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Charitable Incorporated Organisations: An Analysis of the Three UK Jurisdictions

Abstract: The specific legal forms available for charitable organisations have received much less attention by scholars as compared to work on the definition of charity, the boundaries of charitable status and the duties of charity trustees. Under each of the three UK jurisdictions, it could be argued that all charitable property is held on trust (in the sense that it is held for interests of the charity's beneficiaries) but many charities are no longer formed using the structure of a trust. Charitable organisations can have many possible structures including charitable trusts, charitable associations, charitable companies and now charitable incorporated organisations (CIOs). Until recently the UK lacked any specific legal form for charities. The CIO was created to remedy this: a corporate body with limited liability, formed purely by registration with the appropriate charity regulator. Since 2008 it has been enshrined in statute in all three UK jurisdictions, though implementation dates only from 2011 in Scotland and from 2013 in England and Wales. The focus of this paper is a comparison of the CIO form in the three UK charity law jurisdictions. It analyses the frameworks for CIOs established in England and Wales, Scottish CIOs (SCIOs) and the (yet to be implemented) CIOs in Northern Ireland. It concludes that whilst the CIO concept is effectively reflected in all three jurisdictions, the differences between these three types of CIOs are much more than just those needed to comply with the different regimes of charity regulation – the differences raise important choices for those seeking to establish new charities operating UK-wide.

Keywords: charities, charitable structures, charitable incorporated organisations, incorporation of charities, charity formation, CIO, SCIO, UK jurisdictions, England and Wales, Scotland, Northern Ireland

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1 Introduction

This paper presents an analysis of a new form of legal entity, the charitable incorporated organisation (CIO), which was enacted between 2005 and 2008 in all three jurisdictions of the United Kingdom (UK): England and Wales, Scotland and Northern Ireland. It briefly discusses the history of the rationale for CIOs as a new vehicle for third sector activity, before exploring in more detail the differences between the three jurisdictions.

It shows that, as a result of differences in the primary and secondary legislation across the jurisdictions, there are substantial differences between the three forms of CIO which go well beyond the normal differences needed to frame legislation in each part of the UK. It considers the possible reasons for these differences, and in the light of them, examines the issues to be considered when establishing a new charity to operate UK-wide, in terms of the most appropriate choice of home jurisdiction if the CIO form is to be used.

2 Charities and Legal Structures: Management and Governance

Legal structures are not always seen as the most important issue in understanding third sector organisations (TSOs) and within the very extensive literature on the governance in the third sector, few authors provide more than a brief discussion (if any) of the legal entities being governed. Almost all writers in the field stress in some way the need for formalisation of a TSO, in other words the need for a measure of institutionalisation (Saloman and Anheir 1992) requiring a defined structure and boundaries. But the legal means by which this is achieved is rarely explored outside the technical works on charity law (e.g. Luxton 2001; Picarda 2010, 2014) or co-operative law (Cracogna, Fici, and Henry 2013; Snaith 2014), or practical guides for those setting up and running charities (e.g. Adirondack 2009). Even where there is considerable discussion of the significance of charitable status in TSO governance (e.g. Hind 1995; Courtney 2013) or in attracting charitable donations (e.g. Tinklman 2010), the possible legal forms of charity receive little or no attention.

Writers frequently take for granted that not-for-profit organisations (NPOs) or TSOs more generally will be governed by a board (trustees, directors, committee), which has oversight of the organisation – but even where charitable status is considered, it is rare to find explicit discussion of alternative structures for charities except in specific works on charity and third sector law. This is

illustrated in an article from a quarter of a century ago (which went on to have considerable influence on the development of CIOs) where a distinguished legal writer commented: “A non-lawyer regards a charity as a separate legal entity and is surprised when faced with the diversity of possible legal structures” (Warburton 1990).

This lack of attention in the management and governance literature may seem surprising, as from the 1990s onwards, third sector practitioners in the UK were expressing concerns at the structures available to them, and there was considerable lobbying of government, by bodies such as the National Council for Voluntary Organisations (NCVO 1996, 99 recommendation 3) and the Charity Law Association (CLA, NCVO, and University of Liverpool 1997), to legislate for new forms – although it is clear that leading charity lawyers were behind these moves (Quint 2000). However, concerns about legal structures were not just raised by charities – there was also pressure to create new forms of business for other types of non-profits, in particular for non-charitable social enterprises (see Snaith 2007).

3 Structures for Charities: The Case for the CIO

Historically, charities in the UK were mainly formed as trusts, or occasionally by incorporation through Royal Charters (Luxton 2001). Subsequently it became clear that an association of members governed by rules (a constitution) could be recognised as a charity if established for exclusively charitable purposes.

