

Charities Regulation & Legislation

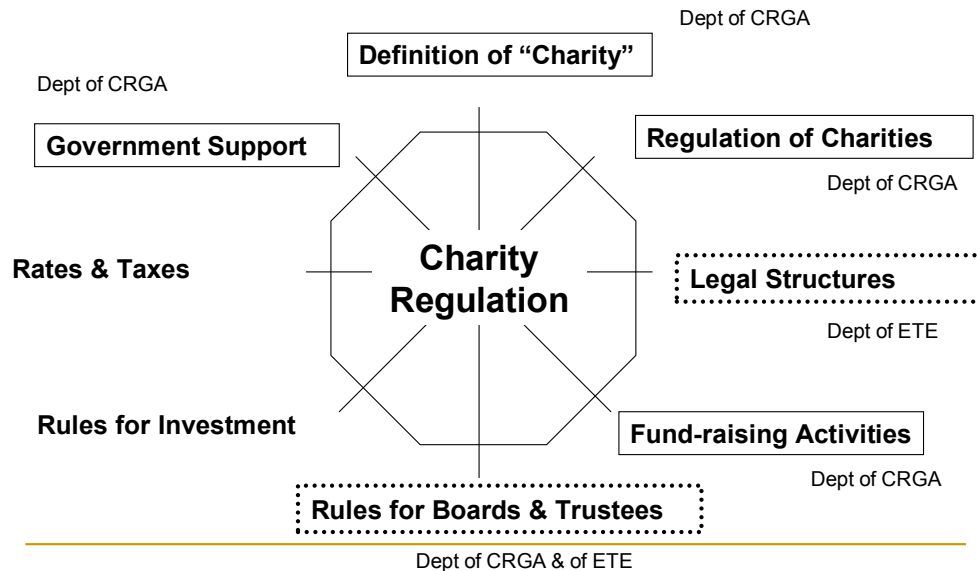
A Dóchas Briefing

March 2006

1. Legal Forms for Charities in Ireland
- *Proposal for a CIO*
2. Government Support for Charities
3. Government Regulation of Charities
- *Proposal for a Charity Regulator*
4. Regulation in Northern Ireland, UK and EU
5. Next Steps for Development NGOs.

Introduction

The 8 Dimensions of Charity Regulation – Topical Issues for 2006



There are many dimensions to the topic of "Charity Regulation" and "Charity Legislation".

Some of these relate to the long legal history of defining what exactly constitutes a "charity", and how Government should work with such organisations. Others relate to the rules Government can set for taxing charitable activities, what rules apply to their fields of activity, and their operations. There are also rules for the functioning of organisations' boards and the responsibilities of their Directors/Trustees, and there are documented guidelines on their financial accounting, their fundraising and their trading activities.

There are currently some major changes under way on three of these dimensions. Changes that will affect the work of all Irish Development NGOs:

- **Definition of Charity:** Who should be classified as charitable?
- **Government Support:** How and why Government should support (financially or otherwise) charitable activities;
- **Regulation:** How Government should regulate the activities of charities;
- **Organisation:** What legal entities charities should or can have;
- **Fundraising:** Setting standards for who should be allowed to collect, and how.

This briefing paper outlines the key elements in these proposed changes, and aims to alert Development NGOs to the potential ramifications of these changes for their work.

Defining a “Charity”

■ History:

1601: Statute of Charitable Uses (organising private charities by specifying “charitable purposes”; adding secular dimension to charity)

1634: Irish version of Statute.

1888: Charitable Uses Act

1891: Charitable Purpose defined (a legal case establishes the four charitable purposes: “relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community”) - “Pemsel Categories”

1961: Charities Act

1973: Charities Act

2001: Valuation Act: new definition of charitable organisation

2005: Dept of CRGA proposes new “Pemsel” Categories of Charitable Purposes.

The concept of a “charity” has a long history in Ireland. But the concept has never been defined in legislation. Rather, it has been developed in four centuries of case law. While this approach allows for flexibility and diversity, it can be bewildering and difficult to understand.

