

NORTHERN IRELAND REFLECTIONS ON THE CHARITY CHALLENGE: THE ELEMENTS OF CHARITABLE GOOD GOVERNANCE

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Introduction

The regulation of charities in Northern Ireland has come a long way since the passage of the Charities Acts 2008-2013. With the establishment of the Charity Commission for Northern Ireland (CCNI) in 2009 and the creation of the Register of Charities in December 2013, the process of mapping the charitable landscape has finally begun. The last four years have seen steady progress in the registration process – with over 5,000 charities now fully registered – while the CCNI continues to call forward for registration charities from the lists of deemed charities and non-deemed charities.¹ For newly registered charities, this has meant adjustment to the oversight of a new regulator and a new way of sharing information about what each charity does and how it does it, via the Charity Register. It has meant new reporting requirements with the introduction of the Charities (Accounts and Reports) Regulations (Northern Ireland) 2015 in the form of a requirement for fully registered charities to submit an annual monitoring return, the annual accounts of the charity (with the Independent Examiner's or Auditor's report, as appropriate) and the Trustee's Annual Report to the CCNI each year. It has also meant new avenues for public engagement, whether this takes the form of inquiry, praise or complaint.

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1 CCNI Newsletter Summer 2016.

The CCNI has placed a strong emphasis on the importance of good governance for charities. Its vision, as set out in its 2014-15 Annual Report, provides for ‘a dynamic and well-governed charities sector in which the public has confidence, underpinned by the CCNI’s effective delivery of its regulatory role’.² This, in many ways, raises the question of what we mean when we talk about a well-governed charities sector; in other words, what does ‘good governance’ look like in the charity context?

The concept of governance at its most basic refers to the process by which an organisation makes and implements decisions. ‘Good governance’ is a flexible term that is used in many different contexts – from the running of states and public institutions to the management of for-profit companies (and the importance of corporate governance) to the focus on the need for good governance in charities. The spotlight is often turned upon ‘good governance’ in those very situations in which it has been found to be most lacking. To put it another way, the presence of poor governance is often the catalyst for our discussion of the importance of good governance.

To this end, this article aims to explore briefly what we mean by good governance generally and what this looks like in the charity context before suggesting some practical steps that can be taken to ensure that governance is a lived experience and not something that is dusted off once a year, like the Christmas decorations, around the time of the filing of the annual charity returns.

Unpacking the Concept of Good Governance

Depending upon whom is asked, good governance is invariably described as having several important characteristics. For example, the United Nations sees good governance as being participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and following the rule of law.³

The importance of good governance from the non-profit perspective

The charity sector too has developed a clear idea of what a well-governed charity should look like, as evidenced by the Northern Ireland Good Governance Code,

2 The Charity Commission for Northern Ireland, Annual Report and Accounts 2014-2015, at 8.

3 UN Commission on Human Rights Resolution 2000/64 recognises that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests.

which is managed by a collaborative partnership of infrastructure support organisations in Northern Ireland, collectively known as the ‘Developing Governance Group’.⁴

First published as eight principles in 2008 and revised to five in 2016,⁵ the CCNI has endorsed the Code, which provides that an effective board will provide good governance and leadership by:

- 1) Understanding its role and responsibilities;
- 2) Working well individually and as a team, having appropriate policies and procedures;
- 3) Delivering organisational purpose;
- 4) Exercising appropriate control; and
- 5) Behaving with integrity.

The Northern Irish Code, adapted from England and Wales’ Good Governance Code,⁶ shares many similarities with Ireland’s separately developed Non-profit Governance Code. Launched in 2012, the Irish Non-profit Governance Code is also based on five key principles (which in turn are broken down into three further sub-principles).⁷ The Irish Code focuses on the board’s role in:

- 1) Leading the organisation;
- 2) Exercising control over the organisation;
- 3) Being transparent and accountable;
- 4) Working effectively; and
- 5) Behaving with integrity.

