in furtherance of charitable purposes. See OSCR, *Meeting the Charity Test: Initial guidance for applicants and for existing charities*, available at www.oscr.org.uk/guidance.stm (last accessed 10 December 2007) (hereafter *Guidance Notes*), pp. 11–12.

74 Ibid.

75 Ibid., p. 11.

76 Ibid., p. 15.

77 Cl. 4(1) provides that the CCNI "must issue guidance in pursuance of its public benefit objective".

78 See Trustee Act (Northern Ireland) 2001, ss. 11(3) and 30.

79 Charities (NI) Bill 2007, cl. 74.

80 Charities (NI) Bill 2007, cl. 92.

81 Charities (NI) Bill 2007, cll. 89–91.

picture in Ireland is far removed from the North's enabling environment. The primary trust legislation in Ireland remains the Trustee Act 1893, which is neither current nor comprehensive. The Irish Charities General Scheme of Bill 2006 attempted to remedy many of the identified deficiencies relating to trustee investment powers, trustee liability, indemnity and remuneration. Yet the Irish Charities Bill 2007 omitted all of these provisions. Ministerial indications at committee stage have flagged the potential reintroduction of sections relating to trustee indemnity and trustee remuneration for non-trust related work at report stage. However, it remains disappointing that no provision will be made in the Irish Charities Bill for default trustee powers of investment and delegation.

III Changes to regulatory structure

Both Ireland and Northern Ireland are introducing major changes to their regulatory structures for charity law. There will be a new regulator in each jurisdiction: the Charities Regulatory Authority (CRA)[82] in Ireland and the CCNI in Northern Ireland.[83] These bodies will be responsible for the establishment and maintenance of a register of charities in each jurisdiction and will also oversee the reporting regimes applicable to registered charities. The regulators will enjoy varying powers relating to the investigation of charities and the protection of charitable assets.

Registration and its effect

One of the most important innovations in terms of regulatory structure will be the creation of the charities register. A charitable organisation that intends to operate or carry on activities in Ireland will be required to register with the CRA. Substantively, that organisation must prove that it is established for charitable purposes and that it satisfies the public benefit test. Procedurally, it must provide the CRA with copies of its governing instrument and financial accounts, details of its trustees and place of business. If the CRA refuses registration, the disappointed applicant can appeal this decision to a new Charity Appeals Tribunal.[84] The Irish Bill, also for the first time, decouples charitable tax exemption from charitable status, making the regulator responsible for charity registration.[85] Revenue will remain the appropriate body to decide whether a registered charity will be entitled to tax relief, though it is expected that a good working relationship will exist between the regulator and the Revenue.[86]

In Ireland, registration will entitle an organisation to hold itself out as being a "charity", a "charitable body", a "registered charity" or a "charity registered in Ireland". The implications for foreign charities (for example, English, Northern Irish or Scottish charities)

82 The CRA will replace the Commissioners for Charitable Donations and Bequests, which will be dissolved and the powers of which will pass to the CRA under Pt 6 of the Irish Charities Bill 2007, ss. 73 and 74.

83 See, generally, Pt 2 and Sch. 1 of the Northern Ireland Charities Bill 2007.

84 The Charities Appeal Tribunal is an extra-judicial mechanism to allow charitable organisations to appeal against decisions of the authority without having recourse to the courts. Two of its five members shall be drawn from the ranks of judges, barristers or solicitors. Additionally, the Minister of State for Community, Rural and Gaeltacht Affairs will appoint two further members who have "experience in areas of expertise relating to charities" – see Irish Charities Bill 2007, s. 68.

85 Irish Charities Bill 2007, s. 7, provides that nothing in the Bill "shall operate to affect the law in relation to the levying or collection of any tax or the determination of eligibility for exemption from liability to pay any tax". Note, however that the CRA must consult with Revenue prior to the establishment of the Register of Charities (s. 37 (1), as amended at committee stage).