However, charitable trusts and associations lack corporate personality under any of the UK jurisdictions,¹ making it impossible to hold property or enter into contracts in the name of the charity itself.² This could be remedied to some extent by the appointment of a corporate trustee, and in due course English law provided a means which dates back to 1872³ for the trustees to apply to the Charity Commissioners for a certificate of incorporation, with the vesting of all

¹ Proposals were published by the Scottish Law Commission in 2009 for granting corporate status to Scottish associations if they met certain criteria, but a consultation by the Scotland office at Westminster identified further issues to be addressed before this could be implemented: *Reforming the law on Scottish unincorporated associations and criminal liability of Scottish partnerships: the Government's response to consultation* (Scotland Office 2012).

² In practice there are many instances of contracts drawn up in the name of unincorporated bodies as though the charity was a legal entity, but in the event of a dispute the courts must first seek to construe the identity(ies) of the actual contracting party(ies), which can be problematic.

³ First enacted in s.7 of the Charitable Trustees Incorporation Act 1872 (Picarda 2014, 563–66), subsequently updated or consolidated in s.50, Charities Act 1993 and now to be found in s.251, Charities Act 2011.

trust property in the corporate body. But such arrangements have not been frequently used, as they lack the benefits of limited liability which are available if the charity is structured as a company.

In recent years, therefore, the majority of larger charities have adopted the form of a charitable company: a company limited by guarantee with exclusively charitable purposes that is also registered as a charity. However, this form means the charity is subject to dual regulation under company law and charity law. This creates a significant burden, particularly for smaller and medium sized charities needing to incorporate (see Morgan 2013, 61–4) – in particular:

- (a) annual returns and changes of trustees/directors have to be notified both to the relevant charity regulator as well as to Companies House;
- (b) all members have to give a financial guarantee which, though small and very unlikely ever to be demanded, can be off-putting to prospective members wishing to support a charity;
- (c) various requirements of company law have to be followed, many of which are designed primarily to protect shareholders with a financial investment – for example, the right to appoint a proxy at an Annual General Meeting of a charitable company;
- (d) the accounting requirements are considerably more demanding for charitable companies as compared to other charities: in particular the option of preparing the accounts on a receipts and payments basis is available for most charities (including CIOs) up to £250,000 income, but this is not available for charitable companies and so the annual accounts have to comply with the relatively demanding requirements of the “Charities SORP”;⁴
- (e) constitutional changes to the articles of a charitable company require a combination of procedures under company law and charity law, involving both the charity and company regulators – unless all these steps are completed in the correct order, the change is not effective.

For some years in the second half of the twentieth century charity lawyers had expressed concerns about the lack of a specific legal form in the UK for charities – bearing in mind that many other countries, particularly in the civil law jurisdictions, had various legal structures for NPOs.

⁴ *Statement of Recommend Practice on Accounting and Reporting by Charities*. See Charity Commission (2005) for the version applicable for financial years commencing up to 2014 (but new 2015 SORPs have been published which take effect for accounting periods beginning on or after 1 January 2015).

Proposals gradually emerged suggesting that the way forward would be a new kind of corporate body, specific to charities, which would have corporate status and the protections of limited liability, but registered and regulated solely under charity law. The first written source appears to be the previously mentioned article by Warburton (1990) which suggested the term “charity corporation”. However, as a fundamentally new legal entity, it could only be implemented by primary legislation. The limitations of existing structures were raised in Parliament as early as 1991 in House of Lords debates on the Bill which became the Charities Act 1992 in England and Wales, but there was insufficient time to progress the issue.

Detailed work on a new structure can be traced to a 1996/97 project established jointly between the Charity Law Association, the NCVO and Warburton and her colleagues at the University of Liverpool Charity Law Unit (CLA, NCVO, and University of Liverpool 1997). Their report, which suggested the term “charitable incorporated institution” (CII) proposed many features which subsequently found their way into the legislation for CIOs.

The first formal interest by government came from the Department of Trade and Industry (DTI) as part of a wide-ranging review of company law (which was to lead, eventually, to the Companies Act 2006). The review documents included a substantial chapter on “Alternative Vehicles and Access to Limited Liability” focusing mainly on NPOs (DTI 2000a, chapter 9). Within this there was considerable support for “a separate corporate vehicle for charities” – a CII – as proposed by the CLA/NCVO/Liverpool report. The DTI recognised that this would be best implemented purely under charity law (rather than as an extension of company law) with the Charity Commission acting as registrar and regulator (for CII established in England and Wales) and with alternative arrangements in Scotland. It also suggested the CII structure should be specific to charities, and not extended to other NPOs. The DTI even published skeleton instructions for the drafting of legislation.

