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RESEARCH PAPER

Regulatory Reviews: Revolutionary Re-imagining of Charity Law or Simply Restatements of Convenience?

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Abstract This article examines a decade of charity law review processes in six jurisdictions—Australia, New Zealand, Northern Ireland, Scotland, England and Wales and Ireland. Using a life-cycle basis viewed through a functional comparative lens, it examines review terms of reference, stakeholder involvement in public consultations, report recommendations and governmental responses. The article compares post-review recommendation implementation across government-owned and independent review processes. In identifying areas most open to and most difficult to reform (including charity definition and advocacy) and probing the hidden state/non-profit sector tensions that underlie such reform attempts, this article provides new insights for future review processes.

Keywords Charity law review · Regulatory processes · Australia · England and Wales · Ireland · New Zealand · Northern Ireland · Scotland

Introduction

'Charity Law' is a common law country concept, and since 2005, six common law jurisdictions have surfed the same regulatory wave (Breen et al., 2017), introducing new Charities Acts and establishing new charity regulators. Within the last decade, all six committed to review the scope and operation of these regimes: three (England and Wales, Australia and Ireland) involved statutorily mandated reviews,[1] while the others (Scotland, New Zealand and Northern Ireland), although not statutorily obliged, made political promises to review. These are the only common law countries that introduced new charities legislation and were also required or committed to reviewing that legislation within a given timeframe.

With five of these jurisdictions now at recommendation/implementation stage (Ireland being the exception), this article examines the regulatory review processes across all six, based on an evaluation of each jurisdiction's review measured against the regulatory review life cycle. It adopts a functional comparative law approach (Zweigert & Kötz, 1989), whereby functionalism is understood as "an analytic tool that makes it possible to achieve some kind of comparability in the rules, the institutions and the behavior with which we were concerned" (Adams & Griffiths, 2012, p. 284). Endorsing the assertion that "comparative legal studies are most fruitful when they focus on styles and techniques rather than on the substantive law" (Harris & Tallon, 1989, p. 394), this paper contributes to the literature by identifying the critical life-cycle phases of review, highlighting the key considerations in initiating and running review processes, comparing and contrasting government-owned and independent review processes, discerning matters best suited to resolution by review and highlighting the challenges and rewards of review processes. Adopting a comparative approach, the article begins with a consideration of the timelines and the constituent phases of regulatory reviews. It examines common substantive thematic areas of concern across the reviews, identifying both resolvable and irresolvable issues before

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[1] See Charities Act 2006 (E&W), s.73; Charities Act 2009 (Ire), s.6; Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth), s.16.

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concluding with lessons for future reviews and areas for further research.

The Timelines and Life Cycles of Regulatory Reviews

Review processes invite us to reflect and consult upon the effectiveness of existing practices and to propose new ways to improve regulatory frameworks either through legislative/policy change or a change in administrative or sector practice. Understanding the life cycle of a regulatory review brings value: it alerts us to strengths and weaknesses of this evaluative model and may provide insight in designing future review models (Breen, 2019).

Timelines from Start to Finish

To date, although five jurisdictions have embarked upon review processes, only England and Wales and Scotland have passed the finish line.

Taking the statutorily mandated reviews first, in England and Wales, from Lord Hodgson's 2011 appointment to the passage of the *Charities Act 2022*, the entire review process has taken over a decade. December 2023 marked the sixth anniversary of the start of the Australian legislative review process. While the Australian Government published its formal response (Australian Government, 2020) to the McClure Commission recommendations (Australian Government, 2018), the legislative reform road has been rocky. The Senate rejected proposed Government amendments to the Governance Standards which would have limited charities' advocacy work (Commonwealth, 2021); implementation of other accepted recommendations has been slow (McGregor Lowndes, 2023). In Ireland, while the Charities Act 2009 mandated a statutory 5-year operational review, that anniversary passed in October 2019 and a Charities Amendment Bill 2023 is now pending in the absence of any formal review.

Jurisdictions that are not statutorily compelled to review their charity frameworks enjoy greater flexibility as to review timing and focus. New Zealand and Scotland adopted government-owned reviews and Northern Ireland appointed an independent panel. The varying reviews' speed and scope raise interesting questions about the effect of government-owned processes.

In Scotland, the Office of the Scottish Regulator's ('OSCR') own-initiative targeted review of charity regulation (OSCR, 2016) commenced a 7-year review process. Ten areas of operation identified in 2016 were refined to six in OSCR's Modernisation Paper (2018), which in turn informed the Scottish Government's public consultations (Scottish Government,). The Charities (Regulation and Administration) (Scotland) Act became law in August 2023.

In the space of four years, New Zealand went from publication of Terms of Reference for its charity law review (New Zealand Government, 2018) to introduction of a Charities Amendment Bill 2022. The absence of a statutorily mandated review process enabled the government to postpone a previously promised full first principles review of the charities legislation (NZ Government, 2012) in favour of this more curtailed review process.

