CHARITY GOVERNANCE:
THE CHALLENGES OF
MULTIPLE REGULATORY
REGIMES

Dr. Oonagh B. Breen
UCD School of Law
GOVERNANCE MEANS . . .

“A transparent decision-making process in which the leadership of a nonprofit organization, in an effective & accountable way, directs resources & exercises power on the basis of shared values.” (Dochas Governance Code, 2008)

“The systems & processes concerned with ensuring the overall direction, effectiveness, supervision & accountability of an organization.” (UK Governance Hub, Governance Code, 2005)
PRINCIPLES OF THE CODES OF GOVERNANCE
CODE KEY PRINCIPLES IN IRELAND AND THE UK

1. **Board leadership** - trustees to collectively ensure delivery of objects, strategic direction and the upholding of values.

2. **The Board in Control** - trustees to be responsible and accountable for ensuring and monitoring that the organisation is performing well, is solvent and complies with its obligations.

3. **The High Performance Board** - trustees should have clear responsibilities and functions, and should compose and organise itself to discharge them effectively.

4. **Board Review and Renewal** - trustees to periodically review their own and the organisation’s effectiveness and take steps to ensure both continue to work well.

5. **Board Delegation** - trustees to set out functions of sub-committees, the chief officer and other staff and monitor their performance.

6. **Board Integrity** - trustees to act according to high ethical standards and deal with conflicts of interest effectively.

7. **The Open Board** - trustees to be accountable to stakeholders.
New Definition of “charity” – all charities must register with the CRA – offence to hold a body out as a charity if it is not registered.

For registered charities, duty to keep proper books of account

New reporting requirements: Annual Report & Annual returns; New Audit & independent examination requirements

New disclosure requirements – public will be able to view register of charities, to inquire into activities of charity, and to examine the submitted annual returns

Investigatory powers of Regulator to ensure good stewardship of charitable assets supported by Court orders to remove/suspend trustees or freeze charitable assets.
GOVERNANCE IMPLICATIONS

 **Section 14 Functions of CRA include:**
  
   Increase public trust and confidence in management & administration of charities;
  
   Promote compliance by charity trustees with duties in control & management of charities;
  
   Ensure accountability of charities to donors, beneficiaries and the public;
  
   Ensure & monitor compliance by charities with the Act;
  
   Encourage and facilitate the better administration & management of charitable organizations by provision of information/advice via guidelines & codes of conduct;
  
   Promote effective use of charitable property.
BROADER PICTURE—Parallel Regimes

- Across the Britain and Ireland there are *four separate systems* of charity law and regulation – *four jurisdictions*:
  - England and Wales (Charity Commission for Eng & Wales)
  - Scotland (Office of the Scottish Charity Regulator)
  - Northern Ireland (Charity Commission for Northern Ireland)
  - Republic of Ireland (Charities Regulatory Authority)

- Massive changes in last few years in all of these:
  - Charities and Trustee Investment (Scotland) Act 2005
  - Charities Act 2006 *(for England & Wales)*
  - Charities Act (Northern Ireland) 2008
  - Charities Act 2009 *(Ireland)*
COMMON ELEMENTS TO EACH REGIME

- Two-part Charity Test plus Regulator in charge of Register

- Regulator administering compliance regime—once registered a charity must keep annual accounts & report to Regulator on stewardship in fulfilling purposes

- Charities submit to a system of monitoring, investigation and of enforcement by Regulator (backed up by the Courts) and subject to Appeals Tribunal

- Each jurisdiction operates controls on fundraising

- BUT differences in detail as to how these requirements are employed in each jurisdiction
VARYING CHARITY TESTS . . .

**England & Wales**
- 13 heads of charitable purposes
- Public benefit is not “presumed” but no detailed definition in Charities Act 2006
- Charity Commission required to issue guidance on public benefit: seven principles established (2008)

**Scotland**
- 16 heads of charitable purposes
- Public benefit is not “presumed”
- Public benefit test is defined in Act 2005
- OSCR guidance on public benefit (2008)
- Consideration of “disbenefits” and fee-charging is explicitly part of Scottish charity test

**Northern Ireland**
- 12 heads of charitable purposes
- Public benefit is not “presumed”
- Consideration of detriment and fee-charging is explicitly part of NI public benefit test
- CCNI required to issue guidance (Consultation Nov 2009)

**Ireland**
- 3 Pemsel heads of charitable purposes plus 12 under “other purposes” = 15 in all
  - Public benefit is *still* presumed in the case of gifts for religion
  - Public benefit test includes consideration of undue restrictions and charges to beneficiaries
DEFINITIONS FOR TAX PURPOSES . . .