86 Revenue Commission Collector General, Gerry Harrahill, "Taxation and Charity: Service and Compliance Issues" (paper presented at ICTRG's 16th Annual Conference: Charities Towards 2012 – What's in Store?, Dublin, 8 November 2007). See also s. 31 of the Charities Bill 2007, providing for administrative cooperation between the CRA and other relevant regulators.

are dealt with in s. 41(6) of the Bill: an unregistered foreign charity will be entitled to refer to itself as a charity in Ireland if it is established in another country under whose laws it is recognised as a charity and it has its centre of management outside Ireland. These foreign charities, however, cannot "occupy any land" or "carry out any activities" in the state.[87] It remains to be seen how this provision will be interpreted. What is clear at present is that in order to fundraise in the Republic, foreign charities will have to register with the CRA and comply with certain reporting requirements. What is not clear is the extent to which a foreign charity will be able to provide services and administer funding in Ireland, while holding itself out to be a charity, without first registering with the CRA.

With respect to Northern Ireland, cl. 16 of Charities Bill provides that every institution which is a charity 'under the law of Northern Ireland' must be registered in the register of charities.[88] A "charity" within the meaning of Northern Irish law, according to cl. 1, is one that is established for charitable purposes only and falls to be subject to the control of the court in the exercise of its jurisdiction with respect to charities. Entry on the register of charities provides a conclusive presumption that the body in question is or was a charity for the time it is so registered. The CCNI's decision to register or not to register an applicant organisation can be appealed to the Charity Tribunal.[89]

Foreign charities are dealt with in cl. 167, which provides for the regulation of institutions that are not charities under the law of Northern Ireland but which operate for a charitable purpose from or in Northern Ireland. "Section 167 institutions" (which, according to the committee stage debates, will cover English and Scottish charities but presumably will also cover charities established in Ireland that carry out activities in Northern Ireland) will be required to prepare a financial statement and a report of their activities relating to their operations for charitable purposes in Northern Ireland. The DCRGA may, by order, require the CCNI to keep a separate register of these institutions and may grant the CCNI power to apply any of the Act's provisions to such institutions that would otherwise not apply. Any such an order will require approval by resolution of the Northern Ireland Assembly.

The reporting regimes – Ireland

In Ireland, the proposed reporting regime will vary depending upon whether the registered charity in question is incorporated or unincorporated. All registered Irish charities will be required to submit an annual report to the CRA.[90] Unincorporated charities must also submit a statement of their annual accounts to the CRA, prepared in line with the requirements of the Charities Act.[91] Charitable companies will be required to submit to the CRA copies of annual returns already prepared in accordance with company law and previously submitted to the Companies Registration Office (CRO). Since it will be an offence for a registered charity not to comply with the reporting requirements,[92] foreign charities that register with the CRA will be required to file reports too.

87 See s. 41(6) of the Irish Charities Bill 2007.

88 This wording differs from the draft Charities (NI) Order which had provided in Art. 18 that "Every charity which is established or operates in Northern Ireland must be registered in the register of charities."

89 See Sch. 3 of the Charities (NI) Bill 2007.

90 Irish Charities Bill, 2007, s. 46. According to the General Scheme of Bill the annual report will refer to the activities of the charity during the reporting year and such other information relating to the charity or to its trustees or officers that is necessary to ensure the disclosure on an annual basis of relevant core information responsive to the requirements of accountability and transparency in the public interest.

91 See ss. 42–4 of the Irish Charities Bill 2007, outlining the accounting requirements for unincorporated charities.

92 Irish Charities Bill, s. 46.

In reviewing the proposed Irish regulation, three problematic areas require further consideration. These three issues arise from the different reporting requirements for charitable entities depending on organisational form and relate to: a) dual filing requirements; b) a loophole with regard to charitable religious companies; and c) lack of audit exemptions for charitable companies that hopefully can be resolved as the Bill progresses. A key tenet for the Irish Government has been to avoid dual filing requirements for charitable companies.[93] Section 46, as currently written, will require charitable companies to submit to the Charities Regulator copies of annual returns (and auditors reports, where relevant) already provided to the CRO. Technically, since the same information is used, this does not amount to dual filing. Pragmatically, charities are likely to view this as an onerous bureaucratic burden that could be more easily resolved between the regulators in question (namely, CRA and CRO) if a system for electronic transfer of files was established between the two offices.

