

**The Evolving Leadership and Governance Forum**

# **Governance and Cross Border (UK) Charities in Scotland**

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### **Introduction**

The 'Evolving Leadership and Governance Forum' (the 'Forum') is a collaboration of organisations committed to strengthening leadership and governance in the third sector in Scotland. In 2010 the Forum work programme included running three workshops on key issues. The second Workshop, on the 30<sup>th</sup> September, was on governance and Scottish charities across the borders of the UK. 17 people attended the Workshop, hosted by ACOSVO and OSCR. The participants included the chief officers of OSCR and the Northern Ireland Charity Commission

The Facilitator was Shirley Otto, a specialist in third sector governance. Prior to the Workshop Shirley circulated a paper summarising key points from practitioners and research reports.

These guidelines are based on these reports, the presentation from OSCR and the learning points from the Workshop.

### **Why focus on Governance and Cross Border (UK) Charities in Scotland?**

Devolution and the establishment of OSCR and the Charity Commission for Northern Ireland have the potential to significantly alter the nature of governance in third sector organisations working across the four nations of the UK. Problems and dilemmas about powers, the delegation of authority and appropriate structures are widespread, and although they may be of long standing, they are brought into profile by the difference in regulation. There have been some very public disagreements. Yet there are also organisations that have identified, and resolved the key issues for them and put in place sound policies and practice.

This report is intended to advance understanding of the circumstances surrounding governance in cross border charities and disseminate best practice

## A case study

What do the issues mean in reality? The following case study is based on the experience of a mix of charities in Scotland

### ChildCareMatters

ChildCareMatters is a well-established charitable company registered with the Charity Commission for England and Wales and OSCR. The charity campaigns for affordable childcare in Scotland and England. The Board of Trustees, based in York, governs ChildCareMatters. In Scotland ChildCareMatters have a small office, a paid Manager, 3 staff including one who manages IT and prepares the annual budget, and a part time fundraiser, and volunteers who report to a Scottish Committee. The chair and vice chair of the Scottish Committee sit on the ChildCareMatters Board of Trustees.

ChildCareMatters has just emerged from a difficult, but ultimately constructive, internal re-structuring. The Trustees, following a financial review, decided on a cost cutting programme including reducing administrative cost by locating all fundraising and IT, from Scotland, to the head office in York. The Board are anxious to reduce administration costs as surveys and media coverage confirms that these are an issue for donors throughout the UK.

These proposals were not well received by the Scottish organisation. The disputes that followed identified issues for ChildCareMatters about conflict of loyalties, inadequate strategic planning and communication. The Trustees and staff in York did not fully understand accountability for funds restricted to services in Scotland – many donors, including statutory funders, as well as OSCR, ask for Scottish specific information such as legacies generated from Scotland which HQ could not provide without changes to the management systems. Nor did they appreciate the value of allowing a local organisation to influence plans about local circumstances.

The Scottish Committee and staff, although aware that the Board of Trustees had ultimate authority in the organisation, tended to act as if they were semi-autonomous viewing information sharing and resources in terms of their situation without regard to the organisation as a whole.

The Trustees, knowing that they were planning to run a pilot project in N. Ireland, invested in a series of joint trustee and staff workshops on governance and communication. With the help of an independent facilitator an action plan was devised to update the constitution, revise role descriptions and improve communication across the whole organisation.

Underpinning these changes was a commitment to work together to assist parents and children in all 3 nations.

## **Does the regulation of cross border charities matter to people in Scotland?**

A nfpSynergy survey of 1,000 adults (aged 16+) *in Scotland* in April 2010, found that,

- a majority (56%) of the sample would prefer charitable donations to be spent in Scotland and
- there is a sharp drop in the perception of a charity as Scottish when they do not have Scotland explicitly in the title.

It appears it matters to many people in Scotland that funds donated to charities in Scotland are allocated to Scottish causes and services – wherever the charity is formally located

### **The regulator's perspective**

(Based on the presentation by Jane Ryder, Chief Executive, OSCR).

All charities operating in Scotland, if they wish to call themselves a charity must register with OSCR. Indeed entry on the Register is what confers charity status. This is in marked contrast with the situation in England and Wales where not all charities, even domestic charities, are required to register with the Charity Commission. The situation in Northern Ireland is likely to be the same as Scotland, in that all charities will have to register in due course.

While OSCR is the “host country regulator”, there is likely to be also an existing “home country” regulator. At present the “home country” for virtually all cross border charities registered with OSCR is England and Wales, and the Charity Commission for England and Wales is therefore the primary other/“home country” regulator.

There are 680 out of the 23,500 charities on the Register which are identified as being cross border. Those charities, account for a disproportionately large percentage of gross income. Indeed, 13 of the 20 largest charities on our Register are cross border charities which are multi-million pound concerns – the British Council, the Open University, and Oxfam. However, at the opposite end of the scale, there are 2 cross border charities that have less than £1,000 gross income. Nevertheless 60% of income is in excess of £1,000,000 per annum. This is a significantly

different profile from purely Scottish charities where, as you know, approximately  $\frac{2}{3}$  of charities have annual income of less than £25,000.