England & Wales
- New definition of “charity” under Charities Act 2006 applies for charity regulation and for tax purposes

Northern Ireland
- Once implemented, Northern Irish definition (2008 Act) will apply for charity regulation
  - E&W definition (2006 Act) applies for tax law
  - So most NI charities need to meet both tests (as in Scotland)

Scotland
- Scottish definition (2005 Act) applies for charity regulation
  - E&W definition (2006 Act) applies for tax law* (excl CC guidance)
  - So most Scottish charities need to meet both tests in order to call themselves charities and have charitable tax benefits

Republic of Ireland
- Once implemented, ROI definition (2009 Act) will apply for charity regulation
- BUT 2009 Act does not change tax law, so Revenue Commissioners will not be bound by CRA registration decisions for tax purposes
NEW STATUTORY GOVERNANCE REQUIREMENTS IN IRELAND

- Duty to keep books of account (s. 47)
- Annual statements of account (s. 48)
- Annual Returns (s. 49)
- Provisions for audit and independent examination (s. 50)
- Requirement of all registered charities to make Annual Report to CRA (s. 52)
- Requirement to provide CRA with information
- Public inspection of all annual reports and returns held by the CRA for public charity trusts
- Sanctions for non-compliance affect both trustee and charity (s. 44)
PRACTICAL IMPLICATIONS FOR CHARITY TRUSTEES

- Act empowers CRA to “promote compliance by charity trustees with their duties in the control and management of charitable trusts and charitable organisations”

- Trustees must be qualified to act (s.55)

- Penalties for both Trustees and staff if disqualified persons act – including personal liability of Trustee/staff member for any losses incurred (ss.56-57)

- Whistleblower obligations for Trustees, Auditors, Investment managers or those involved in account preparation (s. 59)

- Charities Act permits charities to buy trustee indemnity insurance (s. 91)

- Court can grant relief from liability for breach of trust (s. 90)

- Charities can now pay trustees in certain circumstances for non-trustee work (s. 89)
UPCOMING CHALLENGES -- REPORTS & RETURNS

- If an existing charity with a CHY number, it will be “deemed” registered; if new charity, it will have to apply for registration.

- Filing of Annual Report: - if Irish version resembles the UK Tee Annual Report will include information on the charity’s aims, objectives & achievements; governance and management; identification of risk; financial policies and funding sources

- Unincorporated charities will be required to file annual return with the CRA

- Incorporated charities will continue to file their annual returns with the CRO; the CRO will then make them available to the Charities Regulatory Authority.

- New requirement re religious companies ltd by guarantee – not currently required to file full accounts with CRO. 2009 Act will require them to supply such accounts to the Charities Regulatory Authority.
HOW TO PREPARE

- Check if your charity has a CHY number or whether you must apply to the CRA for registration.
- Do you have the appropriate systems and books of account in place?
- Do you have the appropriate skills and resources on board?
- Should you review your internal governance?
- Are Trustees/Directors aware of their responsibilities?
- Are assets protected from possible liability?
- Are appointments of Directors/Trustees up to date and filed (e.g. with CRO and Revenue)?
- Are you compliant with existing codes of fundraising practice?
- Have you carried out a risk assessment of your charity?
- Are you active in any of the UK jurisdictions?
FOR THOSE ORGANIZATIONS ACTIVE IN THE UK AND IRELAND . .

- Cross-border charities will need:
  - To meet the charity test for *each jurisdiction* where they operate (otherwise they cannot call themselves charities)
    - This may mean changing governing documents, especially in Ireland where the definition of charity is narrower than in the UK jurisdictions
  - To register with *each* regulator where required
  - To meet charity tax requirements *wherever* concessions required
  - To meet the accounting requirements of *each* regime
CROSS BORDER CHARITY EXAMPLES . . .

Charity A:
Established in England
Operates with premises throughout UK and Ireland

It must:
- Register with CCEW
- Register with OSCR
- Register as a s167 body with CCNI
- Register with CRA in Ireland
- Produce accounts which meet:
  E&W charity accounting rules
  Scotland charity accounting rules (including info on work in Scotland)
  ROI charity accounting rules
  Separate info on N Ireland activities for s167 NI requirements

Charity B:
Established in Ireland
Operates throughout UK

It must:
- Register with CRA
- Register with OSCR
- Register as a s167 body with CCNI
- Produce accounts which meet:
  Irish charity accounting rules
  Scottish charity accounting rules
  Separate info on N Ireland activities for s167 NI requirements

**BUT**
No requirement to register with CCEW – even though most of its work may be in England
No requirement to follow E&W charity accounting rule
LONGER TERM CHALLENGES

- **Existence of funding for capacity building in charities?**
  (“Government accepts that support will be required for charities to meet their obligations in the new regulatory environment and, in bringing in this new regulation, the Government commits that additional resources to assist the sector in this transition will be made available.” *Towards 2016*)

- **Towards 2016** (“increased investment in the Community Services Programme of €30m by 2009”) versus **McCarthy Report** (“Given the severe pressure on the public finances, and the traditional reliance of these groups on donations as well as the contribution of unpaid volunteers, the Special Group is of the view that the allocation for this Programme should be substantially decreased by €10m annually.”)

- **Sufficient staffing and resources for effective Charities Regulatory Authority?**

- **Better liaison through Charities Regulators Forum to minimize administrative burden on cross-border charities?**
THANK YOU! QUESTIONS?

oonagh.breen@ucd.ie