In March 2006, the Government presented a new statutory definition of “Charitable Purposes” as part of its proposed legislation on charities.

Under currently existing Irish law, Government recognition of a charity does not confer legal status on an organisation.

Government recognition has implications for a charity’s tax status, but not for the way it is organised or structured:

- A charity can be a company, and a charity may occasionally engage in for-profit activities;
- Charities are not all NGOs, and not all voluntary organisations are charities;
- Organisations working for the common good are not necessarily charities, and many charities pursue the interest of a small group, not necessarily society as a whole.

The Government has committed to bring order in this confusing situation.

1. Legal Forms for Charities

- There is not one particular legal entity specifically for charitable organisations.
 - Charities can be:
 - Unincorporated (eg. associations)
 - Companies (eg. Company Limited by Guarantee)
 - Trusts
 - Friendly Societies
 - Other: Statutory Bodies or Industrial & Provident Societies
 - Each legal entity has its pros and cons
 - Difficult to assess extent of charity sector
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In 2000, the Government resolved to streamline registration and regulation of Charities in Ireland, in an attempt to redress some of the confusion, and to ensure that the Irish legal framework is optimised for the effective functioning of charities.

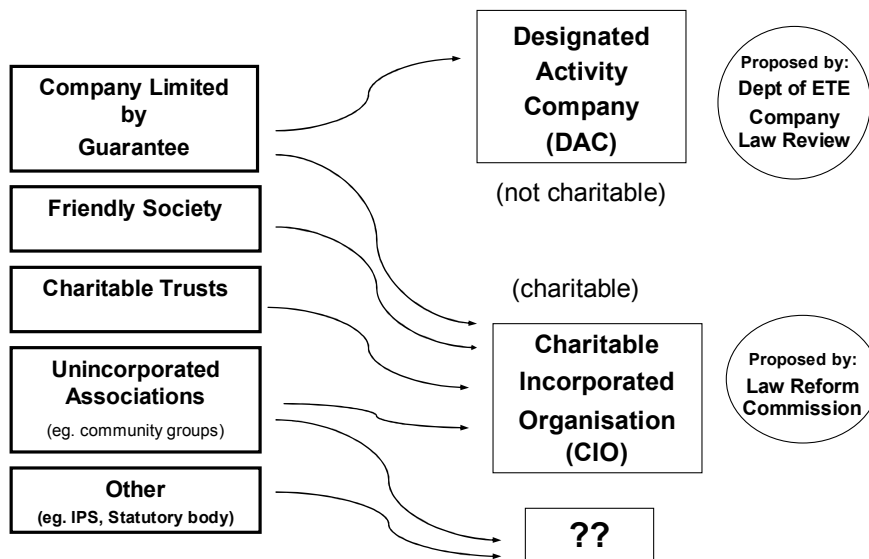
There have been a few initiatives to date:

- 2000: Company Law Review
- 2002: Law Society proposal for charity legislation
- 2003: Dept. of CRGA proposal for legislation
- 2005: Law Reform Commission on Trust Law
- 2006: Law Reform Commission on Charity Law
- 2006: Dept. of Trade on Designated Activity Companies

The core of the argument is that **the legal form of a charity should help, not hinder, its work.**

- ⇒ The requirements placed on charities by their legal forms (eg. company) can often be burdensome, putting artificial constraints on the organisation.
- ⇒ Board members of membership-based organisations have conflicting duties in their roles of company trustee/director and representative of a member organisation, and enjoy little protection.
- ⇒ Because of the multitude of legal forms, there is no clear indication of who is a charity and who isn't.

New Legal Forms for Charities?