The second issue relates to a statutory loophole with regard to charitable religious companies. In its reporting provisions, the Irish Charities Bill strives to avoid the necessity for dual reporting. It achieves this aim predominantly by including a rider in each of the relevant reporting sections stating that those provisions do not apply to charitable companies.[94] Essentially, if a charity is established as a company, then company law takes precedence and the Charities Bill prescribes no additional substantive filing requirements for such organisations. Charitable religious companies, however, fall between the two regimes. Incorporated religious charities are exempt from filing returns under Irish company law[95] because the nature of their activities is sufficiently outside normal commercial activity to justify their exclusion.[96] Yet, these same bodies will not be required to prepare detailed accounts under the proposed charities legislation either.[97] Given issues of departmental competence, it may be outside the powers of the DCRGA to resolve this issue independently of the Department of Enterprise and Employment. The fact that company law is currently undergoing major revision, however, makes this an ideal opportunity to re-examine the reporting duties of incorporated religious charities.

The final discrepancy between the two reporting regimes works to the disadvantage of charitable companies. Section 44 of the Irish Charities Bill provides that unincorporated charities require audited accounts only when the annual income and expenditure of the organisation exceeds €100,000. Below this threshold, it is sufficient to have the accounts independently examined.[98] Charitable companies, being companies limited by guarantee, are required to have audited accounts, regardless of income level.[99] Thus, the existing combination of proposed charity and company legislation will impose more stringent auditing requirements on incorporated charities with an annual turnover of less than

93 See DCRGA, *Establishing a Modern Statutory Framework* (n. 5 above), p. 13, noting: "Arrangements could be envisaged whereby the regulatory body would recognise annual returns filed with the Companies Registration Office or vice versa. In this way, charities which are companies limited by guarantee pursuant to company law as it currently stands would not be subject to dual filing requirements."

94 See, e.g. ss. 42(11), 43(6) and 44(12).

95 See Companies (Amendment) Act 1986, s. 2.

96 113 Seanad Eireann Debates, col. 1335, Companies (Amendment) Bill, 1985: committee stage (25 June 1986).

97 S. 46 simply required incorporated charities to send a copy of whatever they submitted to the CRO to the charities regulator. The CRO accounts filed by incorporated religious charities are redacted and disclose no financial information.

98 Irish Charities Bill 2007, s. 44(2).

99 See General Scheme of Bill, Companies Bill, Pts B3 (Designated Activity Companies) and B4 (Companies Limited by Guarantee) excluding the possibility for companies to avail of audit exemptions that apply to private companies limited by shares.

€100,000 than will apply to similar unincorporated charities that come solely under the scrutiny of the CRA. A statutory mechanism is therefore needed to give the Minister of State for Community, Rural and Gaeltacht Affairs, who is in charge of charity regulation, some input into the accounting requirements for charitable companies whether that is to ensure a basic level of filing (in the case of incorporated religious charities) or a proportional approach to audit requirements (in the case of small charitable companies).

The reporting regimes – Northern Ireland

The proposed reporting regime in Northern Ireland is quite similar to the Irish regime: charities are required to prepare annual accounts in accordance with the Charities Bill, if unincorporated, and the Companies Act, if incorporated. Differences arise, however, with regard to the accounting thresholds. Whereas the Irish Bill uses the €100,000 threshold as the trigger figure for both the audit requirement and the full accounts requirement, the Charity (NI) Bill operates two separate thresholds. For charities with an annual income of less than £100,000 the option exists to prepare a receipts and payments account and a statement of liabilities in lieu of a statement of account.[100] The audit threshold, in line with the thresholds in the rest of the UK, is set at a higher level. Charities with a gross annual income in excess of £500,000 or a gross income in excess of £100,000 and assets with an aggregate value exceeding £2.8 m will require audited accounts.[101] Given the sizeable differences in the auditing threshold that exist between Ireland and Northern Ireland, these differences may adversely affect Northern Irish charities with significant cross-border presence in the Republic when it comes to filing the required charity returns with the CRA since Irish law will require audited reports at a much lower turnover level.