4 See <http://www.diycommitteeguide.org/developing-governance-group>

5 See Developing Governance Group, The Code of Good Governance (revised 2016) available at <http://dmtrk.net/t/1Y95-419XB-CEYELH-1ZCLL5-1/c.aspx>

6 The original English Code was developed by the Charity Governance Code Steering Group, comprising the Governance Institute, NCVO, WCVA, ACEVO, the Small Charities Coalition, and the Association of Chairs. It published a revised version of the English Code, now renamed the Charity Governance Code, in July 2017, and in support of the new code and to encourage charities to use it, the Charity Commission for England and Wales withdrew its CC10 Guidance, *Hallmarks of an Effective Charity*, (see <https://www.gov.uk/government/publications/the-hallmarks-of-an-effective-charity-cc10>). The new Code may be accessed at <https://www.charitygovernancecode.org/en>

7 See The Governance Code: A Code of Practice for Good Governance of Community, Voluntary and Charitable Organisations in Ireland, available at <http://www.governancecode.ie/code.php>

Code Elements	Northern Ireland Governance Code	Irish Governance Code	United Nations HR Commission Resolution 2000/64
	Working well individually and as a team with appropriate policies and procedures	Working effectively	Effective and efficient
	Exercising appropriate control	Exercising control over the organisation	
	Behaving with integrity	Behaving with integrity	Equitable, inclusive and responsive
		Being transparent and accountable	Accountable and transparent
	Delivering organisational purpose	Leading the organisation	

Table 1: A map of the common elements found in the approaches to good governance at UN, Ireland and Northern Ireland level.

Mapping the codes against one another, as in Table 1, shows the similarities in the high-level principles in play. An important point to note about both the Irish and Northern Ireland codes is that the principles of good governance are applied to all charities – regardless of their size, the source of their funding, their corporate status or whether they are staff-led or volunteer-run. The actions that a particular charity may need to take to comply with these fundamental principles will differ according to the nature and size of the organisation.

A useful step in promoting governance in Ireland has been the ability for charities to ‘sign up’ to the Governance Code when they felt able to publicly declare that embarking upon the process to reform/align their practices with those of a well-governed organisation can sign up as being ‘on the journey’ towards compliance – a public marker of good intent, thus acting as an incentive to reach the compliant list.⁸ October 2016 saw the Irish launch of the inaugural Good Governance Awards ceremony for non-profit organisations in Dublin, providing an opportunity

⁸ As of June 2017, there were 410 listed compliant organisations with a further 1136 organisations on the journey towards full compliance in Ireland.

to celebrate good practices as well as providing a useful resource and new role models for charities seeking to improve their own governance.⁹

In a corporate context, many of the reports setting out better governance standards have followed on from governance failures and scandals. And in many cases, corporate governance theory has been directly adopted or sometimes adapted for non-profit purposes. The Cadbury Report in 1992 was published in (although was not prompted by) the wake of the Robert Maxwell Pension scandal, and the collapse of Polly Peck and the Bank of Credit and Commerce International (BCCI).¹⁰ The recommendations of this seminal report on the financial aspects of corporate governance, particularly with the introduction of the ‘comply or explain’ principle influenced subsequent UK, EU and US corporate governance codes.

Again, following the 2001 collapses of both Enron and WorldCom, the United States responded with the passage of the 2002 Sarbanes Oxley Act,¹¹ which increased the oversight role of boards of directors and the independence of the outside auditors who review the accuracy of corporate financial statements. This in turn influenced the governance of non-profit organisations in the United States.¹² Closer to home, the Higgs Report in the UK, published in 2003, made recommendations to clarify the role and increase the effectiveness of non-executive directors.¹³ Given that, by their nature, charity boards are composed of non-executive directors, the role of such directors as identified by Higgs is particularly pertinent. It states:

Non-executive directors need to be sound in judgement and to have an inquiring mind. They should question intelligently, debate constructively, challenge rigorously and decide dispassionately. And they should listen sensitively to the views of others, inside and outside the board.¹⁴

9 The 2016 prize winners may be viewed at <https://goodgovernanceawards.ie/winners-2016/>

10 Report of the Committee on the Financial Aspects of Corporate Governance (December, 1992).

11 PUBLIC LAW 107-204 (July 30, 2002), 116 STAT. 745. Available at <https://www.sec.gov/about/laws/soa2002.pdf>

12 Tamara G. Nezhina and Jeffrey L. Brudney, ‘Unintended? The Effects of Adoption of the Sarbanes-Oxley Act on Nonprofit Organizations’ (2012) 22(3) *Nonprofit Management and Leadership* 321.

