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Redefining the Measure of Success: A Historical and Comparative Look at Charity Regulation

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Abstract: This chapter focuses on three questions in its quest to better understand the historical and comparative perspectives of charity regulation. Accepting the traditional rationales for such regulation, it first explores the question of ‘how we regulate’ followed by the interrelated question of the associated cost of such regulation. Finally, the chapter examines the important issues concerning how we currently (or could better) measure the success of charity regulatory efforts. The paper draws upon the experiences of charity regulators in a range of common law countries across the UK, Ireland, Australia, New Zealand and Singapore.

Key-words: Charity regulation; Ireland; England and Wales; Scotland; Northern Ireland; Australia; New Zealand; Singapore; Regulatory Cost; Charity Registers; Reporting Requirements; Risk Profiling; Regulatory Agency size and resources; annual budget; maturity of registration and enforcement processes; dissemination of key achievements to stakeholder constituencies; individual agency perspectives on successful regulation.

Redefining the Measure of Success:

A Historical and Comparative Look at Charity Regulation

Oonagh B Breen*

That which has been is that which will be,

And that which has been done is that which will be done.

So there is nothing new under the sun.¹

Since the turn of the twenty-first century there has been a noticeable global growth in the number of new charity regulators established, accompanied by a corresponding increase in the level of statutory regulation governing the charity sector. Where once upon a time there was only one country with an independent statutory regulator of charities (England — with the Charity Commission for England and Wales (CCEW)), the past decade has seen many more jurisdictions venture down the path of creating a bespoke charities regulator. Scotland introduced the Office of the Scottish Charity Regulator (OSCR) in 2005, closely followed that year by New Zealand with its establishment of the New Zealand Charity Commission (subsequently replaced by the New Zealand Charities Service in 2010). Northern Ireland followed suit with the Northern Ireland Charity Commission (CCNI) in 2009 while Australia

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¹ *Ecclesiastes* (New American Standard Bible) 1:9.

and Ireland each struggled a little to launch their respective regulators in the subsequent years before finally achieving success in Australia in 2013 (although the existence of the Australian Charities and Not-for-Profits Commission (ACNC) was only guaranteed in February 2016 when federal government threats of abolition were lifted) and in 2014 with the Irish Charities Regulatory Authority (CRA). Charity law reform was not confined to Europe and the Antipodes. Asia also made strides with Singapore revamping its Commissioner of Charities (SCOC) and establishing its new Charity Council in 2007² while China introduced its first Charity Law in 2016, making civil affairs departments at county and higher levels responsible for the registration and oversight of Chinese charitable organisations.³

These countries all share, at least in principle, a similar regulatory aim. They strive to identify and catalogue the very existence of the charity sector within their borders; to approve their status as charities in accordance with predetermined statutory criteria and, once registered, to make those organisations accountable for the funds they receive and transparent in the conduct of their affairs in the achievement of their charitable goals. The impetus for this

² The office of the Commissioner of Charities (SCOC), established by the Charities Act 1982, sat under the Ministry of Finance and concerned itself with tax matters for the first 25 years of its existence. Following the recommendations of the *Final Report of the Inter-Ministry Committee on the Regulation of Charities and Institutions of a Public Character* (March 2006), the Singapore Government increased its registration and regulation responsibilities in the Charities Act (Cap 37, 2007 Rev Ed Sing), transferring it to the Ministry of Community Development, Youth and Sport. The 2007 Act also established the Charity Council to operate in parallel with the SCOC and promote self-regulation. It is comprised of sector representatives, representatives from accountancy, law and corporate governance fields, as well as state ministries.

³ See '2016 Charity Law' (*China Law Translate*, 16 March 2016) <www.chinalawtranslate.com/2016charitylaw/?lang=en> accessed 24 January 2017.

wave of regulation is harder to pin down. The stated reasons for the promulgation of charity legislation traditionally espouse, inter alia, the desire to increase public trust and confidence in charitable organisations, thereby giving both private funders and the public (both directly in the case of individual donations and indirectly through the tax reliefs afforded these entities) greater assurance in the good governance of the charities to which they donate. Such sentiments are often accompanied by the objective of preventing charity trustee fraud or mismanagement of charitable assets. The presence of this latter objective is usually demonstrated by the investigatory powers bestowed on the regulator and associated statutory powers to take miscreant charity trustees to task. In practice, perhaps less often cited but no less real drivers behind the introduction of charity regulation include the desire to prevent misuse of charitable funds for terrorism ends (following the events of 9/11) or often the need to deal with recent domestic charity scandals. These ongoing, if ad hoc, factors tend to provide a country with a renewed focus on strengthening (or in some countries, developing) a modern framework to regulate charities.