Responses to this aspect of the consultation were published separately by the DTI (2000b). For the most part responses were extremely positive regarding the CII concept, though a number of refinements were suggested. The CLA suggested a number of changes and raised concerns about the CII name – one of the alternatives suggested was a “charitable incorporated organisation” (CLA 2000) which was the name eventually accepted.

In the light of the DTI proposals, the Charity Commission appointed an Advisory Group to examine the CIO in more detail. The report of this group was published on the Commission’s website (Charity Commission 2001), with specific recommendations on how the CIO would work and the legislative detail needed (much of which was subsequently enacted in the Charities Act 2006). It

was clear that the Commission had no major concerns about the concept of the CIO and could see many potential advantages.

At the same time, following Scottish devolution, a commission was established to consider a new approach to charity legislation north of the border (McFadden 2001). Amongst many other issues, the McFadden Commission examined the DTI proposals for the CII and concluded:

We are keen that trustees of Scottish Charities should benefit from any changes proposed and have made an interim recommendation to this effect to Scottish Ministers. This means that the DTI can proceed with a British proposal for change. The proposal is that: there should be a new form of incorporation called Charitable Incorporated Organisation (CIO).

However, it seems from this comment that it was not appreciated at the time that if the CIO was to be implemented under charity law (which was a devolved matter) it would need separate primary legislation in Scotland.

Meanwhile, the UK government had been increasingly focused on the role of the voluntary sector in the delivery of public policy and it had been suggested that many charities had inappropriate legal forms to take on public sector contracts (HM Treasury 2002). Following the re-election of Tony Blair's New Labour government in 2001, one of Blair's first announcements was to institute "a comprehensive review of the legal framework for charities and the voluntary sector" (Cabinet Office 2001). This was to be led not by the Home Office (which traditionally had responsibility for charities) but by the newly formed Performance and Innovation Unit (which later became the Strategy Unit) based in the Cabinet Office in order to take a cross-government perspective.

The outcome of this review was the report *Private Action, Public Benefit* in which the Government first formally recognised the benefits which CIOs could offer (Cabinet Office 2002, 57–8). This contained a discussion of "the legal forms taken by charities and other not-for-profit organisations". It pointed out that the UK had no specific corporate form for charities, and listed five reasons why companies limited by guarantee were less than ideal.

A box in that report set out the basic features of a CIO, which corresponded almost exactly to the final reality (see Table 1). (The report also made many other recommendations to improve the legal framework for charities and social enterprises,⁵ most of which were implemented well ahead of CIOs – in particular it

⁵ A number of government documents refer to "charities and social enterprises" as though they are distinct forms of TSOs, but social enterprise in the sense of "trading for a social purpose" can arise in both charitable and non-charitable organisations. A CIO may well undertake trading activities in pursuit of its charitable purposes and may therefore describe itself as both a charity and a social enterprise.

Table 1: Main features of a charitable incorporated organisation.

A corporate body	<ul style="list-style-type: none">– Can hold its own property– Can sue and be sued in the name of the charity (rather than trustees personally)
Limited liability	<ul style="list-style-type: none">– Members are not liable for the debts of the CIO
Governing document	<ul style="list-style-type: none">– Constitution
Registration	<ul style="list-style-type: none">– Entirely by the charity regulator (the registration <i>creates</i> the CIO and <i>confirms</i> its charitable status) – every CIO is a registered charity
Governance	<ul style="list-style-type: none">– Charity trustees (similar to trustees/directors of a charitable company, but no obligations under company law)
Accounting	<ul style="list-style-type: none">– As for other non-company charities – special rules for charitable companies <i>do not</i> apply
Name	<ul style="list-style-type: none">– Normally ends with “CIO” (“SCIO” in Scotland) unless the status is otherwise disclosed on documents
Members	<ul style="list-style-type: none">– A CIO always has a membership but it can have a two-level structure of members electing trustees or single level where the only members are the trustees
Insolvency	<ul style="list-style-type: none">– Regulations in England and Wales create a similar framework to the insolvency arrangements for limited companies (though Scotland applies an approach more akin to personal bankruptcy). (Details in NI will depend on regulations yet to be made.)

proposed the creation of community interest companies⁶ as a specific form of asset-locked company for non-charitable social enterprises.)