13 Derek Higgs, Review of the role and effectiveness of non-executive directors (January 2003) available at

<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file23012.pdf>

14 *Ibid*, at 6.10.

The salience of these four tasks of any charity trustee should not be underestimated: questioning intelligently and debating constructively requires engaged and proactive board members who not only attend board meetings (fully briefed), but actively participate in the business of governing. Rigorous challenge of ideas in a boardroom – whether those of senior staff or other board members – when accompanied by constructive debate empowers good decision-making, particularly when these decisions are made in an objective and dispassionate manner.

Giving effect to these principles within a charity might require ensuring that the board has clear empowering governing instruments and by-laws. It recognises the need for board members to be educated in their governance role – not just upon induction, but on an ongoing basis so that members are able to be active and engaged. It highlights the need for certain committees (depending on the size of the organisation) to address key components of the board’s work, underpinned by proper terms of reference and further supported with a good reporting structure to the board. Being well governed will involve having a relevant vision, mission and strategic plan. Most likely, good governance will require the board to be able to communicate its organisational values well but also to have those values permeate the organisation’s policies, plans, programmes, decisions and actions (thereby talking the talk *and* walking the walk).

Most importantly, good governance requires a separation of the role of governance from the role of management. This separation of roles is perhaps best manifested when there are effective relationships both within the board and between the board and its staff. In smaller volunteer or staff-less organisations where the board may typically be an operating board, it becomes even more important for the board to step back from the job of running the charity to consider and plan the direction in which the charity is headed. This can be neatly encapsulated in the difference between rowing the boat (managing the charity) and steering it (governing the charity).¹⁵

How Does This Look for Charities?

The importance of good governance from the regulatory perspective

With the passage of the Charities Acts in England and Wales, Scotland, Northern Ireland and Ireland, a common key aim was that the new charity frameworks would increase public confidence and trust in the charity sector. Better regulation

¹⁵ David Osborne and Ted Gaebler were the first to encapsulate this idea in the context of government action in their book, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Service* (New York: Penguin, 2000).

through the creation of a new charity regulator, greater disclosure and transparency with the establishment of a register of charities, and greater accountability through the filing of annual returns and reports were to be the basis for greater public trust. The take-away point is that being well governed is a good way to demonstrate that public confidence in a charity is well founded – good governance should firstly help trustees to steer clear of the problems that lead to charity mismanagement and scandal or at least to catch them in the early stages of their unfolding. Secondly, when another organisation's disaster is casting a poor light on the charity sector, well-governed organisations are in a better position to respond positively and to set themselves apart from the disaster zone by highlighting their own good practices.

The annual Edelman Trust Barometer, conducted annually across the globe for the past 16 years, provides some interesting insights in this regard. For the 2016 Edelman Trust Barometer, research firm Edelman Berland surveyed more than 33,000 respondents across 28 countries. While it does not have a special barometer for Northern Ireland, it does provide figures both for the UK and for Ireland. The 2008 survey findings (being pre-charity regulation in both Ireland and Northern Ireland) provide a useful benchmark for the most recent 2016 findings. In 2008, 53% of UK respondents and 59% of Irish respondents trusted NGOs, a figure that in both cases outstripped the level of trust felt in business, government, media and religious organisations. While support for NGOs is still higher than in these other institutions, levels of trust in the sector have fallen over the intervening years. The 2016 figures reveal a fall in general public trust in UK NGOs to 50% (a further fall on the 51% recorded in 2015¹⁶) and to 49% in Irish NGOs (representing a good recovery on the low general public trust levels of 37% recorded in 2015).

The CCNI-commissioned Report on Public Trust and Confidence in Charities (2016) revealed that overall levels of trust and confidence in Northern Irish charities vary largely (with a mean trust score of 6.2).¹⁷ Some of the interesting findings of this study were that while 30% of study participants had a high level of trust in charities, trust levels were higher in those sectors that were perceived to be highly regulated (such as doctors (69%), the police service (48%) and public services (40%)).