One innovative feature in the Charities (NI) Bill is the provision dealing with auditors and independent examiners' duty of disclosure to the CCNI. This duty is twofold. Clause 68(2) requires such parties to inform the CCNI in writing when they become aware of any matter that they reasonably "believe is likely to be of material significance for the purpose of the exercise" of the commission's inquiry powers. Provision is also made for auditors and examiners to report other matters falling outside the scope of cl. 68(2) to the commission if the accountant has "reasonable cause to believe [that it] is likely to be relevant for the purposes of the exercise by the Commission of any of its functions".[102] In such an instance the auditor "may" make a report on the matter to the Commission. The disclosure duty in both cases survives the accountant's retirement or replacement.

The provision of a tiered disclosure standard predicated on "materially significant" information, on the one hand, and "relevant" information, on the other, is a clever safety net that better places the CCNI to garner information from accountants concerning potentially untoward financial practices by charities. Whereas there may be scope to debate whether something is materially significant or not, there is considerably less room for manoeuvre if a lower category of relevancy exists that invites disclosure. In each instance the power is broader than the corresponding Irish provision which requires accountants who have reasonable cause to believe that a charity has committed an offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 to disclose that fact to the CRA.[103] In stark

100 See Charities (NI) Bill 2007, cl. 65(3).

101 See Charities (NI) Bill 2007, cl. 66, with regard to the audit/examination requirements for unincorporated charities and s. 104 with regard to audit/examination requirements for charitable companies.

102 Charities (NI) Bill 2007, cl. 68(3).

103 Irish Charities Bill 2007, s. 52.

contrast to the position in the Republic,[104] however, the Northern Ireland Bill does not impose any sanctions for an accountant's failure to comply with either reporting requirement, so judgment of the provision's practical effectiveness must await implementation.

The powers of the regulators

One area where the two Bills differ quite considerably relates to the proposed powers of the regulators. When it comes to dealing with charities in general and charitable trustees in particular, the CCNI has greater powers than its Irish counterpart. The Northern Ireland Bill empowers the commission, when acting under its statutory investigatory powers,[105] to take action on its own motion to freeze charitable assets and suspend or remove charity trustees,[106] if it is of the opinion that there has been misconduct or mismanagement of the administration of the charity in question and that its assets are at risk. In this regard, the commission can also direct a charity under investigation to take any action that the commission deems expedient in the interests of the charity.[107] Given the broad nature of the powers given to the CCNI, it is not surprising that the Charity Tribunal for Northern Ireland enjoys equally broad powers to scrutinise the commission's decisions in this regard and to quash or modify the orders made.[108] Appeals on a point of law lie from decisions of the Charity Tribunal to the High Court of Northern Ireland.

In marked contrast, the CRA enjoys much more limited powers. Although it can appoint inspectors to carry out investigations into a charity's affairs and demand the production of documents,[109] any action that the CRA wishes to take on foot of such an investigation, unless it is classed as an intermediate sanction (basically name and shame),[110] requires prior High Court approval. Thus, the CRA needs judicial approval to suspend or remove trustees,[111] to remove a charity from the register,[112] to freeze charitable assets[113] or to issue directions to a charity to take a particular course of action.[114] Only in relation to the initial decision whether to register an organisation as a charity does the CRA enjoy relatively unfettered rights. It follows that given the limited powers of the CRA to act on its own initiative, the Charity Appeals Tribunal's power of scrutiny is similarly circumscribed to reviewing decisions to register or refuse to register a charity.[115] These variances in the powers of the CRA and CCNI are due to constitutional law differences between Ireland and

104 S. 52 states that an accountant who fails to inform the CRA where he/she has reasonable cause to believe that a charity has breached the 2001 Act or an accountant who makes a materially false or misleading report to the CRA in this regard will be guilty of an offence under the Act.

105 Charities (NI) Bill 2007, Pt 5.

106 See Charities (NI) Bill 2007, cl. 34.

107 Charities (NI) Bill, 2007, cl. 36.

108 See Sch. 3 of the Charities (NI) Bill 2007.

109 Irish Charities Bill 2007, ss. 57 and 58.

110 See Irish Charities Bill 2007, s. 66, with regard to intermediate sanctions.

111 S. 67(4)(a).

112 S. 39(5).

113 S. 67(4)(b).

114 S. 67(1).

115 See ss. 39 (providing a right of appeal for bodies deemed to be "excluded bodies" and removed from the register) and 40 (providing for a right of appeal against a CRA decision to refuse to register an organisation) of the Irish Charities Bill 2007.