4 Legislation and Implementation

Private Action, Public Benefit initially proposed the implementation of CIOs solely in England and Wales, leaving the devolved governments in Scotland and Northern Ireland to make their own decisions, but in the end the process of charity law reform moved forward in all three jurisdictions. The article does not attempt to document all the extended discussions which led to the final legislation, but following further consultations and white papers,⁷ legislation for CIOs

⁶ Implemented in the Companies (Audit, Investigations and Community Enterprise) Act 2004.
⁷ For more on the process leading to enactment of CIOs in England and Wales and SCIOs in Scotland, see Cross (2008).

was eventually enacted in Scotland in 2005 (where the structure was called a “SCIO”),⁸ in England and Wales in 2006⁹ and Northern Ireland in 2008.¹⁰ (Unless otherwise stated, the abbreviation “CIO” is used in this paper to refer to all three forms.)

The close timing of the CIO legislation – with enactment in all three jurisdictions over a span of just three years – could be considered surprising given the very different historical traditions of charity law and regulation, the generally long intervals between charity legislation and the very different experiences of the charity regulators. England had had a system of charity law dating back to the 1601 Statute of Charitable Uses (arguably earlier) and a permanent body of Charity Commissioners since 1853 and a register of charities since 1960. Under the Charities Act 2006, the Commissioners became a corporate body as the Charity Commission for England and Wales (CCEW).

Both Scotland and Northern Ireland had no charity regulator equivalent to CCEW until the Acts of 2005 and 2008, respectively, though most charity cases were matters of tax law and were thus considered in relation to the English interpretation of charity.¹¹ A measure of charity regulation for Scotland had, however, been established under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and subsequent regulations, which meant Scotland had a framework for charity accounting, but there was no direct equivalent to this in Northern Ireland (Breen, Ford, and Morgan 2009).

The 2005 Act created the Office of the Scottish Charity Regulator (OSCR) with formal powers from 2006, and the 2008 Act led to the Charity Commission for Northern Ireland (CCNI) which became operational in 2009.

One of the major features of the CIO concept is that the registration of the CIO would be handled by the body empowered to make decisions on charitable status (Morgan 2013 4), and the three Acts had a number of differences in the definition of “charity” (Breen, Ford, and Morgan 2009) administered by the separate regulators CCEW, OSCR and CCNI. The three Acts thus empowered CCEW, OSCR and CCNI each to register CIOs, subject to charity law in their respective jurisdictions.

Even once the primary legislation was passed, there were considerable delays in finalising secondary regulations. In the end, the Scottish Executive

⁸ Charities and Trustee Investment (Scotland) Act 2005, ss.49–64.

⁹ Charities Act 2006, now consolidated in Charities Act 2011, ss.204–50.

¹⁰ Charities Act (Northern Ireland) 2008, ss.105–122 and Schedule 7.

¹¹ It is worth noting that the seminal case which led to the formalisation in case law of the four heads of charity, *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, was actually a Scottish case.

decided not to wait for their counterparts at Westminster, so implementation came first in Scotland, with SCIOs available from April 2011, nearly two years earlier than the implementation in England and Wales in January 2013. Implementing the whole framework for charity registration in Northern Ireland has taken longer, largely due to amendments to the public benefit requirement,¹² but it seems certain that CIOs in Northern Ireland will be implemented in due course.

However, in both England and Wales, and in Scotland, CIOs are proving very popular. By the end of 2014, OSCR reported that 48% of new charity registrations north of the border were SCIOs¹³ – and in England and Wales the proportion had reached 44%, less than two years after the registration of England and Wales CIOs became possible.¹⁴

5 Jurisdictional Comparisons

It is clear from the discussion above that there was wide support for the CIO concept in addressing the deficiencies in existing legal forms for charities.¹⁵ The focus of this paper is not on the broad concept of the CIO, but on the differences in the CIO form across the three UK charity law jurisdictions. It compares CIOs established in England and Wales under the 2011 Act (referred to as E&W CIOs), Scottish CIOs (SCIOs) formed under the 2005 Act and the (yet to be implemented) CIOs in Northern Ireland (NI CIOs) which will be formed under the 2008 Act.

Although at first sight the E&W CIO, SCIO and NI CIO may appear to be near-identical bodies in different jurisdictions, the differences between them are far wider. Table 2 provides a summary of the main features of each CIO form,¹⁶ followed by a discussion of some of the principal differences.

The most fundamental distinction is that the three jurisdictions have differing definitions of “charity” – so whilst all three bodies are charitable institutions as defined under the legislation of their home jurisdictions, they are not all

¹² Charities Act (Northern Ireland) 2013, s.1.

¹³ OSCR Management Information (to Dec 2014) reports that 546 Scottish charities were registered in the nine months from 1 April to 31 December 2014, of which 262 (48.0%) were SCIOs.

¹⁴ Data from the CCEW online register shows 3,517 charities registered between 1 April and 31 December 2014, of which 1,538 (43.7%) were CIOs.