While the Northern Ireland review process was also non-statutory, it differed from Scotland and New Zealand in its independence from government. Appointed in January 2021, the Panel published its report in January 2022 (Department for Communities, 2022a). Despite political instability which ultimately led to the dissolution of the Northern Ireland Assembly, one of the Minister for Communities' last official acts was to issue her formal response to that report in October 2022 (Department for Communities, 2022b).

While independent processes advance more quickly to report stage than government-owned processes, quicker reform implementation is not guaranteed. Review success depends on how palatable the incumbent government finds the recommendations (particularly where the review is independent), whether amending legislation is required to give effect to the recommendations (common to all jurisdictions) or whether further research or consultation is required after the review is published (e.g. referral to the English Law Commission). A further critical consideration is whether the policy window remains open to reform post the review, a factor often influenced by whether there has been a change in/loss of government (Australia and Northern Ireland in 2022), a shift in political priorities (e.g. Brexit) or an alteration in Government–non-profit sector relations (Anheier & Toepler, 2019).

Comparing Review Life Cycle Processes—Key Takeaways

While every review process is to some extent bounded by place, political context and culture, there are five critical phases in a review process life cycle. Each phase is examined below to ascertain the extent to which its successful completion is a prerequisite for ultimate review success.

The Terms of Reference

The Terms of Reference ('ToR') set the scope of the review and may expressly or implicitly place certain

matters beyond the review panel's remit. Their framing is always political. Language matters and the considerations that inform the drafting of the ToR and the stakeholders who influence this development are critical to the review's direction and its outcomes.

Where a review is statutorily mandated, statutory provisions may inform their content. In England and Wales, the Charities Act 2006, s.73(2)(c) prescribed specific areas for consideration. Lord Hodgson's ToR had a corralling effect, instructing him to:

> take a broad approach and … to address these three issues: what is a charity and what are the roles of charities?; what do charities need to have/be able to do in order to be able to deliver those roles?; what should the legal framework for charities look like in order to meet those needs …? *Note, however, that formal recommendations should relate only to the third of these*. (emphasis added) (Hodgson, 2012)

In Australia, s.16 of the Australian Charities and Not-for-Profits Commission ('ACNC') (Consequential and Transitional) Act 2012, mandating a statutory review of both that Act and The ACNC Act 2012 was less prescriptive. The Australian Government's (2017) ToR settled on four main areas: the Acts' relevance; the effectiveness of the regulatory framework; the sufficiency of ACNC powers; and amendments necessary to achieve objectives or deal with the emerging issues identified by the review. Inclusion of this final area enabled the McClure Commission to examine fundraising regulation—an issue of deep concern to the sector, but one not otherwise expressly mentioned in the ToR.

In non-statutory reviews, ToR may be informed by different factors. In the case of Northern Ireland, two factors precipitated the independent review:

1. A judicial finding that the Charity Commissioners were the body corporate and did not have express or implied power to delegate their functions to staff acting alone.[2] This decision invalidated more than 7,200 staff decisions and resulted in the suspension of the charities register.
2. The undermining of sector confidence in the regulator's effectiveness and in the Department's oversight following a series of challenges to the proportionality of the Commission's decision-making and its communications with charities over time (Department for Communities, 2021, p. 1).

The resulting ToR (Department for Communities, 2021) focused the Panel's attention on the existing regulatory framework's fitness for purpose; the Commission's engagement with stakeholders; and the Department's fulfilment of responsibilities in the development and delivery of charity regulation against international best practice. The Minister for Communities appointed the Review Panel in January 2021 with final ToR agreed in February, allowing Review Panel engagement with the Minister around those terms to ensure both clarity of purpose and deliverability of the ask. This constructive approach to framing the ToR was key to the successful completion of the review process.

New Zealand's ToR (New Zealand Government, 2018) took a more adversarial approach. Matters relating to the regulatory framework, registration and deregistration, and the obligations of registered charities (including unrelated business activities) were placed firmly within its scope. Expressly excluded were charitable purpose definition (an area of sector concern), the scope of charitable tax exemptions, and the regulation of non-profits more generally.

For its part, Scotland skipped ToR entirely, moving directly from OSCR discussion papers to Government consultation processes. It is interesting that in both New Zealand and Scotland, charities called for more broad ranging reviews of charity regulation, something both governments have promised to undertake sometime in the unspecified future (Scottish Government, 2022; NZ Government, 2022a).

ToR matter. When present, they inform the direction of inquiry and shape a review's outcomes. Review panels are simultaneously corralled and shielded by them. Politically, ToR are government-owned so stakeholder ability to influence their drafting is a powerful tool.