There are currently two practical proposals on the table for providing legal entities that would address this need:

1. The **Designated Activity Company (DAC)**, proposed as part of the Department of Enterprise, Trade & Employment's review of Company Law. The DAC would suit groups such as non-charitable community interest groups, social enterprises and/or trading subsidiaries of charities. This legal entity would recognise the fact that not all companies are the typical for-profit organisations for which the Company Law was designed. DACs would be allowed to lock their profits into the company, for not-for-profit purposes.
2. The **Charitable Incorporated Organisation (CIO)**, proposed by the Law Reform Commission. This would be the first legal entity specifically designed with charities in mind. It would offer directors/trustees the benefits of limited liability offered by existing Company Law (eg. protection against costs of winding up an organisation), but be less cumbersome. Trustees can be organisations, not just individuals as under Company Law.

(Note:

- A Charitable DAC is also being discussed, but not at present being proposed; in contrast to a CIO, the CDAC would remain in the reach of Company Law, not Charity Law.
- In the UK, a Community Interest Company is being introduced; see later on in this document.)

What this means for Development NGOs

- CIO: clearly a “charity”
- Protection through limited liability of Directors
- Suitable for membership organisations
- Separation of activities: charitable only; no trading
- Organisations have choice: CIO or stay with old entity
- Flexibility: Speedier change of constitution
- Irish law harmonised with UK

Details of CIO not yet known.

Organisations that choose to register as a CIO are clearly identifiable as a “charity”. This means they fall under Charity Law, and will report to the Charity Regulator. These organisations will have no need to fulfil all other requirements of the Company Law, a law that was not written with them in mind.

As Company Law is getting more complicated, many Directors of charitable companies were finding it difficult to be aware of the full extent of their responsibilities under law. Also, Company Law does not allow for two-tiered organisations, as Directors should be individuals, not other organisations. A CIO, however, does allow this.

Charities that are regulated by Trust Law will find opting for the CIO interesting, as it will offer protection under limited liability for their trustees.

The CIO structure is voluntary: each organisation can choose if it wants to convert to a CIO, or remain with the status quo. (but not converting will mean dual reporting; to the companies office as well as to the charity regulator)

BUT:

- CIOs can only be charities. They are not allowed to engage in trading! (unless trading “solely for the purpose of the charity” [eg. religious books] or “trading is carried out by the beneficiaries” [eg. Blind craft])
- CIOs are not open to all charities. Not clear at present what will happen to those that don’t fit.
- There is a potential divergence between CIO rules and trust/company law on duty of care.

- The CIO will bring new requirements for board members, and new reporting requirements. Organisations will need to brief board members on their duties and responsibilities.
- There is a major issue around the conversion to the CIO entity: How exactly should charities affect the transfer of property/contracts/liabilities? How will the system cope with potentially thousands of organisations wishing to convert at the same time?
- At present, it is as yet unclear how CIOs will relate to Charity Law.

2. Supporting Charities

- Ireland has a long history of Government support for Charities
 - Church-based education system
 - Voluntary hospitals
 - 1830's: Poor Laws set minimum social service provision
 - 1950's onward: State funding for voluntary activities (eg. Health Act) and tax exemption for charities.
- 2000: Government to modernise the legal & policy framework
 - Dept. of CRGA White Paper on “supporting voluntary activity”.

But support & dialogue require regulation!

In the beginning of the 21st century, Ireland is seeing a step change in the relationship between State and the voluntary sector.

With the publication of the White Paper on “supporting voluntary activity”, new formal procedures have been introduced for consultation and dialogue with, and support for voluntary organisations.

The White Paper represented a recognition by Government of the “underdeveloped legal and policy framework in Ireland for the support of voluntary work.” The Government sees a role for the voluntary sector as part of a “vibrant, participative democracy,” and therefore introduces:

- **formal mechanisms for consultation and policy dialogue;**
- **multi-annual funding for priority services.**

However, **for these mechanisms to function, regulation of the sector is inevitable.**
(Cf. parallels with Irish Aid and Dóchas)

3. Regulating Charities

■ History:

1853: Charity Commissioners for England & Wales established (not for Ireland)

1990: Costello report (committee examining fundraising activities for charitable purposes, recommending regulation)

1996: Burton report (proposed setting up of a national fund-raising register)

2001: Tax Reform (tax paid on donations reclaimable by charities; charity exemptions from rates)

2002: Programme for Government (stating the Government “will enact comprehensive reform of the law of charities”; to ensure accountability and to protect against abuse.)