¹⁵ The deficiencies are discussed further in Morgan (2013, chapter 4).

¹⁶ The table is slightly adapted from Morgan (2013, 308–9).

Table 2: Summary of major features of CIOs in each jurisdiction.

Legal form	E&W CIO	SCIO	NI CIO
Central feature	Corporate body with limited liability and registered as a charity under the English definition	Corporate body with limited liability and registered as a charity under the Scottish definition	Corporate body with limited liability and registered as a charity under the Northern Irish definition
Primary legislation	Charities Act 2011, ss.204–250	Charities & Trustee Investment (Scotland) Act 2005, ss.49–64	Charities Act (Northern Ireland) 2008, ss.105–122 & Schedule 7
Secondary legislation	CIO General Regulations 2012 CIO Insolvency and Dissolution Regulations 2012 <i>(Total: 83 pages)</i>	SCIO Regulations 2012 SCIO Removal from the Register and Dissolution Regulations 2012 <i>(Total: 10 pages excluding sample forms)</i>	<i>Not yet made</i>
First established	2 January 2013	1 April 2011	<i>Awaited</i>
Minimum number of members	One	Two	One
Insolvency framework	Follows Insolvency Act 1986 (adapted for CIOs)	Similar to framework for personal bankruptcy in Scotland under Accountant in Bankruptcy	<i>To be confirmed</i>
Regulatory approval needed for constitutional amendments	Regulated alterations ¹⁷ need approval by CCEW – others just agreed by members	Regulated alterations need approval by OSCR – others just agreed by members	Regulated alterations need approval by CCNI – others just agreed by members

(continued)

¹⁷ The term “regulated alterations” refers to constitutional amendments which affect the charitable objects, rules on trustee benefits or dissolution – provisions which cannot generally be amended purely by the CIO’s members without the consent of the relevant charity regulator.

Table 2: (Continued)

Legal form	E&W CIO	SCIO	NI CIO
Proportion needed to agree constitutional amendments at a general meeting of members	75%	Two thirds	75%
Process of implementing constitutional amendments	Do not take effect until registered with CCEW	Must be advised to OSCR, but take effect immediately	Do not take effect until registered with CCNI
Access to register of members	Any member may ask for a copy but members can give service addresses	Any member may ask for a copy but addresses may be redacted if the member is not a trustee	<i>To be confirmed</i>
Provisions for CIO mergers with automatic transfer of property, assets and liabilities?	Yes – but only between E&W CIOs	Yes – but only between SCIOs	Yes – but only between NI CIOs

charities in the same sense of that term. For example, an E&W CIO must have purposes (expressed as objects in its constitution) which are charitable under the Charities Act 2011,¹⁸ but in some instances it might be impossible to form an SCIO with the same objects, as the objects and associated activities would not in all cases meet the slightly tighter definition of public benefit¹⁹ which lies at the heart of the “Scottish charity test” in the 2005 Act.

There are also differences in the definition of what is included in the “advancement of religion” between English and Northern Irish charity law,²⁰ and Scottish charity law offers no explicit clarification of this term. These definitions have yet to be tested, but it is likely that CIOs advancing certain belief systems could be established in one or two jurisdictions but not all three. Moreover, both Scotland and Northern Ireland allow for the concept of a “designated religious charity” (DRC) which is subject to lighter regulation than other charities, and whilst this is not specific to CIOs, the designation of a CIO as

¹⁸ Charities Act 2011, ss.1–5.

¹⁹ Charities and Trustee Investment (Scotland) Act 2005, s.8.

²⁰ Charities Act 2011, s.3(2)(a); Charities Act (Northern Ireland) 2008, s.2(3)(a).

a DRC would have different implications for governance in each case (Morgan 2013, 256–60 and 292–4). The concept of a DRC does not apply in England and Wales, although it is worth noting that many religious charities under £100,000 income are excepted from registration under the Charities Act 2011,²¹ but this exception does not apply to CIOs since every CIO is a registered charity. It follows that religious CIOs, even where their objects clearly fall within the “advancement of religion” under all three definitions, may face different levels of regulation in each jurisdiction. The powers of the charity regulators to intervene in religious CIOs in the event of concerns are strongest in England and Wales, a little lighter in Scotland (where there are considerable hurdles to be classified as a DRC) and lighter again in Northern Ireland (where the DRC definition is broader).