The Public Consultation

Good communication around the purpose of consultation and targeted engagement with stakeholders is critical to effective public consultation. Review panels need to hear from a wide variety of stakeholders—including the general public (donors and beneficiaries), charities, funders, accountants, lawyers and the civil servants who handle charity-state relationships. Managing public engagement is a real challenge as it is not enough simply to bring the right people into a room—what you ask of those individuals is equally important.

In Northern Ireland, while the Review Panel met with all of the stakeholders listed above (in addition to charity regulators in neighbouring jurisdictions), it also invested considerable resources preparing briefing material for virtual community meetings and developing an online consultation questionnaire. Capturing stakeholders' input saw the Panel's secretariat prepare transcripts of all community meetings, cataloguing issues raised orally so that these

[2] *McKee v Charity Commission* [2019] NI Ch 6.

Table 1 Review processes

Jurisdiction	Mandate	Nature	ToR	Public Consultation	Submissions Publication	Report	Government Response	Political Context	Implementation
England & Wales (2011)	Statutory	Independent	Yes	2011	No	2012	2013	Govt 90% acceptance; Collaborative	Legislative change 2016 & 2022
Scotland (2016)	Non-statutory	Govt-owned	No	2019 & 2021	Yes	2019 & 2021	**X**	Govt-owned; Collaborative	Legislative change 2023
Australia (2017)	Statutory	Independent	Yes	2018	Yes	2018	2020	Govt 66% acceptance; NP sector resistance	Legislative change rejected 2021; Major change awaited
New Zealand (2018)	Non-statutory	Govt-owned	Yes	2019 & 2021	Yes	**X**	**X**	Govt-owned; NP sector resistance	Legislative change ongoing 2023–24
Northern Ireland (2021)	Non-statutory	Independent	Yes	2021	Yes	2022	2022	Govt 98% acceptance; Dissolution of NI Assembly	Admin changes ongoing 2023; legislative/policy changes awaited
Ireland (not started)	Statutory	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**

remained live to the Panel throughout its deliberative processes. This proved to be significant when many of those meeting attendees did not otherwise submit written observations; it is a valuable learning for future reviews.

Australia and New Zealand placed equal value on gathering the communities' views. New Zealand's Department of Internal Affairs (DIA) and Australia's McClure Commission went on tour, physically meeting the public over the course of 27 meetings in New Zealand (NZ DIA, 2019c) and numerous roundtables in Australia (Australian Government, 2018). Such gatherings allowed stakeholders to share their insights and, at times, their frustration, demonstrating that being heard is a really important part of review processes.

Turning to duration, most jurisdictions generally allocate 6–8 weeks for stakeholder meetings and submission of written consultation responses. Tensions exist between facilitating timely information gathering to enable an efficient review process and giving the public sufficient time to understand the issues involved and express their views. Consultation deadlines can be changed, however. In New Zealand charity lawyer intervention rallied over 100 charities to successfully petition the Social Services and Community Select Committee to extend the public submissions period on the New Zealand Charities Amendment Bill 2022 by one month (Moe, 2022).

Official post-review publication of received submissions, subject to respondents' consent, is common and valuable in ensuring transparency (see Table 1). England and Wales is the exception: while the Hodgson Report (2012) named respondents, which included the Charity Commission for England and Wales ('CCEW'), no official channel made these submissions available.

Respondents, of course, can and do publish their own submissions independently so that they form part of the marketplace of ideas during reviews. In Australia, at the request of the McClure Commission, the ACNC published its response to the review in January 2018, midway through the submission process.[3] Publication put the ACNC's views on record and allowed it, as an important stakeholder in the process, to be heard. The downside of this 'early mover advantage' is the risk that subsequent submissions may respond more to the Regulator's brief than the review panel's, thereby altering the course of the reform conversation regarding the issues emphasised or perhaps left undiscussed.

Thus, asking the 'right' people the 'right' questions in a workable timeframe; capturing fully stakeholder input; and sharing submissions at an appropriate point in the process are all important factors that affect review outcomes and should be borne in mind in future reviews.

[3] Correspondence with McClure Commission member 6 July 2023, on file with author.

Report Recommendations

One notable feature of independent reviews is that they generally report in a timely fashion. Both Lord Hodgson (2012) and the McClure Commission (Australian Government, 2018) delivered their recommendations within eight months of their respective appointments; in Northern Ireland it was twelve months from panel appointment to final report publication (Department for Communities, 2022a).

A second distinguishing feature between independent and government-owned reviews is that independent reviews tend to have a higher percentage of recommendations aimed at reform of the charity regulator—whether in terms of its administrative practices or its general engagement with the sector.