2003: Consultation: Dept of CRGA consultation paper proposes creation of a Charity Regulator

March 2006: Legislation: Publication by the Dept. of CRGA on the Charity Regulator

The charity sector in Ireland is unregulated. There is no body which has the specific aim of supervising the sector, or has the power to maintain a register of charities.

There is no:

- reliable information on the number of charities active in Ireland;
- reliable information on the financial worth of the charity sector;
- reliable information about the number of people working in the sector;
- reliable information on the way charities spend their funds.

Following a lengthy consultation process, started in 2003, the Department for Community, Rural and Gaeltacht Affairs (CRGA) in March 2006 published the outlines of a Bill proposing the regulation of the charity sector.

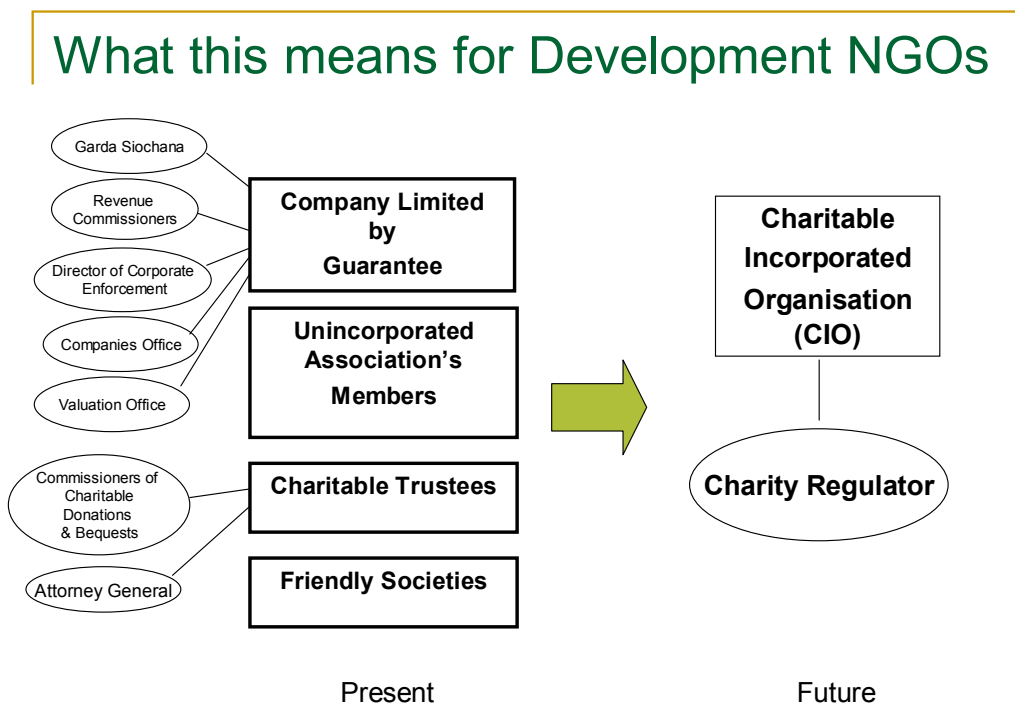
The Bill provides “an integrated system of mandatory registration and proportionate regulation and supervision of the charities sector For the first time, too, there will be a statutory definition of what a charity is.”

The proposed Irish Regulatory Authority for Charities, would have five objectives:

- a) to increase public trust and confidence in charities;
- b) to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;
- c) to promote the effective use of charitable resources;
- d) to enhance the accountability of charities to donors, beneficiaries and the general public;
- e) to promote awareness and understanding of the operation of the public benefit requirement.

The Charities Regulator would have the following general functions:

- 1) **to determine whether institutions are or are not charities;**
- 2) to establish and maintain an accurate and up-to-date **register of charities;**
- 3) to encourage, facilitate and **monitor compliance by charities** with the legislation;
- 4) to **investigate apparent misconduct or mismanagement** in the administration of charities and to take remedial or protective action;
- 5) to encourage and facilitate the better administration and conduct of charities by the **provision of advice, best practice guidelines, codes of conduct, and model constitutional documents;**
- 6) to give information to the Minister for Community, Rural and Gaeltacht Affairs.