## Reporting

It follows from the different registration requirements, that the Scottish reporting regime is somewhat different from that of England and Wales. OSCR had always intended that in addition to the comprehensive registration regime there should be comprehensive reporting, and the requirements of this have evolved over the last 3 years via:

- Reference Group which developed consultation proposals for a modified reporting regime for cross border charities.
- The launch of the consultation, which included sending the consultation document to all cross border charities of which we were aware. This attracted an encouraging 133 responses.
- A pilot study with 20 cross border charities in 2008.
- Finally, the introduction of the bespoke monitoring regime for cross border charities in May 2009.

Between the launch in May 2009 and August 2010, some 351 cross border charities, or just over 50% of the total, had returned the required information to OSCR with the remainder due by the end of December. An initial evaluation of these 351 Returns, in the main relating to the financial year ending during 2009, was collated in time for this Workshop and the publication of the OSCR monitoring report was launched on the day of the Workshop.

## Highlights from the Evaluation

(Further details can be found on the OSCR website: [www.oscr.org.uk](http://www.oscr.org.uk))

Some of the most relevant findings were:

- 93% undertake activities in Scotland. However, only 65% stated that they have staff based in Scotland.
- Just over 50% indicated the charity had Scottish trustees or a Scottish committee/steering group. This means a large proportion of cross border charities have their activities in Scotland managed by trustees or senior managers based elsewhere.
- Only 11% of the charities stated they consider they had identified specific risk relating to their objectives and activities in Scotland. The details are in the Trustees Annual Report (5%) or stated in the Annual

Return Form (6%) That means 89% of the charities in the population did not identify any specific risks relating to Scottish activities. The evaluation generously concludes that this may mean the activities being undertaken in Scotland by a majority of cross border charities are identical to those undertaken in England and Wales, and therefore the identification management of the risk across the organisation is no different. An alternative scenario is that trustees did not always appreciate the significance of being located in different nations made to their organisation; for example the impact (and therefore potential risk) for their organisation of different regulatory regimes.

- Of the 11% of charities which stated they had identified specific risk, the risks mainly related to:
  - Anticipated loss of Scottish funding due to cutbacks or,
  - Current funding agreements not being renewed at the end of their current period either due to cutbacks, increasing commercial competition of the same services being provided by the public sector,
  - The need for the charity trustees to be more familiar with Scottish Charity legislation in order to ensure compliance.

### **Differences in regulation**

There are some significant differences between Scotland and England and Wales, particularly in the different consents regimes. Charities do not require OSCR consent for a number of actions for which charities must seek Charity Commission consent including:

- Trustee remuneration
- Sale of land

For investigations, unlike the Charity Commission in England and Wales, OSCR does not need to formally distinguish between a simple enquiry and a full statutory enquiry: this gives OSCR welcome flexibility both in terms of the powers that can be used and also the speed of response, which is as critical in dealing with a compliant as the correctness of the eventual outcome.

What is particularly relevant to the subject of the Workshop is that the outcome of pressures and disputes tend to come to OSCR eventually as a complaint, or an identified issue about governance, which will go beyond registration and reporting and will touch on issues of power, rights and

responsibilities within and across borders. This Workshop is an important step in assisting charities to understand how these pressures and disputes can be addressed in a positive and constructive way.

### **Pressures and disputes**

What then are the common concerns, associated with governance, for UK cross border organisations? The kinds of issues and difficulties mentioned by participants at the Workshop, and in reports from board members, chief officers and consultants, are listed below.

1. Constitutions – unclear, inappropriate and /or out of date
2. Governance roles – unclear, conflictual and vague about the allocation of authority and liabilities
3. Structures (e.g. decision making or communication) – unclear and/or dysfunctional; accountability not understood; too great a focus on the HQs, or one nation; waste staff's time; poor systems for communications within and across borders
4. Legal form(s) – the need to separate the situation for (a) unitary cross-border organisations (i.e. parent organisation with dependent or semi-autonomous 'branches') from (b) those working in partnership with other autonomous organisations across borders
5. Quality of trustee induction and training – e.g. trustees unfamiliar with their governing document and ignorance about regulatory regimes
6. The capacity of trustees to give the time required; discontinuity of trustees.
7. Dilemmas of affiliation and loyalty and problems related to conflicts of interest
8. Power struggles between national / regional HQs and between the trustees/CE and committees in the affiliated nations.
9. Lack of respect and integrity when negotiating relationship issues
10. Few enabling policies and procedures (e.g. procedures for managing differences)
11. Impact internally of an unstable or uncertain economic climate of weak structures and poor communication
12. Different reporting requirements

## Getting the best out of governance in cross border organisations

The ideas of participants at the Workshop, and from practitioners and consultants, are listed below.