There is, however, as we are often told, ‘nothing new under the sun.’ Recent research investigating the longitudinal patterns of charity regulation across sixteen jurisdictions identified recurring common issues that over time and territory have not abated but rather require constant regulatory engagement and management.⁴ So, in setting out to examine the current comparative trends in charity regulation, one must not be blind to the lessons of history. Charity problems and solutions come and go, as do charity regulators but such

⁴ Oonagh B Breen, Alison Dunn and Mark Sidel (eds), *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (CUP, 2017).

vacuums are inevitably filled with new variations on old problems and with new regulators. Understanding the nature of the problems faced is the first step towards crafting a regulatory solution. In situations of generic charity regulation ‘problems’, drawing on the wisdom and experience of both ancestral and peer regulators should provide us with richer possibilities to learn from previous successes and failures and, at the very least, not to repeat the mistakes of the past.

To this end, this chapter focuses on three main questions as it begins its quest to better understand the historical and comparative perspectives of charity regulation. Accepting the rationales offered above for charity regulation in the first instance, Section I considers the question of ‘how we regulate’ followed in Section II by the interrelated question of the associated cost of such regulation. Finally, Section III explores the important issues concerning how we currently (or could better) measure the success of our regulatory efforts. Tackling these questions may better fit us for the challenge of ascertaining whether our charity policy goals in the areas of regulatory rationale, execution, cost and success are correctly aligned.

1. The How of Charity Regulation — Who Is in Charge?

A variety of regulatory models are currently in vogue across the common law countries active in the regulation of charities. The independent statutory regulator model leads the league table, being the choice of five jurisdictions (Australia, England and Wales, Ireland, Northern Ireland, and Scotland). Canada and the United States rely on their respective revenue agencies (namely, Canada Revenue Agency and the Internal Revenue Service) as the lead federal regulator. New Zealand changed its regulatory model in 2010, abolishing its

independent regulator in favour of a hybrid model that sees regulation of the charity sector carried out by a division of the Department of Internal Affairs (New Zealand Charities Services) with an independent three-person Board (the Charities Registration Board) appointed to make decisions about registering or deregistering charities. Singapore is similarly reliant upon a government department to house its regulator. The Commissioner of Charities (also referred to as the Charities Unit) forms part of the Ministry of Culture, Community and Youth (MCCY) and is the main regulatory authority, overseeing charities supported by five separate sector administrators.⁵

When it comes to national charity regulation, federal jurisdictions tend to be tax-driven. The award of federal income tax exemption is based on a universal tax test that applies across all states, application of which requires annual submission of financial reports to the federal tax authority. This regime ensures that charities register with the tax authority and are subject to a national standard when it comes to tax relief. Competency for the regulation of charitable status outside of this realm lies with the state or territory, which can result in a myriad of different registration, reporting and compliance mechanisms across a country in matters relating to initial formation or fundraising regulation, for instance. The level of charity law

⁵ The Commissioner of Charities (SCOC) is directly responsible for oversight of religious charities and charities involved in arts and heritage; environmental protection or improvement; animal welfare; and any sector falling outside the remit of the five sector administrators. These sector administrators are Ministry of Education, which oversees education charities; Ministry of Health, which oversees health promotion charities; Ministry of Social and Family Development, which oversees charities whose objects relate to the relief of poverty or those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantages; the People's Association, which oversees charities whose objects relate to the advancement of citizenship or community development; and Sport Singapore, overseeing sporting charities.

enforcement in each state may also depend upon the priorities and resources of the State Attorney General (or other assigned official, such as the Director of Consumer Affairs), although the low engagement rate of the Attorney General is not a phenomenon limited to federal jurisdictions.⁶

The advantage of a tax driven regulatory regime for charities lies in its universal application — an obvious advantage in federal jurisdictions such as the United States, the United Kingdom, Canada and Australia. The disadvantage of this regime can lie in its narrow focus since the issue of charitable good governance goes far beyond the fiscal realm — evidenced perhaps by the defection of five jurisdictions from the tax based model to an independent charity regulator model over the past decade.⁷ The United States and Canada both continue to subscribe to this pure tax regulatory model with the Inland Revenue Service (IRS) and the Canada Revenue Agency (CRA) being the respective lead federal regulators for charities.