16 Similar results focusing on charities (rather than NGOs) and surveying a wider age group 16+, as opposed to 25+, carried out by NfpSynergy in 2015 revealed a 53% trust rate for charities, the lowest level since 2007 for England and Wales. Interestingly, NfpSynergy reported that local levels of trust in charities were higher in both Scotland (62%) and Northern Ireland (69%) from comparable polls conducted there in April 2015.

17 CCNI, Public Trust and Confidence in Charities (Ipsos MORI, 2016) available at <http://www.charitycommissionni.org.uk/media/128201/public-trust-and-confidence-in-charities-research-report-2016.pdf>

Of importance to the public in terms of trust, three findings are worthy of particular note insofar as achievement of these objectives is more easily within the grasp of a charity that actively practises good governance:

1. 87% of participants indicated it was important to them that donations/funds raised by charities are used properly;
2. 85% claim that it is important that charities have a positive impact on the causes that they represent and that charities will do what they say they will;
3. 84% claim that it is important to them that charities are well managed and are transparent about the way they spend their funds and collect their donations.

The importance of good governance is also highlighted in the CCNI's thematic reports. The 2014, 2015 and 2016 reports place an increasing focus on governance concerns.¹⁸ Each of the eight CCNI statutory inquiries carried out to date (August 2017) has involved, *inter alia*, instances of poor governance or governance failings.¹⁹

Good governance is both a daily exercise and a life-long one. In its most active form, it is a regime that informs day-to-day decision-making and underlies the planning and achievement of longer-term goals. In its most shallow insipid format, it amounts to a box-ticking exercise conducted once a year for the purpose of the annual returns.

So, as a board navigates the choppy waters of keeping its charity afloat, it should ask itself: to what extent does good governance influence how the following issues are approached?

1. *Documents: Birth Cert or Life Manual?*

To what extent is the governing instrument of a charity a frequently referred-to document? Is it treated simply as the birth cert of the organisation, or is it a well-thumbed and often consulted oracle? Do its provisions still meet the needs of the organisation? When was it last reviewed and/or amended? The answers to most governance questions begin and end with the governing document – it sets out the charitable

18 See CCNI, *Key Lessons in Charity Governance* (2014); CCNI, *400 Concerns about Charities* (2015); CCNI, *500 Concerns about Charities* (2016).

19 Since its powers commenced the CCNI has opened 8 statutory inquiries and has published 4 statutory inquiry reports, available at <http://www.charitycommissionni.org.uk/concerns-and-decisions/statutory-inquiry-reports/>

purpose of the organisation, the founding structure and powers of the board and the rights of members (if any). It provides insight into board composition and size, meeting requirements and many other issues besides. Knowing where to find a charity's governing documents and being familiar with their contents is a very good start towards good governance. Are these readily available on the charity's website? Does the board build upon the foundation stones of the governing instrument by developing a board manual or handbook that gathers together the policies the board adheres to and the procedures it adopts when making decisions?

2. *Trustee Arrival, Duration and Departure*

A well-drafted governing document will set out the minimum and maximum number of charity trustees, nomination and election processes, term of service length, possibilities for re-election, and board rotation procedures. This may sound very basic, but ensuring that the board is quorate not only legitimises the board's decisions but guards against one or two charity trustees effectively ending up running the organisation by design or default.

- **Succession Planning:** The departure of trusted and valued board members is never easy, but it is a necessary part of growth in an organisation. How does board succession happen in the organisation? Does the governing instrument provide for a staggered rotation of board members so that the charity has the benefit of new blood while preserving and passing on institutional knowledge and know-how? How long is a term of service – a fixed period or indefinite duration? Is there provision for reappointment? To what extent does the board engage in succession planning? No one is indispensable, and the greatest weakness of any organisation is over-reliance on one or two trusted members and the belief that they will be present forever. Prolonged service, even if complacency is avoided, deprives the charity of a fresh pair of eyes that only a new member (or returning former board member) can bring. Change offers an opportunity to review board practices and to introduce new life and ideas.
- **Induction:** The other side of the succession planning coin is, of course, the induction of new board members. What happens when a new member joins the board? How is this person inducted into the culture of the board? Are they provided with a copy of the governing document and/or board manual, and are the procedures by which board meetings are run explained to them? Is training

provided on how to be an effective board member? When new members are appointed (or at other times), does the board take time out to talk about how the charity is run as opposed to what the charity does?