Secondly, it must be stressed that the three Acts each introduced a new legal entity in their respective jurisdictions, so they are three distinct entities. The E&W CIO, the SCIO and the NI CIO are each corporate bodies subject to the courts of their home jurisdictions. For each of these forms there is comprehensive primary legislation allowing CIOs to merge with other CIOs without loss of legal personality – i.e. with all property, assets and liabilities automatically transferred. This is a very significant feature of the CIO legal form (Morgan 2013, 209–14), but such arrangements are not possible on a cross-border basis. So it is not possible for an SCIO to merge directly with an E&W CIO, or for an NI CIO to merge directly with an SCIO as these are fundamentally different entities – any such merger could only be achieved with a formal winding-up of one of the existing CIOs and a transfer of assets.

There are also significant differences in membership requirements (a single member CIO is not permitted in Scotland), in the processes for constitutional amendments, in the rights of members to have access to registers in order to contact other members and, in particular, very different frameworks in the event of a CIO being unable to meet its obligations and subject to an insolvent dissolution. These distinctions are summarised in Table 2. Appeals against decisions affecting CIOs by the relevant charity regulator – for example an appeal against a refusal to register a CIO – are subject to substantially different processes under the First-tier Tribunal (Charity) in England and Wales,²² the Scottish Charity Appeals Panel²³ or the Charity Tribunal of Northern Ireland.²⁴

²¹ Charities Act 2011, s.30(2)(c) and Charities (Exception from Registration) (Amendment) Regulations 2014.

²² Charities Act 2011, ss.315–331.

²³ Charities and Trustee Investment (Scotland) Act 2005, ss.75–78.

²⁴ Charities Act (Northern Ireland) 2008, ss.12–15.

The SCIO is governed by a legal framework which in many ways is far simpler than the E&W CIO (for example, the SCIO regulations amount to only 10 pages compared to 83 pages for E&W CIOs). The insolvency framework of the SCIO largely follows the approach for personal bankruptcies in Scotland whereas an insolvent E&W CIO is subject to the normal corporate framework in the Insolvency Act 1986 (adapted by the regulations to be applicable to CIOs²⁵).

Some of these distinctions – for example the different definitions of charity, the different legal entities and the differences in regulation and appeal processes – are a necessary consequence of the decisions in the devolution process that charity law should be devolved in Scotland²⁶ and Northern Ireland.²⁷

But whilst charity law is devolved, many other areas of law – for example company law and most areas of tax law – are reserved to the Westminster Parliament, and thus operate UK-wide with very few differences. One of the major achievements of the company law reform process, as implemented by the Companies Act 2006, was to minimise the differences in company law between the jurisdictions of the UK, and the formerly separate framework for Northern Irish companies was integrated with the rest of Britain. Even the Community Interest Company – which, to a large extent, can be considered a specific structure for TSOs – is subject to a common framework and there is a single CIC Regulator for the UK as a whole.

It is thus interesting that the development of CIOs has taken a different path with far greater jurisdictional differences than would be needed simply to accommodate the different legal systems. To some extent, these differences, particularly between England and Scotland, reflect the chronology of the legislative process in each jurisdiction and the specific issues raised by interest groups in response to consultations – for example it seems that collectivists in the third sector in Scotland were uncomfortable with the idea of a single member SCIO (hence the requirement for at least two members), but in England it was felt useful to allow an entity which might be a single corporate person to be the sole member of a new CIO. But the differences also appear to reflect alternative perspectives by the respective legislatures regarding the fundamental purpose of offering the CIO form – for example, in Scotland the

²⁵ Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012, reg.3.

²⁶ Scotland Act 1998 (as amended), s.30 and Schedule 5 (Reserved Matters). Under Part II of Schedule 5 (Specific Reservations), section C1 makes the law of business associations a reserved matter, but charities are listed as a specific exception from this.

²⁷ Northern Ireland Act 1998 (as amended), s.4 – charities are not included in the list of reserved or excepted matters and are thus a transferred matter, on which the NI Assembly is able to legislate.

emphasis seems to have been on simplicity and pragmatism, whilst in England and Wales the focus appears to be more on retaining corporate parallels with company law. These differences are particularly evident in the vastly different insolvency regimes, and in the order of magnitude difference in the detail of the secondary legislation.

On many issues, the details for NI CIOs are yet to be determined and the regulations could end up closer to those for SCIOs or to E&W CIOs. The simplest solution for Northern Ireland Ministers would be to adopt the English CIO regulations with minimal alterations, as the CIO provisions in the Charities Act (Northern Ireland) 2008 are firmly based on the English precedent. But at a number of practical levels, the operation of Northern Irish charity law is closer to Scotland – for example, the requirements for universal charity registration, and the fact that both CCNI and OSCR are relatively new regulators wishing to avoid unnecessary complexity. So the Northern Irish CIO regulations may seek to draw on both the English and Scottish regimes in different respects. Other differences will necessarily emerge – for example, even if, as seems likely, Northern Ireland follows England and Wales in applying the company insolvency framework to NI CIOs, there are some differences in insolvency law between England and Northern Ireland²⁸ which will have to be extended to CIOs.