The United States has attempted to temper the realities of tax-led regulation by stretching the boundaries of such oversight to include governance matters. This reform, initiated with the 2008 revision of the reporting Form 990, saw the inclusion for the first time of questions relating to governance, management and disclosure practices along with greater information on the compensation of the top five highest compensated employees from these

⁶ See Oonagh B Breen, ‘Guardians of the Charitable Realm: Charitable Trust Supervision Practice and Procedure in the Common Law World’ (2016) 24 *European Review of Private Law* 1141.

⁷ New Zealand (2005); Scotland (2005); Northern Ireland (2008); Australia (2012); and Ireland (2014).

organizations.⁸ The reaction to the new revised IRS oversight has been mixed. Some have praised the IRS for asking the new governance questions. In the words of Thomas Silk,

it is not far-fetched to imagine a national scandal featuring a prominent charity in violation of standards of charitable governance but incorporated in a state with inadequate charitable enforcement. In the congressional hearings that might follow, the IRS would surely be in a far more defensible position if it had already gone forward to educate the charitable sector about the importance of good governance practices. Later legislation introduced by a supportive Congress may easily resolve any jurisdictional ambiguities about governance of charitable organizations and enforcement.⁹

Others have questioned the jurisdiction of the IRS to regulate charities in this manner¹⁰ or the practical effectiveness of this new departure.¹¹

⁸ Internal Revenue Service, 'What's New: Redesigned Form 990 and Instructions for 2008 Tax Year' (Draft Summary, 9 December 2016) <www.irs.gov/pub/irs-tege/990_whatsnew_purpose.pdf> accessed 1 January 2017.

⁹ Thomas Silk, 'Good Governance Practices for 501(c)(3)s: Should the IRS Become Further Involved?' (2007) 107 *Journal of Taxation* 45. See also Evelyn Brody, 'Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool' (2012) 12 *Florida Law Review* 183, 232 (generally disagreeing 'with those critical of a role for the IRS in charity governance, at least to the extent these criticisms apply to the governance questions on the redesigned Form 990').

¹⁰ See Marcus S Owens, 'Charity Oversight: An Alternative Approach' (2006) *The Hauser Center for Nonprofit Organizations, Harvard University, Working Paper No 33.4* <https://cpl.hks.harvard.edu/files/cpl/files/workingpaper_33.4.pdf> accessed 17 September 2017; Marcus S Owens, 'Charities and Governance: Is the IRS Subject to Challenge?' (2008) 119 *Tax Notes* 613.

The introduction of a federal charity regulator (ACNC) in Australia that is separate from the tax authority, the Australian Tax Office (ATO), is thus a new venture in charity regulation for a federal state. The ACNC, established in December 2012, took over the role of granting or refusing charitable status and maintaining the charities register while the ATO remains responsible for deciding eligibility for charity tax concessions and other Commonwealth exemptions and benefits. A memorandum of understanding sets out the back-office services that the ATO provides to the ACNC on a fee per service basis.¹² In its first year, this collaboration resulted in a reduction of the combined time of 28 days for the ACNC to determine charitable status and ATO to decide on tax concession on a new application in 95.6% of cases.¹³ By comparison, the Canada Revenue Agency Annual Report 2014–15 reports a 91.2% achievement on the number of charitable registration applications ‘reviewed and responded’ to within two months for simple applications and an achievement rate of

¹¹ See James J Fishman, ‘Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative’ (2010) 29 *Virginia Tax Review* 545, 590–91 (commenting that the IRS ‘corporate governance initiative is an unwelcome, unnecessary distraction. It increases administrative costs, diverts boards and staff from the focus on the charity’s mission and has no verified relationship to tax compliance’).

¹² See ‘Australian Charities and Not-for-Profits Commission’ (*Australian Taxation Office*, 2 March 2015) <www.ato.gov.au/About-ATO/Annual-Reports/Annual-Report-2012-13/Part-02-Performance-reporting/Support-for-other-programs/Australian-Charities-and-Not-for-profits-Commission> accessed 30 January 2017.