Northern Ireland.[116] It will be interesting, however, to assess the ramifications of these constitutional differences for the respective regulators' effectiveness in regulating charities. Finally, the decision to divest the Irish Attorney General of his powers over charities in favour of the CRA[117] marks a break with the common law perception of the Attorney General as protector of the public interest. This initiative has not been followed in Northern Ireland where the Attorney General retains a supervisory role.[118] Given the reluctance of the Irish Attorney General to intervene in charitable affairs in the past,[119] it may be that the transfer of powers to the CRA should be welcomed on condition that that the CRA is properly resourced to give effect to these unspecified transferred responsibilities.

IV Conclusion

A close study of the charity law reform proposals for Ireland and Northern Ireland reveals common concerns relating to charity governance and regulation that are shared with Scotland, England and Wales. Ireland and Northern Ireland share similar policy objectives in terms of charity regulation: to strengthen the charity sector and prevent fraud.[120] Provision of a charity register, greater transparency regarding the decision-making process for charitable status, a visible regulator for a sector that engages so often with the public through fundraising appeals and the reputation and continued success of which is based on trust and public confidence, these are all positive steps.

The tasks ahead in both Ireland and Northern Ireland in setting up the charities' register and bringing about a climate of accountability relating to both financial returns and charitable activity should not be underestimated. If done well, there will be great potential for increased public confidence, better internal governance standards in charities and a greater opportunity to showcase some of the wonderful work carried out by charity organisations operating on shoe-string budgets. If time and money are not invested in perfecting and policing the new regimes, there will be onerous new administrative burdens on charities without any quid pro quo for the majority that are already compliant. Different approaches to public benefit and to the specifics of charitable purpose will increase the temptation to forum shop whereas the separate financial accounting thresholds in each jurisdiction will make operating as a cross-border charity more challenging than ever before.

Steep learning curves lie ahead for the newly appointed regulators in both jurisdictions. In this regard, the transition of responsibility for charities must be handled carefully so that the collective, albeit fragmented, wisdom of those currently responsible for charity matters is not lost. This issue will be particularly salient in Ireland with the dissolution of the

116 See Arts 34.1 and 37 of the Irish Constitution, the former laying down the general principle that the function of administering justice is one solely for judges appointed under the constitution; the latter qualifying the former by providing that statutes may authorise the exercise of "limited functions and powers of a judicial nature" by persons other than judges in non-criminal cases. See further on the implications of these Articles, J P Casey, "The judicial power under Irish constitutional law" (1975) 24 *ICLQ* 305.

117 See Irish Charities Bill 2007, s. 36.

118 See Charities (NI) Bill 2007, cll. 12(3) and 15.

119 See O'Halloran and Breen, "Charity law" (n. 3 above).

120 "The purpose of [the Irish Bill] is to deliver reform of the law relating to charities in order to ensure accountability and to protect against abuse of charitable status and fraud": comments of the Irish Minister of State for Community, Rural and Gaeltacht Affairs on the publication of the Charities Bill 2007. "I believe this can only be a positive development, which will strengthen the charitable sector and protect it from potential abuse": comments of the Northern Ireland Minister for Social Development after the first reading of the Charities (NI) Bill 2007.

Commissioners for Charitable Donations and Bequests,[121] the transfer of the Attorney General's responsibilities for charities to the CRA,[122] and the express limitation of the Revenue's role in relation to charities to that of tax liability assessment only. Likewise, the breadth of powers bestowed on the CCNI presents a new statutory agency with omnipotent powers that will need to be wielded with care if the aspiration of light touch regulation is to become a reality.