3. *Collective Responsibility*

In between arriving and departing, board members are collectively responsible for overseeing the charity's activities. To what extent does the board act as a collective entity? Does everyone attend board meetings, and how frequently are meetings held? Does the number of meetings meet the requirements of the governing documents? Are the meetings quorate? Is everyone fully briefed on the issues facing the charity, or is decision-making left to one or two more informed or perhaps, dominant board members? How might the level of discussion or decision-making at board meetings be further improved? To what extent are the board members independent of the charity and of each other in their decision-making processes?

4. *Information Flows*

How good are the information flows between the charity's senior staff/CEO and its trustees/directors? To what extent is there active communication and questions from the board following a CEO report? And what about the free flow of information between board committees (whether this comprises the audit/finance committee, or any other related committee) and the board? Is information always presented in a timely and full fashion? Does the board make the minutes of meetings available to members of the charity? How are these shared?

As the CCNI noted in its 2013 Report on Key Lessons in Charity Governance:

A high level of transparency and good communication with stakeholders is an essential part of good governance, providing a number of benefits to both the charity and its trustees, including: demonstrating that resources, including donations, are being used wisely and for the stated purpose; showing that the charity is organised and managed properly; and raising awareness of the good work of the charity, its trustees, staff and volunteers.²⁰

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<http://www.charitycommissionni.org.uk/media/60063/20140915-key-lessons-in-charity-governance.pdf>

5. *Conflicts of Interest*

The general rule in charity law and indeed one of the distinctive features of charity trusteeship is that charity trustees are not paid for their service. While their out-of-pocket expenses may be reimbursed, charity trustees are by and large unremunerated. Charity law does provide for trustees to be paid for services delivered that are unconnected with their trusteeship, but even then, the proper procedures must be followed. It is only in exceptional circumstances that a charity could pay a trustee for acting as a charity trustee, and such payments may be subject to prior Commission authorisation. While being unremunerated should make trustees more independent in their decision-making processes and better able to act in the best interests of their charity, it is still possible for conflicts of interest or duty to arise. A well-governed charity will have a policy in place identifying and addressing how such conflicts will be handled if they arise. The successful application of these procedures is also important. Many of the problems that arose in the 2016 Console Bereavement charity scandal in Ireland stemmed from conflicts of interest that were not properly managed (remunerated directors, sanctioning of expenditure in ways not in the best interests of the charity and that benefitted directors or related parties etc.).²¹

It is also important to remember that conflicts can arise even when personal interests are not in play. A charity trustee may serve on the board of more than one charity (or on the board of a related trading subsidiary of a parent charity). A conflict of interest may arise when the decision of one board will affect the interests of the other charity or related entity. Documenting potential conflicts at the start of every year and providing an opportunity for board members to declare any new conflicts at the start of every meeting is a good practice. Equally critical to the wellbeing of the charity is creating policies and procedures to manage conflicts once declared and ensuring that these policies and procedures are followed.

6. *Fundraising*

Given the recent scandals in the UK flowing from the Olive Cooke case, board members should ask how well-informed they are about the manner in which the charity raises funds from the public. If the charity uses a third-party fundraiser, is the board aware of (and has it approved) the terms under which this third-party fundraiser acts on behalf of the charity?

²¹ Eilish O'Regan, "Console scandal: Elaborate web of deceit of an 'untouchable' charity founder" Irish Independent, July 2, 2016; Patsy McGarry, "Decision taken to shut down scandal-hit charity Console" The Irish Times, July 7, 2016.

What steps has the board taken to ensure that the fundraising practices used by the charity fit with the vision, mission and ethos of the charity, which the board is collectively responsible for upholding?