By way of illustration, of the 103 recommendations in the Hodgson Report (2012), 44 specifically focus on the CCEW. The majority of these (35) are what might be termed 'practice and procedure' recommendations that seek to change existing regulatory practices, whether through requiring the CCEW to provide better guidance to charities or altering the way in which it engaged with the charity sector. A similar pattern is found in Northern Ireland: 57 of the Independent Panel's 93 recommendations (Department for Communities, 2022a) are directed towards the Charity Commission for Northern Ireland ('CCNI'), with 52 centring upon its regulatory approach and culture, its engagement with the charity sector and its prioritisation of its regulatory functions. Turning to Australia, 10 of the McClure Commission's 30 recommendations focused on the ACNC, with five of these specifically addressing the ACNC's priorities and regulatory approach. So, in independent reviews between one-half and one-third of recommendations tend to be regulator-focused.

One possible explanation for this is that in independent reviews, the regulator—although a key stakeholder and participant in the review—is fully scrutinised as part of that process. Arguably, it is easier for an independent panel to objectively evaluate the regulator's practices with a view to improvement than it may be if government is essentially reviewing itself.

Contrast this outcome with government-owned processes: in Scotland and New Zealand, both review processes began life with OSCR (2018) and New Zealand DIA (2019) position papers, respectively. These papers (usurping ToR in Scotland's case) set the review stage and in turn influenced the level of scrutiny to which those regulators were subjected in the subsequent consultation processes, an outcome noted in the Scottish Government's (2019, p. 4) concession that "the issues highlighted in this consultation mainly derive from OSCR's proposals". Therefore, in government-owned processes, the regulator often enjoys 'favoured player' status whose views inform the agenda before others are asked to comment. It is perhaps less surprising then that just five of New Zealand's 21 proposed legislative changes relate to Charities Service's practices and procedures, nor that the thrust of the new Scottish legislation is to provide OSCR with new or wider oversight and investigation powers.

Formal Government Responses

(a) Independent Reviews

Independent reviews, unlike their government-owned counterparts, require a formal government response. In England, the Cabinet Office issued an interim response to Lord Hodgson's report four months after its receipt with a more formal comprehensive response published 15 months later.[4] The British Government for the most part welcomed and accepted Hodgson's recommendations with approximately 10 recommendations (10%) receiving an outright rejection (Cabinet Office, 2013).

In Northern Ireland, the Minister's formal response came nine months after the Review Report's publication (Department for Communities, 2022b). With the exception of one recommendation, the Minister accepted all of the Independent Review's recommendations either fully, partially, or subject to further consideration. The one issue of fundamental disagreement was the requirement to register. The Panel recommended that all charities should continue to be required to register whereas the Minister indicated that following intense sector lobbying, only charities with an income in excess of £20,000 would in future be required to register in an effort to ensure the ability of charities to attract volunteers. Given that 47% of registered charities in Northern Ireland report an annual income of less than £20,000 (Department for Communities, 2022a, p. 145), it remains to be seen whether the Minister's decision will achieve its aim without undermining the greater transparency and accountability of the broader charity sector.

In Australia, 18 months elapsed between the publication of the McClure Commission's recommendations and the Government's formal response in 2020, wherein the government rejected almost one-third of the 30 recommendations it received. In contextualising the Government's willingness (or lack thereof) to accept the recommendations, Senator Seselja noted:

> Since the Government tabled the panel's report in Parliament…I have consulted extensively with the

[4] The delay was in part occasioned by the Government's decision to await the recommendations of the Public Administration Select Committee's post-legislative scrutiny inquiry (whose work began after Hodgson published his report) before responding to Hodgson's review.

> charity sector, the community, and with state and territory ministers to understand their views on the panel's recommendations. I believe our response to the recommendations will result in a better balance between reducing red tape for charities…while ensuring … trust and confidence in the governance of the charities. (Australian Government, 2020, p. 4)

And yet, many of the recommendations supported by the sector were not amongst those ultimately accepted. The Government rejected recommendations to amend the Australian Consumer Law to clarify its application to charitable fundraising or to introduce a mandatory fundraising code of conduct. It also rejected outright the proposal to introduce ACNC test case funding to enable the Regulator and the courts to develop the law in matters of public interest, including disqualifying purposes (Australian Government, 2020).

(b) Government-owned Reviews

In government-owned processes, the absence of both formal recommendations and formal government responses makes the task of ascertaining review outcomes more nuanced. Careful tracking of a review's start and end points is required to distinguish a government's 'action points' from its talking points. In New Zealand, the DIA's Discussion Paper (2019) raised the management of risks where charities carry out unrelated business activities to raise funds and related issues of registration and reporting requirements of charity businesses. These matters were subsequently explored in targeted stakeholder engagement, yet the Regulatory Impact Statement (NZ DIA, 2021a) made no recommendations in these areas. Similarly, while advocacy merited a full chapter in the Discussion Document, in the Regulatory Impact Statement, the Minister excluded advocacy in favour of a narrower scope for the modernisation work, so that policy results could be delivered during the parliamentary term. Thus, issues identified as important at the outset can—and do—get lost in the political process of government-owned review.

