Post referendum issues for charities

Jackie McGuire, Paul McMahon and Alan Eccles
Brodies LLP
Charities and the implications of constitutional change
A look back

A Charitable Concern

- Pre- Referendum but post White Paper
- Independence a legal and social change of major consequence for charities
- Little discussion on the impact of constitutional change for charities
- Research methods
Key findings

- A - Independence – 28%
- B - Independence or Devo-max - 31%
- C - Neither - 23%
- D - Don’t know-28%

Devo-max non specific
Key findings

• Greater likelihood of charities with UK links feeling that full independence would impact on them 20% - 18%
• Full Independence or Devo – max 37% - 31%
• Not affected 20% - 14%
• Don’t know – 25% - 35%
Key findings

- Preparation for change
- Expression of opinion
- Other views expressed
- Risk Registers
Scotland’s Future

Building a modern democracy

Civic Society and the Third Sector

- Regulation
- Tax
Timetable

2014
10 September
Vote for Independence in referendum
Negotiations with UK begin

2015
May 2015
UK General Election

2016
March 2016
Settlement with UK on Independence
Constitutional platform for Independence put in place

March 2016
Agreement on continued membership of EU with Scotland as member state

March 2016
Scotland’s Independence Day

May 2016
Scottish Parliament elections to decide who governs independent Scotland
Where are we now? The Vow?
The pace and the nature of further devolution

- What the parties say
- What does it mean for Scottish charities?
- What can charities do in the interim?
Timing and The Lobbying Act
Post referendum employment considerations for charities

Income Tax

- Scottish rate of income tax ("SRIT")
- 6 April 2016
- 10% Variance
- Identification of “Scottish taxpayers”
- Likely to be overtaken by further devolution proposals
Post referendum employment considerations for charities

Further Devolution

- Conservatives – No mention of employment law
- Liberal Democrats- Employment law a “reserved” matter
- Labour – Employment law a reserved matter except-
  - administration of Employment Tribunals (including charging arrangements)
  - enforcement of equalities legislation (female representation on public boards?)
- Further (further?) Devolution
  - “Home Rule”/ Federalism?
  - Left leaning/ increase in basic worker rights / extension of Trade Union participation?
Post referendum employment considerations for charities

Business as usual...

- European Union In/Out Referendum
  - many employment rights derive from Europe e.g.
    - discrimination
    - pregnancy and maternity
    - working time
    - holiday pay
    - TUPE

- Upcoming issues:-
  - holiday pay
  - shared parental leave
  - zero hours contracts
Issues key to charities crossed-over many of the topics at the centre of referendum

Some of the big issues

- tax policy
- tax administration
- EU and cross-border
- social justice
- (macro) economics
- identity
- history
- culture
- education
Non-Rumsfeldian analysis

**Unknown unknowns**

- use “knowns” and “likelys” to plot a navigation course
- some issues are inherently difficult to predict… tax
- Schrödinger’s cat
  - keeping key issues under review
- purposes, purposes, purposes
Post Referendum Issues for Charities

Current regulatory position

- Currently
  - Scotland has own:-
    - regulator (OSCR)
    - definition of “charitable”
      - and a particular notion of what is charitable
  - the regulatory structure already exists and perhaps little change?
  - HMRC not OSCR regulates tax recognition
    - work with a “foreign” law already – English law
Post Referendum Issues for Charities

UK, Europe and beyond

- English law has a quite different definition of what is charitable and associated policy
  - it would be fair to state that Scotland has a narrower notion of charity in terms of the rules and policy
- the “Europeanisation” of philanthropy law
  - *Hein Persche v Finanzamt Ludenscheid*
    - ECJ requires equal treatment of cross-border charitable transfers
    - Finance Act 2010
Post Referendum Issues for Charities

Great Britain cross-border

- philanthropy with borders
  - cross-border donations/bequests
  - tax relief
    - capital movement effect of tax relief
      - tax relief that “moves” across a border
  - Gift Aid (see Scotland Act approach)
  - HMRC European recognition (current experience)
    - HMRC has recognised few, if any, European charities for UK tax relief purposes (primarily based on “fit and proper” issues)
  - divergence of definitions and IHT relief
  - do your purposes work for tax?
- “reluctance” to give/prepare or an opportunity for review?
  - nfpSynergy / Carnegie Trust / Acosvo
Post Referendum Issues for Charities

Extended devolution- Scotland Act 2012

– Scotland Act 2012
– Scottish Rate of Income Tax
  – does not directly apply to charities
  – will the new Scottish income tax encourage personal donations?
– Land and Buildings Transaction Tax
– what motivates giving?
– the desirability for streamlined charity recognition
  – charity brand, charity law, charity tax, tax relief and charity fiscal relief (e.g. rates)
  – UK level playing field
Post Referendum Issues for Charities

Scotland Act 2012 – gift aid- bureaucratic issues

- if the Scottish rate is higher – charities could have the advantage of reclaiming more tax
- if the Scottish rate is lower – charities could be disadvantaged as there would be less tax to claim back
- **BUT**
- the Charities Technical Group voiced concerns re, administrative burdens on charities
- therefore gift aid for charities will continue to apply at the UK basic rate regardless of tax position of the donor
- personal tax relief available on basis of Scottish rate
  - SRIT higher than UK then (small) amount of tax paid by a donor on gross donation will become irrecoverable because of UK-wide gift aid rules
Post Referendum Issues for Charities

Further tax devolution

- tax devolution beyond the Scottish Rate of Income Tax (SRIT)
- other personal taxes... Inheritance Tax, Capital Gains Tax
  - the effect of this on legacies and bequests across the UK
  - the need for tax congruence to encourage giving
- the place of gift aid and corporation tax
Post Referendum Issues for Charities

Updates to the 2005 Act?

- OSCR’s role in recommending updates to government
  - reorganisation rules… technical, but important
  - registration: geographical or other links to Scotland
  - protecting and recovering charitable assets

- wider issues:-
  - interaction with tax rules and administration
Post Referendum Issues for Charities

Constitutional issues for charities

- no, not that “constitutional”!
  - Companies Limited by Guarantee
    - well-used and well-known
  - Scottish Charitable Incorporated Organisations
    - of growing popularity across a range of charities (33%)
  - FCA regulated charities- Industrial & Provident Societies
  - unincorporated associations
    - Reform put on table, but no-body seems to be eating
  - Community Interest Companies
  - trusts
    - current reform on table in Scotland (could have wider economic effects)
  - “constitutional” divergence across UK?
Post Referendum Issues for Charities

Some sector specific issues

- service/ex-service
  - UK armed forces remain
- art and culture
  - “central” funding was and will continue through Creative Scotland
  - creativity
  - grant giving opportunities from across UK
- sport
  - UK, Scottish or mix
  - higher echelons and grassroots
  - sponsorship
- grant giving charities
  - business as usual?
Contact

Jackie McGuire
0131 656 0008
jackie.mcguire@brodies.com

Paul McMahon
0141 245 6281
Paul.mcmahon@brodies.com

Alan Eccles
0141 245 6255
alan.eccles@brodies.com