1. Simplicity: First and foremost, the proposal to create a Charity Regulator will simplify matters for charities: rather than a host of governmental organisations (some of which are ill equipped for the task) to deal with, there will be one single entity to relate to.

The Regulator will take over tasks currently undertaken by:

- the Revenue Commissioners (registration);
- Companies Office (registration);
- Gardaí (investigations);

- Director of Corporate Enforcement (prosecution & investigation);
- Commissioner of Charitable Donations & Bequests (adjust deeds and advice to trustees).

2. Obligation: Registration with the Regulator is compulsory for charities (equally for charities headquartered in Ireland or just operating here).

3. Reporting: Registered charities have to make annual returns (“to include both financial information and an activity statement”) to the Charities Regulator, in the shape and form prescribed by the Regulator.

At this stage, it is hard to see if this will increase or decrease the burden of work on charities. It is for certain, however, that it obliges charities to list how much money they raised and what the costs of raising it was.

4. Behave: The Regulator will issue Codes of Conduct and guidelines on good practice. At this stage it is not clear whether these Codes would be obligatory, or just recommended.

BUT:

A number of questions remain on the details of the Charity Regulation. These include:

- **Friendly Policeman?** How will the Regulator combine its dual role “policing” and “supporting” the sector? What scope is there for a separation of these two roles? The draft Bill mentions potential sanctions, but there is little evidence of incentives and support mechanisms.
- **Accountability?** Will the Regulator focus on a narrow definition of accountability (justifying the use of funds; limiting the administrative costs, etc), or will it focus on the other dimensions of accountability (eg. towards the organisation’s beneficiaries)?
- **Politics?** Will the Regulator allow charities to engage in policy influence and advocacy? Where will it draw the line, and on what basis? What sanctions will there be for organisations deemed “political”?
The list of “charitable purposes” includes references to Human Rights, social justice and the “advancement of citizenship”, but omits the reference to “advocacy” that was there in previous drafts!
- **Standardisation?** Will the Regulator apply all standards equally to all charities, irrespective of size and capacity? What balance will the Regulator strike between accountability and flexibility?
- **Self-Regulation?** The draft Bill does not make reference to promoting self-regulation initiatives, or promoting networking and exchange among civil society organisations. What value is there in recognising codes of conducts agreed by (sections of) the sector, such as by Dóchas and other networks?

- **Government lead?** “In the absence of a comprehensive umbrella organisation representing the sector” the Charity Regulator is set to take the lead in formulating codes and rules. How can we ensure proper consultation and proper input by charities?
- **Jurisdictions?** Many charities undertake activities under separate structures, or in separate jurisdictions (eg. Northern Ireland). What rules will apply for consolidated reporting?

Regulation in Northern Ireland and UK

- **Northern Ireland:**
 - Proposals for modernisation of charity law: “integrated system of registration and regulation” through an NI Charities Commission.
 - Introduction of a CIO
 - **Scotland**
 - Charities & Trustees Act 2005
 - Introduction of SCIO
 - **England & Wales**
 - Existing Charity Regulators
 - 2004: Charities Bill
 - Introduction of a CIO
 - Introduction of a CIC (Community Interest Company) for community enterprises
 - not charitable; reporting to independent regulator.
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Developments in Ireland mirror those in the United Kingdom: CIOs are being introduced in England, Wales, Scotland and Northern Ireland. But Ireland is behind in a number of other aspects, not least the creation of Charity Regulators and umbrella structures for the voluntary sector:

- Legislation creating the CIO in England and Wales has already passed the House of Lords. A Scottish CIO is being introduced.
- England & Wales have had Charity Commissioners since 1853
- Voluntary sector umbrella organisations exist in Northern Ireland (NICVA) and England (NCVO).