So it is clear that whilst the three forms of CIO have many similarities, the differences are far from minor, and seem almost certain to cause confusion amongst those involved in forming or running CIOs in more than one jurisdiction. Where a charity operates with a federation of local branches or centres, each structured as a charity in its own right, the obvious structure is to form each branch as a CIO – but if the branches are spread across the three UK jurisdictions, three distinct constitutional models are needed. Given the developments in cross-border harmonisation of non-profit regulation elsewhere in the world which have received considerable attention by researchers (e.g. Breen 2008; McGregor-Lowndes 2013), it seems unfortunate that the modernisation of charity law in the UK did not lead to a higher degree of harmonisation for the CIO structure.

6 CIOs Operating UK-Wide

Many charities operate across the UK – with local activities, services and fundraising spread in communities in all three jurisdictions. In some cases a

²⁸ Corporate insolvency law in Northern Ireland is governed by the Insolvency Northern Ireland Order 1989 which has a number of differences from the Insolvency Act 1986 (Morgan 2013, 300).

separate charitable organisation is established in each jurisdiction and arrangements are made for collaboration, but it is probably more common to establish a single entity in one home jurisdiction which then operates for charitable purposes (as locally defined) across the UK.

In such cases the organisation may be subject to more than one charity regulator (see Breen, Ford, and Morgan 2009; Morgan 2013, chapter 15) – for example many major UK charities are established as charitable companies in England and Wales and thus registered with CCEW (and Companies House) but also have to register with OSCR due to substantial Scottish presence. A review by OSCR (2012) provides statistics on 609 such cross-border charities registered both with CCEW and with OSCR. However, there is no converse arrangement – a charity established in Scotland but with activities in England cannot register with CCEW even if it wishes to do so, as it would not be an entity subject to the High Court of England and Wales.²⁹ In Northern Ireland, an intermediate approach is taken: in due course there will be a “section 167 register” of external charities operating in Northern Ireland.³⁰

Such cross-border registration can bring further complications. Once an external charity is registered with OSCR it becomes subject to almost all the provisions of Scottish charity law. In particular, it must make annual returns to OSCR and comply with the Scottish charity accounting rules.³¹ In many respects the Scottish charity accounting requirements are stricter than those in England and Wales, and these have considerable impact on charities operating UK-wide especially for those below the Scottish audit threshold of £500,000 income (in England and Wales the audit threshold is increased to £1M income from 31 March 2015³²). There are also differences in the independent examination requirements (for charities below the audit threshold) which, in several respects, are more demanding under the Scottish framework. For a cross-border charity established in England, but also registered in Scotland, the Scottish charity accounting rules will in practice take precedence (Morgan 2013, 305) even though only a small amount of the charity’s work may be in Scotland.

CIOs, like other charities, are subject to the cross-border complexities which arise whenever a charity is formed in one jurisdiction which may also operate elsewhere. So, in the case of a new charity being formed to operate UK-wide, where the founders decide to adopt the CIO form but where the charity could, in principle, be based anywhere in the UK, there are important questions as to

²⁹ Charities Act 2011, s.1(1)(b).

³⁰ Charities Act (Northern Ireland) 2008, s.167.

³¹ Charities & TI (Scotland) Act 2005, s44.

³² Charities Act 2011 (Accounts and Audit) Order 2015.

which form is most appropriate. It is too early to consider the NI CIO in detail as the final regulations are yet to be made, but in terms of the choice between an E&W CIO and an SCIO it is far from a straightforward choice.

As noted above, the SCIO is governed by regulations which are far simpler than the E&W CIO, and with insolvency procedures that omit options such as members and creditor's voluntary arrangements or placing the CIO in administration, whereas an E&W CIO is subject to the normal insolvency framework applicable to companies. Most importantly, for those seeking to avoid multiple regulator accountability, an SCIO is particularly attractive (as explained above, except in limited circumstances, an E&W CIO operating in Scotland is required to register with OSCR as well as the CCEW but the converse does not apply). A charity operating UK-wide but structured as an SCIO would simply account to OSCR as its main regulator, and a simplified report to CCNI under the section 167 register (this could be considered as oversight by 1.5 regulators) – whereas an E&W CIO operating UK-wide would be fully accountable to CCEW and OSCR, and to CCNI under section 167 (a total of 2.5 regulators). So those seeking minimum regulation will probably choose the SCIO. Also the SCIO can be considered a more established form, having been available since April 2011.