### Legal forms

It is essential cross border organisations carefully consider the implications for registration and governance of their *legal form(s)*. For example to decide between (i) unitary structure (one organisation with dependent 'branches'/ groups) and (ii) federal or group structure (with a parent body).

### Regulatory regimes

Essential to attend to the requirements of the relevant regulators (e.g. the wording of the governing document).

### Managing cross border organisations

#### A. *Talk four nations*

1. Clear framework for cross nation governance including powers (including who is in charge), roles and accountability;
2. Managing assumptions about powers, rights and accountabilities within and across borders (e.g. the nature of the delegated authority to national committees);
3. Guidelines on conflict of interest / alliances, decision-making and where to go if there are problems;
4. Trustees, chief officer and staff up to date on legal/policies & aware of regulatory differences and potential risks;
5. Reflect in trustee commitment & focus;
6. Included in recruitment & induction of trustees;
7. Trustee tailored code of conduct and toolkit.

#### B. *Tailored structures*

1. Match governance with the nature and function of the organisation - e.g. membership or branches. Some options:
  - (a) devolved committees
  - (b) trustees on a nation's committee/nation's rep/trustee on HQ's Board
  - (c) local advisory group (e.g. professionals and/or clients from outwith the organisation);
2. Avoid tokenism



3. Robust links and processes for consultation, co-ordination and communication across the whole organisation;
  4. Governance secretary to support trustees.
- C. *Same services across nations*
1. Protocol for processes, services clearly understood by trustees, chief officer and the senior management team - and reviewed regularly;
  2. Appropriate procedures for accounts/ financial information across nations;
  3. Clear expectations about allocation of surplus + deficits, activities, fund-raising, personnel and ICT
- D. *Values and branding*
1. The values, branding and culture reflect the reality within the organisation and supports the work;
  2. Commitment to getting together, to the Nolan principles - for example openness, integrity and honesty;
  3. Accept and manage the reality of conflicts of interest / alliance
  4. Understand that trust is best earned;
  5. Use governance to enable a shared vision across the whole organisation;
  6. Bear in mind-‘What is a good way for a charity to work is a good way to govern.’

### **Final reflections**

There are good reasons why third sector organisations work across the borders in the UK, usually because it reaches those in most need or it best service their cause. This is as it should be yet a shift in attitudes could bring even greater benefit – if only in terms of robust working relationships – *towards celebrating and investing* in cross border identity and organisation.

If, however, the disadvantages of cross border working prove greater than the advantages then, within the powers available to Trustees, there are other choices for legal forms. Would the cause, or service users, get greater benefit from a community of independent organisations working together as part of a strategic alliance (that just happens to cross the borders of the UK)? Legal forms are only tools for achieving the purpose and goals of an organisation.

## Resources

OSCR '*Cross- border charity regulation in Scotland; Guidance on statutory requirements and reporting to the Office of the Scottish Charity Regulator*', from OSCR website: [www.oscr.org.uk](http://www.oscr.org.uk)

OSCR (2010) '*OSCR monitoring of cross border charities: An initial evaluation*'. [www.oscr.org.uk](http://www.oscr.org.uk)

Butler, S. J. (2005) '*Branch networks in the 21<sup>st</sup> Century: a handbook*', Volunteering England: [www.volunteering.org.uk](http://www.volunteering.org.uk)

Breen, O.B., Ford, P. & Morgan, G. (2009) '*Cross-Border Issues in the regulation of Charities: Experiences from the UK and Ireland*', International Journal of Not-for-Profit Law, vol. 11, no.3, May.5.

nfpSynergy (2010) '*Scottish Research Seminar*', July 2010.

## Appendix

### EVOLVING LEADERSHIP AND GOVERNANCE FORUM

The Evolving Leadership and Governance Forum (the 'Forum') is committed to governance development in the third sector in Scotland. A primary role of the Forum is to share information and highlight guidelines and models of governance that work while overcoming barriers to governance development.

The remit for the Forum is to:

- Advance thinking on governance and issues of governance support and development
- Plan, and implement, a strategic and specific programme of support in response to emerging issues and examples of good practice
- Lead to actions that are demand-led and meet the needs of the sector
- Pilot examples of collaborative practice and joined up working
- Promote active leadership

Pat Armstrong Chief Executive of ACOSVO presently chairs the Forum.

#### **Members of the Forum** (as of Spring 2010)

Pat Armstrong of ACOSVO

Linda Boyes of ACOSVO

George Thompson of VDS (Volunteer Development Scotland)

Jackie Petitqueux of SCVO (Scottish Council for Voluntary Organisations)

Shirley Otto Independent Consultant (Management Development Network Scotland)

Kris Von Wald Independent Consultant

Neil McLean of the Social Enterprise Academy

Rod Hunter of SHARE (Scottish Housing Association Resources and Education).

Catriona Reynolds of Arts and Business

Steve Marwick of Evaluation Support Scotland

OSCR and the Scottish Government support the Forum.