Regulation in EU

- Since 1992: discussions on a Statute for a European Association
 - allowing charities to operate across the EU

 - 2005: Commission proposal for a Code of Conduct for Non-Profit Organisations
 - Developed out of security concerns
 - Member States to develop registration & regulation of NGOs
 - NGOs (networks) to develop labels for compliant organisations
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Much of the impetus for change in the charity legislation is inspired by the European Commission's push to tighten up on loopholes that can be exploited by ill-willing individuals.

A review post 9/11 showed that some NGOs had served as channels of funds supporting suspected terrorist activity. The international Financial Action Task Force (FATF) had urged international action to prevent abuse of charity law for terrorism, and the EU Member States have taken a lead in this regard.

In March 2004, the Council adopted Conclusions on Combating Terrorism, outlining the EU's strategic objectives, which was followed up by a Declaration in July 2005 that Member States would agree a "Code of Conduct to prevent the misuse of charities by terrorists."

In July 2005, the Commission published a set of recommendations to EU Member States, which recommended that:

- **Member States should put in place mechanisms for the oversight and monitoring of the non-profit sector;**
- **Member States should oblige non-profit organisations to register basic information with a central government service;**
- **Member States should oblige non-profit organisations to formulate and adhere to a Code of Conduct on Transparency;**

- **Member States should develop public information campaigns, highlighting the vulnerability of NGOs;**
- **Member States should put in place mechanisms for EU-wide investigation of suspicious non-profit organisations.**

During 2005, the Commission has consulted Member States and the public, and has promised to organise an expert conference “in the first semester of 2006”.

The code is, as the commission claims, a move to “protect the [NPO] sector ... against the threat of being exploited for the financing of terrorism”. The proposed code lays out rules it expects all NPOs in every European Union member state to abide by in order to demonstrate integrity and credibility. These include the maintenance of annual financial statements, minutes of trustees’ meetings, and full and accurate audit trails of funds.

There are a number of concerns with the Commission’s proposals:

- **Who?** There is uncertainty about the definition of non-profit organisations – is it overlooking the difference between fund-raising NPOs and others?
- **Diversity?** Should the same requirements apply to large and small NPOs? Does the Code mean that all NGOs that are slightly different are suspicious? Do the risk factors included boil down to the assumption that Muslim organisations are suspicious? Does the Commission recognise that most NGOs have multiple bank accounts, and that Development NGOs sometimes work with partner organisations that do not have access to formal banking systems?
- **Dubious:** The code has also been criticised for what it calls “risk indicators” that can be used to identify dubious activity in the non-profit sector. One of these is the maintenance of “several different bank accounts”. Another such proposed indicator is “sharing offices with other organisations”.
The Commission suggests that an NPO that “chooses a form of activity that it is not legally required to register or falls under minimal or no supervision” should be linked with terrorism financing.
- **Impact:** If not supported by verification systems, Governments will lose credibility, and so will NGOs will.
- **Non-Profit?** Why has the corporate sector been excluded from these concerns about transparency and potential misuse?
- **Enforcement?** Why has the Commission identified NPOs as one of the key risks in the fight against terrorism? Would it not be more logical to strengthen law enforcement mechanisms first?
- **Consultation?** The Code has been put together in a tremendous hurry. Consultation took place during one month, in the summer holidays.

Next Steps

1. Law Reform Commission:

- Consultation period until 31 March
- Write to express support for CIO, asking questions about details, and ask for further consultation.

2. Dept of CRGA / Charity Regulator:

- Bill now going to the Oireachtas
- Seek clarifications from Dept. CRGA
- Contact TDs with concerns.

3. European Union:

- Contact MEPs and Dept of CRGA
 - Write to express concerns about subjective nature of NGO assessment (“different is dangerous”) and risks of demonising NGOs.
 - Need to improve law enforcement, not NGO monitoring.
 - Need to acknowledge non-formal banking in developing countries.
 - Need to acknowledge that NGOs work in “high risk countries”
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First and foremost:

Let Dóchas know what your concerns are!