Charities' perception of the new regime's success will be based upon their registration experiences with the new regulators, the proportionality of the administrative burdens placed upon them in complying with the new legislation and the extent to which the regulators will supervise charitable activity thereby allowing charities (and the public) to distinguish between well-managed bodies deserving of support and other less-deserving entities. Public perception of the charity regimes, on the other hand, will depend greatly on the user-friendliness of the registers, the responsiveness of the regulators to complaints and the workability of the new fundraising regimes. The last point will be dealt with predominantly by voluntary codes of practice in the Republic in conjunction with a public collections permit system run by the Garda Síochána. Northern Ireland regulation of public fundraising will also be based on a permit system, run by the CCNI. Whether Northern Ireland will opt for a non-statutory code of practice (as is currently proposed in the Republic)[123] or decide instead to follow the English and Scottish decision to establish a Fundraising Standards Board remains to be decided.

Even if the new regimes work well on both sides of the border, consideration should be given to how we might foster a system of mutual recognition of registered charities, thereby relieving some of the increasing burdens on charities that operate in more than one jurisdiction. Given a shared common law heritage coupled with the presence of cross-border charities, plus jurisdictional penchants for resolving similar problems differently, greater practical cooperation between charity regulators should be encouraged. One step forward would be to give formal recognition to the UK and Ireland Charity Regulators' Forum. Created in 2006, this body, comprising of officials from OSCR, the English Charity Commission, and the charity units from the relevant government departments in Ireland and Northern Ireland, seeks to encourage co-ordination of and consistency in regulatory approaches in the UK and Ireland, share information and best practice on charity regulation, and encourage effective working relationships between the devolved administrations responsible for the regulation of charities. The forum, which as a concept finds support in EU law,[124] is a welcome supplement to existing memoranda of understanding between certain regulators.[125] It is to be hoped that in its twice yearly meetings this body might formally take up the challenge of reducing some of the unnecessary differences that exist between the two jurisdictions so as to stimulate greater cross-border charitable activity without increasing the regulatory compliance burden on law-abiding charities.

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121 Irish Charities Bill 2007, Pt 6.

122 Irish Charities Bill 2007, s. 36, In contrast, in Northern Ireland, the Attorney General will continue to act in his role of *parens patriae* with regard to charities, see cl. 12(3) and s. 15 of the Charities (NI) Bill 2007.

123 See Irish Charities Tax Research, *General Statement of Guiding Principles for Fundraising* (Dublin: ICTR, May 2008) and *Final Feasibility Report: Regulation of fundraising by charities through legislation and codes of practice* (Dublin: ICTR, May 2008) at www.ictr.ie (last accessed 3 June 2008).

124 See European Commission Communication on *The Prevention of and Fight against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector*, COM(2005) 620 final (Brussels: 29 November 2005).

125 See www.oscr.org.uk/ukandirelandcharityregulatorsfor.stm. See, e.g. Memorandum of Understanding between the Office of the Scottish Charity Regulator and the Charity Commission (June 2007).

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Paul O'Higgins (1927-2008)

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Professor Paul O'Higgins who died on 13 March 2008 was an outstanding scholar, lecturer and researcher. He contributed to the education of successive generations of law students at Christ's College, Cambridge. O'Higgins was well known and respected. His scholarly reputation came from his contribution to three specialist areas of law: civil liberties, labour law and social security law.

In the field of civil liberties his *Censorship in Britain*[1] provided an analysis of how state intervention in the lives of ordinary people came in many forms including rules about obscenity as well as measures to protect the national interest through secrecy and confidentiality laws. He was pioneering in his perception that the state's claim for the public interest in underpinning public order, in fact, concealed inroads into the private lives of ordinary citizens. He was sensitive in recognising the precarious nature of the freedoms that we take for granted in Britain and vigilant against liberty being incrementally eroded. His *Cases and Materials on Civil Liberties*[2] provided a useful compendium of information of available civil liberties and their limitations in Britain, long before the advent of the Human Rights Act 1998.

In labour law, O'Higgins with Bob Hepple edited the *Encyclopaedia of Labour Relations Law*[3] and collaborated on other works with Hepple, including *Individual Employment Law*.[4] In many respects the partnership with Hepple provided a bed-rock on which labour law thrived at Cambridge and this legacy endures today. And in social security law, he co-edited, with Martin Partington, a *Bibliography of the Literature on British and Irish Social Security Law*.[5] O'Higgins was a bibliographer of international reputation. In this, he helped to engage with the future of legal scholarship and make accessible many obscure but significant works.