¹³ Australian Charities and Not-for-Profits Commission, *ACNC Annual Report 2012–13* (20 September 2013) 26, ahead of the benchmarked target of 85%.

94.7% within six months for regular applications.¹⁴ The high user satisfaction rate with the ACNC in Australia is also noteworthy. Figures from a 2015 survey of 943 board members and charity CEOs revealed 58% preferred the ACNC as the sector regulator followed by co-regulation (30%) with fewer than one in 20 preferring regulation by the ATO.¹⁵

With Australia now at the opposite end of the regulatory spectrum from the United States and Canada it is interesting to consider briefly the hybrid model found in the United Kingdom. Despite the devolution of power to Scotland, Northern Ireland and Wales,¹⁶ tax matters remain a sovereign issue in the United Kingdom and to this end, Her Majesty's Revenue and Customs (HMRC) determines charitable tax exemption on a UK-wide basis in accordance with the provisions of the English Charities Act 2011. Charity regulation itself, however, is a devolved matter. Thus, within the United Kingdom, three separate charity regulators coexist subject to separate charity legislation. Although the Charity Commission of England and Wales (CCEW) has long coexisted with HMRC in the regulation of charities, the establishment of new charity regulators in Northern Ireland (CCNI) and Scotland (OSCR)

¹⁴ Canada Revenue Agency, *Annual Report to Parliament 2014–2015* (2015) 165. It should be noted that the language used in the CRA Report does not lead one to believe that 'review and respond' automatically equate with 'decide'.

¹⁵ Pro Bono Australia, *Sector Survey: Gauging the State of the Nonprofit Sector* (2015) 38. This figure reveals a year-on-year steady level of support for the ACNC over the ATO as regulator. To this end, see Emma Tomkinson, 'The Charity Sector Wants to Keep its Regulator: Analysis of Submissions to the ACNC (Repeal) (No 1) Bill 2014' (2014) <<https://emmatomkinson.files.wordpress.com/2014/05/20140528-acnc-repeal-no-1-bill-2014-analysis1.pdf>> accessed 7 September 2017.

¹⁶ Peter Leyland, 'The Multifaceted Constitutional Dynamics of UK Devolution' (2011) 9 *International Journal of Constitutional Law* 251.

subject to their national charity laws but bound by HMRC's interpretation of tax law in accordance with the English Charities Act creates a model that lies halfway between the federal revenue-led models of the United States and Canada and the federal charity-led model of Australia.

In the absence of a federal tax regulator as lead regulator, the most popular regulatory model of recent vintage is the statutory charity regulator. Five jurisdictions (Ireland, Northern Ireland, Scotland, Australia, and England and Wales) use this model. All, except the regulator in England and Wales, are creatures of the new millennium and have been established as part of the rollout of modern charity regulatory frameworks that introduce charity registers, statutory definitions of charitable purposes and charity reporting requirements for the first time. Even in the case of England and Wales, which has had a charity register since 1964, recent revisions to the Charities Acts in 2006 and 2016 have changed the status and regulatory powers of the Charity Commission.¹⁷ Given the relatively recent vintage of many of these new regulators — only the Scottish regulator has reached its tenth birthday — there is still an air of bedding down and regulatory establishment in many of these jurisdictions to date. Rolling reviews of the charity register are on the cards but are not yet common practice and in some cases, statutory enforcement powers have yet to be fully exercised.¹⁸ There is thus much room to learn from the milestone achievements of each other.

¹⁷ See English Charities Act 2006, as consolidated in the English Charities Act 2011 and further amended by the English Charities (Protection and Social Investment) Act 2016.

¹⁸ Receiving its enforcement powers only in September 2016, the Irish CRA took and won its first prosecution under the Charities Act 2009 in 2017 in *Charities Regulatory Authority v Williams* (Sligo District Court, 2 February 17) when it successfully prosecuted an organisation for holding itself out as a charity while unregistered, contrary to Charities Act 2009 ss 41, 46.