To some degree, Scotland mitigated this hazard by publishing a Policy Memorandum with its Charities (Regulation and Administration) (Scotland) Bill 2022 (Scottish Government, 2022). The memo listed the issues upon which the Scottish Government consulted and linked the Bill's proposed legislative changes to the level of respondent agreement expressed during stakeholder consultation. Future (particularly, government-owned) reviews should consider adopting this feedback mechanism as a useful stakeholder accountability tool.

Post Review Implementation

Implementation can take many forms: legislative reform whether by way of new or amending legislation (witness England's Charities (Protection and Social Investment) Act 2016 (UK) and its Charities Act 2022; Scotland's 2023 Act and New Zealand's Charities (Amendment) Act 2023) or the introduction of new statutory regulations is often needed to bring about radical change. It can be a slow, uncertain process (as opposition rejection of Australian legislation shows).

Non-statutory recommendations, involving changes in a regulator's administrative practice or a better communication of regulatory role, may be quicker to implement. Nevertheless, tracking the implementation of such recommendations can be difficult in the absence of specific regulator obligations to report back.

In England, none of the CCEW's annual reports since the Hodgson Report's publication reference the recommendations directed to it. The ACNC fares slightly better. In its *Annual Report* (ACNC, 2021, p. 3), the Commissioner's introduction nodded to the Legislative Review with references to the ACNC's work with the Government to amend the definition of 'basic religious charity' and the introduction of Governance Standard 6 to provide an incentive to charities to participate in the National Redress Scheme.

Conscious of the need to be able to track implementation, Northern Ireland's Independent Review (Dept for Communities, 2022a, p. 229) recommended that the Department should monitor the CCNI's implementation of agreed review recommendations, a recommendation the Minister accepted as 'key' to ensuring 'delivery of the Panel's recommendations in an open and accountable way' (Dept for Communities, 2022b, p. 43). In advance of the Minister's formal response, the CCNI (2022a) addressed the Panel's recommendations in both its Annual Report 2021–22 and its Business Plan 2022–23 with a commitment in the latter to "publish information in the annual report on progress on recommendations taken forward in the business plan" (CCNI, 2022b, p. 11).

Aside from direct 'fixes' by way of statutory or non-statutory change, a government may decide to refer a matter to its law reform commission for further consideration, particularly if the matters to hand are legally complex. This approach was built into the English review process with the Law Commission (2011, p. 10) signalling that its research agenda would be informed by the then "forthcoming review of the Charities Act 2006.'' Following Lord Hodgson's specific referral of certain issues, the Government initially agreed ToR for the charity law project in 2013, updating them in 2015 (Law Commission, 2017, p. 371).

Starting with social investments by charities, the Law Commission's recommendations (2014) led to the Charities (Protection and Social Investment) Act 2016 (UK). The Law Commission began work on the remaining technical charity law issues in 2015. The project involved a comprehensive consultation, exploring 100 questions across a range of areas of charity operation, including changing purposes and amending governing documents; acquiring, disposing of and mortgaging charity land; permanent endowment; cy-près schemes and fundraising appeals; ex gratia payments; charity incorporations and mergers; charitable trusts in insolvency; certain Charity Commission powers; and the charity tribunal. The Law Commission's final report (2017) included a draft Charities Bill. Welcoming the recommendations, Lord Hodgson noted that while they appeared highly technical, the recommendations would cumulatively have a huge impact on the sector, and he voiced his hope for a speedy implementation by government (Law Commission, n.d.). Four years later, Westminster published its formal response (Office for Civil Society, 2021), accepting 36 of 43 recommendations, and giving rise to the Charities Bill which became the Charities Act 2022.

So, one decade on, three reports (Hodgson, 2012; Law Commission, 2014, 2017) and two Acts (2016 and 2022) later, English charity law reform is now implemented. New Zealand has also reaped the benefits of Law Commission research. NZ Law Commission (2013) recommendations, accepted by the New Zealand government (2014), resulted in the broadly welcomed Incorporated Societies Act 2022.

Tasking a Law Commission with taking forward charity law regulatory review recommendations has value. It keeps the policy window ajar after publication of the review report; it allows time for legal scrutiny and drafting; and it keeps alive recommendations that require technical legislative change but may not otherwise hold political attention long enough to achieve it. Utilising Law Commission expertise is thus another useful tool for future review consideration.

Cross-Cutting Themes and Quick Wins

Turning from the procedural nature of reviews to their substantive outcomes, there are four identifiable thematic areas of concern common to the charity reviews discussed herein. These relate to (a) the regulator's powers; (b) "the practice and procedure" of regulators, particularly in the context of the culture of their stakeholder engagement and communication; (c) registration and deregistration issues; and (d) embedding proportionality and accountability in the regulatory asks made of charities. Typically, review panels will be charged to consider issues under these headings and make recommendations.