His enduring love of Ireland included a sensitivity and respect for Irish legal history, a subject for which he had an encyclopaedic knowledge and understanding. His interest in Irish legal history was clear from some of his early writing. In 1960, he published several bibliographical notes in the *American Journal of Legal History*. His *Irish Jurist* article in 1966 on "English law and the Irish question" provided an intellectual basis for the study of the

1 London: Nelson, 1972.

2 London: Sweet & Maxwell, 1980

3 London: Sweet & Maxwell, 1972.

4 London: Sweet & Maxwell, 1971.

5 London: Mansell, 1986.

common law in Ireland. His efforts provided recognition for Irish legal history as an indispensable part of legal historical studies in Britain. This recognition did much to encourage comparative work and highlight the distinctive and original contribution that Irish scholars could make.

O'Higgins was fascinated by the work of law reporters and the importance of Irish law publishing as a means of understanding how the legal profession developed in Ireland and the influences that shaped its development. His analysis of the life of William Sampson (1764–1836) for the *Dublin University Law Review* in 1970 is a good example of how significant but obscure individuals could be identified by O'Higgins and given recognition for their achievements. In his research in Irish legal history, his preoccupation was to find evidence and establish facts that could be verified and authenticated. The debunking of myths and the rejection of mere assertion gave O'Higgins a critical appreciation of the truth and its realisation through rigorous analysis and scholarship. Assessing the significance of historical material and understanding the past became an abiding theme of his lifelong devotion to collecting bibliographical material. Very often the only source for an obscure article or trial was with the author's own collection – an indication of how professionally he took his task of collecting and verifying. In 1966, O'Higgins published *A Bibliography of Periodical Literature Relating to Irish Law*[6] followed by the First Supplement in 1975 and the Second Supplement in 1983. Three years later came his monumental *A Bibliography of Irish Trials and other Legal Proceedings*[7] which was awarded the Joseph L Andrews Bibliographical Award by the American Association of Law Libraries in 1987.

This defined the availability of a vast array of material on Irish law that undoubtedly was path-breaking. The surprise was just how much material was available and how little research had been undertaken. The bibliography reveals many forgotten and obscure sources that contribute to deepening our understanding of Irish law to an extent previously thought impossible as many legal records had been destroyed or overlooked over previous centuries. In this way, O'Higgins has provided a foundation in the subject for present and future generations of scholars.

In all the bibliographical works there is a painstaking and meticulous attention to detail and his method of cataloguing sources has made the availability of material an achievement of note. O'Higgins brought an astonishingly acute legal eye for detail into the study of social, political and economic issues and in defining sources and identifying ideas and influences.

O'Higgins was also an enthusiastic and committed teacher who made the student learning experience enjoyable and rewarding. At weekends during term he and his wife Rachel hosted tea at his home in Cambridge where different generations of research students and undergraduates would meet. These were memorable and happy occasions and the couple's kindness and generosity were truly appreciated. His time spent at Cambridge from the early 1960s until his appointment to the Regius Chair of Laws at Trinity College, Dublin, in 1984 was epoch making. The study of labour law and of civil liberties were established at the university and research students flourished in this environment. O'Higgins returned to England in 1987 when he was appointed to a Chair of Law at King's College until he retired in 1992. He was elected Vice-Master of Christ's in 1995.

He was a passionate believer in individual liberty and spoke out against injustice. His attitude to education was a holistic one. He believed that well-educated young people could make their mark on the world and through their contribution repay the debt that they owed. He believed that the value of education was in its passage to future generations and

6 Belfast: *NILQ*.

7 Abingdon: Professional Books, 1986.

that reason and knowledge gave way to understanding which was the best antidote to prejudice and bigotry.

O'Higgins was a tireless and selfless scholar who willingly shared his knowledge, time and understanding with others. He belonged to a generation that valued scholarship; that regarded teaching and research as inextricably linked so that all would benefit. His legacy will endure and there are countless students who will carry with them the value of his friendship and the integrity of his thinking.