The final model on offer is the New Zealand model, which comprises a Charities Services Board housed within the Government Department of Internal Affairs topped up by an independent Charities Registration Board made up of three independents who determine precedential charity registration or revocation decisions and have audit oversight of the remainder.¹⁹ This hybrid regulatory model was introduced in 2012 and replaced the former New Zealand Charity Commission (NZCC) that had existed under the New Zealand Charities Act 2005. The given reason for the abolition of the NZCC at the time was one of cost. At the time of disestablishment, not everyone was convinced by the cost saving exercise. In its financial review of the transition costs (2011), the New Zealand Parliament Social Services Committee commented:

Some of us are very concerned about the proposed transfer of functions and the disestablishment of the Commission because of the lack of evidence of cost savings and the chance that the cost of changes may outweigh any potential savings once the costs of redundancy payments and breaking contract agreements are taken into account.²⁰

¹⁹ See Andrew Phillips, 'How the Charities Registration Board Makes Decisions' (*Charities Services*, 6 December 2016) <<https://charities.govt.nz/news-and-events/blog/how-the-charities-registration-board-makes-decisions/#https://charities.govt.nz/news-and-events/blog/how-the-charities-registration-board-makes-decisions>> accessed 17 September 2017.

²⁰ Social Services Committee, *2010/11 Financial Review of the Charities Commission* (Report to New Zealand House of Representatives, 10 May 2012) 3.

That the fears of the Select Services Committee may have been warranted appears to have some weight when the Crown Funding for the New Zealand Charities Service (NZCS) is compared with that of the former NZCC. The Crown appropriation for NZCS in 2014–15 was NZ\$5.21 million, rising to NZ\$5.22 million in 2015–16. In contrast, the Crown appropriation for the NZCC was NZ\$4.84 in each of its final years of operation.²¹ The relative value for money brought about by this transition is a separate question that will be addressed in Part III. The New Zealand model is interesting for several reasons. It provides a case study of a country that has played with and abandoned the stand-alone statutory regulator, currently so favoured by other jurisdictions. Moreover, the New Zealand government chose not to hand back control for the regulation of charities directly to Inland Revenue but instead created the Charities Services division (NZCS) within the Department of Internal Affairs, a department primarily responsible as the public services department for issuing passports, registering births, deaths and marriages and overseeing that National Library and Archives of New Zealand. The NZCS provides secretariat support for and exercises the delegated powers of the New Zealand Charities Registration Board and liaises with both Inland Revenue and the Ministry for Economic Development.

2. The Associated Costs of Regulation: Black Hole Expenditure or Value for Money?

²¹ Government of New Zealand, *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2017 — Māori, Other Populations And Cultural Sector* (Budget 2016, B 5 Vol 8, 26 May 2016) 101. The correlating NZCC appropriation funding may be found in Charities Commission, *Annual Report for the Year Ended 30 June 2012* (28 November 2012) 22.

Howsoever charities are regulated such regulation normally involves a registration and review process which, if successful, leads to entry upon the register of charities and obliges the registrant to comply with annual reporting obligations and, depending upon the jurisdiction and the nature of the charitable entity, certain disbursement guidelines. From the state's perspective, the establishment of a new government agency, its staffing and the introduction of new regulatory requirements involves certain sunk costs. As these establishment and registration costs level out over the initial years, they are replaced by annual monitoring costs (depending upon the level of sample audit of compliance undertaken), rolling reviews of the register (depending upon how clean the initial register was upon its primary population), and education and enforcement costs (depending upon the level of active engagement of the regulator with the charity sector). Thus, costs may change with the age of the regulator but may not necessarily lessen.

The level of public interest (perhaps driven by media interest) can often further influence the level of political interest in the regulation of charities and this can have the effect of determining charity regulatory policy and direction and the level of active investigation and enforcement. To further complicate matters, not every issue relating to charity regulation necessarily falls within the remit of the regulator. Thus, many of the jurisdictions reviewed in this chapter do not assign operational oversight of charitable fundraising to their charity regulator. In some cases, responsibility for fundraising regulatory compliance may rest with another independent body focused solely on fundraising matters (such as the Fundraising Regulator in England and Wales or Independent Panel in Scotland). In others, oversight may be by way of sector self-regulation (eg in New Zealand via the Public Fundraising Regulatory Association and the Fundraising Institute of New Zealand) while in some federal jurisdictions, such as Australia, fundraising regulatory oversight may lie at the state level

with a host of different regulators (from the Attorney General in the Northern Territory through to Consumer Affairs in Victoria and the Department of Commerce in Western Australia). Even in those jurisdictions in which the charity regulator is charged with this role, it may not be actively enforced in practice (as in Northern Ireland where the 2008 statutory provisions making the CCNI responsible for issuing public collection certificates have yet to be commenced).²²

How then does one account for the cost of regulating charities or even compare such costs as between jurisdictions? One useful starting point is to look at the annual budget awarded to the standalone charity regulators and to consider this figure in the context of the number of regulated entities and the size of the agency charged with oversight.