In the time limited environment that defines most multi-issue review processes, certain issues lend themselves more easily to resolution than others. Resolvable issues tend to be functional and tangible, albeit sometimes complex or technical, in nature. They are often matters more related to good regulatory practice (falling under (b) and (d) above) than necessarily matters related to the definition of charity or the politics of what benefits (should) flow from this status. Recommendations on these functional issues nevertheless improve charity law and provide governments with welcome blueprints for reform.

A case in point relates to the setting of financial thresholds for regulatory reporting purposes, falling under theme (d). All five reviews contain reporting recommendations focused on financial thresholds. In Northern Ireland, revision of reporting requirements formed a core set of Panel recommendations (Dept for Communities, 2022a, p. 274–5). Aimed at lessening smaller charities' reporting burdens and simplifying the reporting process more generally, the Minister accepted the recommendations in principle (Department for Communities, 2022b).

Following its review, the New Zealand Government (2022b) agreed to give DIA power to exempt small charities from Tier 4 reporting obligations when the compliance burden on those charities would be disproportionate to the level of transparency needed.

The Australian Government (2020, p. 12) accepted the McClure Commission recommendation to raise revenue thresholds for minimum reporting requirements so that fewer charities would be required to provide financial reports in its amended 2021 reporting regulations.[5]

The Charities (Regulation and Administration) (Scotland) Act 2023 implemented review recommendations for increased accountability by requiring the regulator to publish accounts for all registered charities. Interestingly, the Cabinet Office (2013) rejected similar proposals by Hodgson (2012) in England and Wales on grounds of principle and cost.

The acceptance of such quick wins, however, does not obviate the need for greater consideration of the conceptual and philosophical underpinnings of charity law; matters sometimes excluded entirely from review (as in New Zealand's exclusion of definitional matters) or rejected by government due to political pressure (as in Northern Ireland's decision to exempt almost 50% of charities from registration).

[5] ACNC Amendment (2021 Measures No 3) Regulations 2021 (Cth).

The Harder Nuts to Crack in the Charity Review Process

So what are the problematic areas in multi-issue reviews? The list is not exhaustive. Past examples include fundraising regulation reform, charity tax policy, charitable purpose definition and advocacy. Underlying these issues are politically sensitive questions relating to what defines modern charity and the extent to which tax-exemption should curtail political voice. Governments tend not to accept independent recommendations made in these areas. In government-owned reviews, even when these matters are ostensibly raised within the process, they tend to be de-prioritised as the process advances, rendering them policy orphans. Two such issues—charitable definition and advocacy—are considered below.

Charitable purpose

The thorny definition of charitable purpose has caused difficulties in multiple jurisdictions. New Zealand's 2018 ToR explicitly excluded discussion of charity definition. Charities advocated for its inclusion, given a sector perception that DIA's conservative approach to charitable purpose made it more difficult to successfully register as a charity (Barker, 2022). It is noticeable that notwithstanding the ToR's remit, stakeholder submissions unilaterally raised definitional matters, causing the Minister's officials to brief her on "the strong public interest that the concept of charitable purpose can prompt" while remaining steadfast in their advice that this area remains excluded from consideration (NZ DIA, 2021b, p. 3).

New Zealand's experience is not unique. In Canada in the mid-1990s, a non-profit sector-driven Voluntary Sector Roundtable ('VSR') initiative sought to develop mechanisms for dialogue with federal government, increase charitable tax incentives and encourage new definition and regulation of charities. The VSR culminated in the publication of the Broadbent report (1999), which in turn led to the Voluntary Sector Initiative, in which Government and the sector established six joint-tables to explore ways of strengthening relations (VSI, 2009). Charity definition—an issue prioritised by the voluntary sector—fell to the Joint Regulatory Table. Convened in 2000 to study and make recommendations for improving the regulatory environment in which the voluntary sector operates, its final report (VSI, 2003) made no substantive progress on charity redefinition. Placing the blame squarely on the government representatives, Brock identified officials' unwillingness to share policymaking power in this area:

> The federal government agreed to review these items internally but would not discuss them jointly, which almost caused the Regulatory Table to collapse … [These] areas signify the inability of the government to reconcile the tension between a desire to have organizations more fully involved in policy design and delivery, and to accept organizations in a critical, policy advocacy role. (Brock, 2004, p. 275)

The relative failure of the Joint Regulatory Table when compared to the tangible success of the other Joint Tables implies that the problem lay more with the subject matter under discussion than with the effectiveness of the collaborative process (Brock, 2005, p. 12).

Resistance to shared ownership of change in definitional or regulatory reform areas also existed in Ireland. There, a Government White Paper proposal (Dept of Social, Community & Family Affairs, 2000) to utilise a joint Implementation and Advisory Group (comprising government and sector representatives) in charity regulatory reform was floated but failed in 2000. Indeed, Department officials reclaimed the task of regulatory reform early in the advisory group process, much to the annoyance of the voluntary sector representatives involved.