On the other hand, the E&W CIO could be considered more robust, given the greater detail in the framework, and the fact that insolvency would be handled under the 1986 Act in a similar way to company insolvencies may be more attractive to lenders.

Of course, the CIO is not the only option for a charity operating in more than one jurisdiction – in particular the proposed legal form of a European Foundation (see Breen 2013), when finally implemented, may offer an alternative legal form, specific to non-profits, operating across more than one country of the European Union. But, in order to gain the benefits of charitable status in the UK, a European Foundation would at the least need to gain charity tax recognition from HM Revenue & Customs, and if it had any substantial activities in Scotland and/or Northern Ireland, it would also have to apply to register with OSCR and/or with CCNI. For a charity whose operations are specific to the UK, the CIO will generally be the simplest option.

7 Conclusion

It is clear that the simplicity of the CIO in enabling a charity to have corporate status and limited liability without the overheads of company law is attractive to those seeking to form new TSOs with charitable status. Both in England and Wales, and in Scotland, CIOs are accounting for nearly half of all new charity

registrations. Many unincorporated charities are converting to CIOs and others are considering doing so. This is currently the case both with E&W CIOs and with SCIOs, and no doubt will also apply when NI CIOs are implemented. Legislation also allows for charitable companies in each jurisdiction to convert directly to CIOs without loss of legal personality.³³ In Scotland this has been implemented since 2012 and a steady stream of such conversions is occurring; implementation of the equivalent provisions in England and Wales is expected shortly.

Of course, the E&W CIO, the SCIO and the NI CIO have many similarities in terms of the concept as a corporate body that can only ever be established for charitable purposes (as defined in the jurisdiction concerned), each formed and regulated by the relevant charity regulator. They all have members and constitutional arrangements concerned with distinct roles of members and trustees. Each jurisdiction allows for conversion of charitable companies and CIO mergers without loss of legal personality – though only for CIOs within the jurisdiction concerned.

But the similarities do not go very much further. The differences in constitutional requirements (as laid down in regulations), insolvency arrangements, access to registers and similar issues create many traps for those unfamiliar with the differences. The impact of these differences is likely to increase as the CIO develops, and they raise profound issues for those considering where best in the UK to establish a new charity.

The analysis in the previous section showed that the question of where best to constitute a new CIO operating UK-wide may be determined largely by whether the priority is for simplicity of regulation (the SCIO) or robustness for creditors (the E&W CIO). The first major CIO insolvencies, where creditors face significant losses, will no doubt lead to significant questions on the relative merits of the different insolvency regimes. But other factors could be central to the decision: for a charity holding a sensitive membership list (e.g. a charity whose members have a medical condition such as HIV, or where the members hold unpopular views) issues such as access to the register of members could be the determining factor. For religious organisations the level of protection from interventions by the charity regulator such as suspending trustees could be a central issue.

It seems likely that as CIOs become more embedded in the landscape of the UK's not-for-profit sector that the differences between the three forms will cause difficulties and confusion, and hence that pressure for harmonisation will

³³ Charities Act 2011, ss.228–233; Charities and Trustee Investment (Scotland) Act 2005, ss.56–58; Charities Act (Northern Ireland) 2008, ss.112–115.

emerge. Some of the differences follow essentially from the different systems of charity law, but other differences are harder to explain: it is not obvious, for example, why a single member CIO is permitted in England and Wales, and in Northern Ireland, but why a minimum of two members is needed in Scotland. Similarly, it is hard to explain differences in the rules on access to a CIO's registers. As observed above, it seems that these differences arose largely because of different comments arising from pre-legislative consultations in each jurisdiction, and the lack of a co-ordinated timetable for implementation of CIOs, rather than from any underlying fundamental issues requiring different approaches in different jurisdictions.

Nevertheless, the greatest challenge applies not to the case of a single CIO operating UK-wide, but to charities operating through federations of local charities. The differences in charity law, even before the establishment of CIOs, created some difficulties in such instances – for example in the differing accounting requirements. The CIO is such an obvious structure to use in such federations, enabling each local centre to have its own corporate charitable personality and as a completely new form one might have expected more uniformity. Yet the fundamental differences in the underlying regulations could well lead to difficult practical consequences – such as needing to implement differing arrangements for member confidentiality or a loan scheme being available to the E&W CIOs in the federation but not the SCIOs, or vice versa.

This paper has analysed some of the jurisdictional differences, but until there is any jurisprudence affecting CIOs, it is too early to draw any conclusions on many of the issues raised. However, it is self-evident from this analysis that those operating CIOs, and professionals advising on the formation of CIOs, need to consider the differences carefully between the CIO form in each jurisdiction, rather than assuming they are simply “different versions of the same thing”.

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