7. *Achieving Charitable Mission*

Does the board reflect on how the past year's activities have advanced the charitable purposes for which the charity was set up and the extent to which public benefit has been provided? To what extent does the board benchmark the end-of-year report against the strategic plan for the charity and amend the latter, as required, in light of progress made?

In many of these instances, the role of the board is, in the words of the Higgs Report (2003), to 'question intelligently, debate constructively, challenge rigorously and decide dispassionately'. The outcomes of many of the steps outlined above will naturally feed into a charity's annual reporting to the CCNI, and if some appear not to fit with a particular organisation, the board members should ask themselves why this is the case and ensure that they are satisfied with the answer. Thus, if they say, 'we never have new board members who join us', it might prompt them to review the length of current board member service and the charity's procedures for renewing the board. They should beware of the dangers of the institutional stagnancy and resulting complacent governance that can occur in the absence of new board members, and they should think how the organisation might plan for board succession.

Conclusion: a Journey, Not a Destination: Some Final Practical Steps

In the same way that a garden is never finished, good governance is an ongoing process. Good governance must be a daily ongoing lived experience, not a once-a-year, tick-the-box exercise. It is easier to tackle small issues regularly than to ignore them until they become larger, more unwieldy problems. Some final thoughts in this regard look at the need to create the space to think about governance, and to chart the charity's course for the future – but also to take time to celebrate current achievements based on the work of the past.

Putting governance on the board's agenda – literally and metaphorically

Charity board agendas are always so full, but putting governance on the agenda and tackling a small issue at every board meeting can be a useful way of beginning the challenge of living good governance. The simple step of asking board members and staff – as a brain-storming exercise – what changes they would make to the charity (or even to charity board meetings) to make it work better can in itself be useful. If signing up to the Northern Ireland Code of Good Governance

(or to any similar Code) is on a board's bucket list, making it a standing agenda item and working through the Governance Health Check list a little at a time at each meeting can help it to refresh or reform its practices.

The importance of forward planning – does the board have a strategic plan?

Developing and implementing a strategic plan allows a board to turn the mission and the vision statements of the charity into a series of actionable steps leading towards their achievement. Many charities start the process by identifying the organisation's strengths, weaknesses, opportunities, and threats, in what is commonly called a 'SWOT' analysis. Keeping a strategic plan relevant so that it does not become a glossy brochure that sits on a shelf but rather becomes a working and living document (that is referenced at every board meeting and that is constantly reviewed and revised as the organisation grows) can be a challenge. Adopting the approach recommended by NCVO's KnowHow team in the development of a working strategy document can help to keep a board's focus on the important issues it is facing. In its Strategic Plan Framework, the KnowHow team recommends five key headings: Purpose; Drawing from the past; Considering the future; Strategic aims, objectives and scorecard; and Delivering the goals. These headings are then elaborated upon in terms of possible content to enable organisations to begin the task of creating or revising their own strategic statements.²²

What constitutes success for a particular charity, and how is this communicated? How is success recognised?

If the charity's stakeholders were asked what constituted success for the charity, what answers would they give? Would these answers differ if the question was put to the board, the CEO/senior staff, the volunteers, the beneficiaries or the funders? How is success for the charity celebrated and communicated? Is it saved up for the annual report? Or is good news shared more frequently through the charity's website, newsletters, meetings or social media accounts? Benchmarking a charity's successes and achievements against its strategic plan and the targets outlined therein can help a charity to stay focused on its priorities or, when appropriate, to review those priorities in light of the charity's activities.

The practice of good governance can never guarantee a charity a trouble-free existence, but what it can do is help charity trustees to manage and mitigate risk when a charity sails into choppy waters – good governance can be the canary in the mine that warns a charity of impending dangers and can be the life-raft back to

22 See further, <https://knowhownonprofit.org/organisation/strategy/options/plan/suggested-strategic-plan-framework>

safer waters in troubled times. Undoubtedly, there are costs associated with good governance, but in the long term, these costs will be relatively low if the organisation becomes more effective and efficient in the delivery of its charitable objects in compliance with both charity law and the public's expectations of well-run charities.