This pattern of non-engagement with the sector on regulatory policy matters has continued under the Charities Act 2009. Section 6 of that Act mandated a Ministerial review of the Act's operations within 5 years of its commencement with an obligation on the Minister "to make a report to each House of the Oireachtas of his or her findings and conclusions resulting from that review." Contrary to the experience in other jurisdictions, there has been no publicly announced review (independent or otherwise), no public consultation on the Act's operation and no resulting reports laid before Parliament to inform legislative reform. Instead, the Minister published the Charities (Amendment) Bill General Scheme in 2022, neatly sidestepping all five stages of the review process life cycle discussed above. When challenged, the Minister cited unspecified "consultation" along with "operational experience acquired by the Charities Regulator since 2016" as enabling her to move the standalone Amendment Bill (Dáil Debs, 2022).

Interestingly, the one success story of the current Charities (Amendment) Bill 2023 is its proposed extension of 'charitable purpose' to include the advancement of human rights (s.4). This 'win' comes after two failed attempts to introduce legislation to this effect in 2014 and 2018[6] and 8 years after the Joint Oireachtas Committee Report (2015), recommending its inclusion. It is

[6] Charities (Amendment) Bill 2014 (no. 3 of 2014), defeated; Charities (Human Rights) Bill 2018 (no. 88 of 2018), lapsed.

noteworthy that the recommendations came through a human rights' and not a charity committee.[7]

England and Wales provides another example of non-engagement: while Hodgson raised the issue of charitable definition, his review did not propose any changes to the 2006 Act's statutory list of charitable purposes. In rejecting the Commission on Scottish Devolution (2009) proposal for the introduction of a UK-wide definition of charity, Hodgson intimated that harmonisation of the definition remained desirable (2012, p. 42). Speaking on the mismatch between the public's perception of which organisations are charitable and the reality, Hodgson presciently pointed to the need:

> for an important wider debate between and among Parliament, the public and the sector, around whether charities should be limited in their activities or where the boundaries of the definition should lie (2012, p. 31).

The English Public Administrative Committee ('PAC') in its post legislative scrutiny report of the Charities Act 2006 picked up Hodgson's gauntlet and examined whether charity boundaries might be better defined with clearer public benefit legislative guidance. It ultimately recommended that "Parliament must legislate to clarify the flawed legislation on the question of charities and public benefit" (House of Commons, 2013, p. 51). The Government however rejected this proposal (Cabinet Office, 2013).

The English Law Commission similarly vetoed discussion of charitability. Writing on Hodgson's passing of the 'technical issues' baton, Commissioner Cooke noted that:

> In line with the general approach of the Law Commission and consistent with its independent status, *we are not addressing matters of political controversy*; *in particular we are not consulting upon anything that would change the definition of a charity*. (emphasis added) (Cooke & Robinson, 2014, p. 67)

The learnings emerging from these four country experiences of tackling charity definition reform are twofold. First, there is a marked unwillingness of government officials to engage with sector representatives on the political question of what defines charity. This non-engagement retards charity policy development and undermines broader sector-State relations. Second, while we may now have statutory definitions of charitable purpose, there is less political willingness to embrace the civic responsibility which comes with such power to engender good debate on the statutory evolution of charity law and its regulation. Politically controversial or difficult issues are passed between state bodies with no overall state accountability for the lack of deliberative and informed policy debate and ownership of these critical matters.

Advocacy

The issue of advocacy has also proved to be troublesome, resulting in an absence of recommendations (in England and Wales) and state reticence to act (in New Zealand and Australia).

In England and Wales, aside from acknowledgement of the importance of continuing sector independence, advocacy does not feature in Hodgson (2012). While the PAC (House of Commons, 2013, p. 46) devoted some time to exploring current levels of political advocacy, it decided that neither side of the conflicting evidence it heard on the matter was compelling. It thus made no recommendations to change the rules on political campaigning by charities.

New Zealand's Modernising the Charities Act 2005 Discussion paper (NZ DIA, 2019a) raised the issue of advocacy, noting that the Act provided little guidance on when charities could advocate for causes with the key precedents being common law ones. Over 200 consultation submissions addressed the issue, making advocacy the third most popular substantive topic amongst respondents (NZ DIA, 2019b). Notwithstanding this high level of interest, the Minister's officials advised her in February 2021 to exclude advocacy (amongst others) from ongoing policy development if the Minister desired to pass an amendment bill in the following term. The briefing noted:

> "While these topics can be constrained, their very nature potentially raises more fundamental questions … Overall, we recognise that excluding the topics above might disappoint some sector representatives. Leaving room for a further stage of work, that could pick up on the remaining topics consulted on in 2018, may help mitigate concerns" (NZ DIA, 2021b, p. 3).

So, despite Government awareness of the fundamental questions arising in relation to advocacy (regarding the extent of permissible action and application of the public benefit test) and notwithstanding advocacy's explicit inclusion in the ToR and the high level of sector engagement, the application of the political time guillotine meant that advocacy reform failed to feature in New Zealand's policy framework.

In Australia, although not making a direct recommendation on the nature of advocacy itself, the McClure Commission recognised the ambiguity that exists around the threshold between issues-based advocacy linked to a charitable purpose and activities undertaken to achieve a

[7] Under its ToR the committee was established to examine issues, themes and proposals, legislative or otherwise, relating to compliance with the human rights of persons within the State.

political purpose that constitute a disqualifying purpose. It recommended the provision of ACNC test case funding to enable ACNC seek legal clarification through the courts of those difficult issues from which the politicians had shied away in New Zealand (Australian Government, 2018, p. 83). Unfortunately, the Australian Government (2020, p. 16) peremptorily rejected this recommendation, preferring instead to explore legislative options to address uncertainty in the law; options which were ultimately rejected by the Australian Senate in 2021.

Thus in all three cases the review process failed to deliver either as a result of conflicting evidence, lack of proper time for scrutiny of the issue, or a preference for a political solution. Arguably, referral of advocacy to the respective Law Commissions for greater in-depth consideration could have provided a better policy outcome.

Conclusion: Future Reviews and Future Research

Research by Anheier and Toepler (2019) has pointed to the hidden tensions that exist between the state and non-profit sectors and the dangers of the growing policy neglect of non-profits. In recognising that "nonprofits have long outgrown their regulatory frameworks and it is up to policymakers to provide adequate environments" (p. 7), the authors identify the key policy challenge as identifying the right policy framework within which to balance the interests of civil society and government. Within the review frameworks that lie at the heart of this current article, the concept of hidden state/sector tensions provides a useful analytical lens to understand some of the difficulties encountered in government-owned and independent charity law review processes. Throughout the review life cycle, but particularly at post-review stage, these tensions manifest themselves in the form of shifting governmental priorities relating to the non-profit sector based on party-political palatability of review recommendations. The nature of that palatability is often influenced by a change in government or changing national priorities (e.g. Brexit). It may also be affected by the legal and technical effort required to effectively articulate civic freedom parameters in legislative (as opposed to non-binding political) form.

Building on Anheier and Toepler's work, this article has explored the reform efforts in six common law jurisdictions, shining a new light on these charity framework review processes. In analysing review processes and outcomes against the backdrop of state–non-profit sector relations, it explains why 'functional quick wins' are easier to advance and implement than the identified harder nuts, which relate to the very essence of what defines charity and its space and place within the competing state and market sectors. The failure of review processes to adequately address, or Governments to accept recommendations made, on these latter critical issues (ranging from the charity definition to the scope for "permissible" advocacy by charities) further speaks to the great need for "fundamental debate considering the longer-term trajectories of government-civil society relations" (Anheier & Toepler, 2019, p. 7).

In the immediate absence of such fundamental debate occurring, this article has argued that a better understanding of the regulatory review process life cycle with a keener sense of the advantages and disadvantages of government-owned versus independent review mechanisms will enable better review mechanism design in the future, leading in turn to better policy engagement and hopefully improved, regulatory frameworks. The importance of stakeholder involvement and accountability has been highlighted with the recommendation that future (particularly, government-owned) reviews should consider adopting the Scottish feedback mechanism (directly linking proposed legislative changes to both the original consultation issue raised and stakeholder response received) as a useful stakeholder accountability tool. More broadly, greater future utilisation of Law Commission expertise (as seen in England and Wales and New Zealand) in teasing out the intractable charity law issues would provide a greater window for focused and deliberative consideration of these matters resulting in more reasoned legislative proposals for change.

Future research is also required to examine the role of lawyers in both highlighting technical problems that stymie the law and offering feasible workarounds in charity framework review processes. International exemplars like the International Centre for Not-for-Profit Law (focused on improving the legal environment for civil society) and Justice Connect Australia (designing and delivering high impact legal interventions to progress social justice) evidence this vital contribution, which deserves greater study. More research on monitoring policy implementation is equally critical. Replication of a recent Australian evaluation on the delivery rate of non-profit review recommendations (McGregor Lowndes, 2023) would pay dividends. It would provide state accountability at a time when none of the reviewed jurisdictions have provided new statutory review clauses to enable automatic future reviews of charity legislation.

In conclusion, regulatory reviews have the power to be revolutionary re-imaginings of our charity law frameworks but this is not an automatic consequence of their establishment. The reform road is long and momentum can be lost at any of the five stages of review. If we are serious about moving beyond restatements of convenience and tackling the difficult policy issues that arise, a deeper understanding of how review mechanisms work, greater

exploitation of the lessons that can be gleaned from existing reviews and fuller state–sector engagement is required.

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