Table 1: Regulatory Budgets for Independent Charity Regulators at Y/E 2016

Statutory Agency	Established	Budget 2016 (million)	Staff	Staff Costs:Budget Ratio 2016 (million)	Registered Charities Y/E 2016
CRA Ireland	Oct 2014: CRA &	€2.66	31	€1.7 ²³ (66%)	8,003 ²⁴

²² See Charities Act (Northern Ireland) 2008, pt 13 ch 1. A similar, if more dramatic, situation exists in England and Wales where both the provisions of both the Charities Act 1993 and the Charities Act 2006 on public collections have yet to be commenced.

²³ Charities Regulator, *Business Plan 2017* (2017) 8.

²⁴ Based on 'Public Register of Charities' (*Charities Regulator*, July 2017) <www.charitiesregulatoryauthority.ie/en/cra/pages/search_a_charity> accessed 25 January 2017.

	Register				
ACNC Australia	Dec 2012: ACNC July 2013: Register ²⁵	\$14.8 ²⁶	94	\$10.7 (70%)	54,354 ²⁷
OSCR (Scotland)	Feb 2006 OSCR & Register	£3m	48	£2m (66%)	24,066 ²⁸
NZCC New Zealand	July 2005: ²⁹ NZCC Feb 2007: Register	2011/12: \$5.73m ³⁰	2012: 45	2011/12: \$2.5m (40%)	2005–10: 30,000 registered

²⁵ ‘ACNC Media Release: Survey Confirms Strong Public Trust in Australian Charities’ (*Australian Charities and Not-for-Profits Commission*, 9 July 2013) <http://acnc.gov.au/ACNC/Pblctns/Media_centre/Med_Rel/ACNC/Comms/Med_R/MR_036.aspx> accessed 17 September 2017.

²⁶ ACNC Annual Report 2015-16, 103.

²⁷ ACNC website at 24 November 2016.

²⁸ OSCR website at 16 December 2016.

²⁹ Trevor Garrett, ‘Establishing a Charities Commission in New Zealand’ (Modernising Charity Law Conference, Brisbane, 16–18 April 2009) 3 <<https://wiki.qut.edu.au/download/attachments/89014022/T.Garrett-NZCharitiesCommission.pdf>> accessed 17 September 2017.

³⁰ Charities Commission, *Annual Report* (n 21) 22.

(Edward Elgar, 2018)

NZCS New Zealand	July 2012: NZCS & NZCRB	2015: \$5.99m	37	\$3 ³¹ (50%)	27,990 ³²
CCNI Northern Ireland	Mar 2009: CCNI Dec 2013: Register	£1.8m ³³	14/15: 25 FTE & 4 seconded	£1.2m (66%)	5,288 ³⁴
CCEW England & Wales	2007: Current form 1964: Register	15/16: £24 ³⁵	285 ³⁶	£15.4 (66%) just over 2/3 (70%)	165,334 ³⁷
SCOC Singapore	2007: (revised)	\$5.38	31	\$3.9 (75%)	2,247 ³⁸

³¹ Author correspondence with the New Zealand Charities Service, February 2017.

³² NZCS website at 30 December 2016.

³³ See the Charity Commission for Northern Ireland annual report and accounts for the year ended 31 March 2017.

³⁴ CCNI website at 14 December 2016.

³⁵ Charity Commission for England and Wales, *Annual Report and Accounts 2014–15* (30 June 2015), 70.

³⁶ *Ibid*, 69.

³⁷ ‘Charity Commission for England and Wales’ (*Wikipedia*, 3 August 2017) <https://en.wikipedia.org/wiki/Charity_Commission_for_England_and_Wales> accessed 17 September 2017.

³⁸ Singapore Commission of Charities Annual Report 2016, 7.

Table 1 above sets out the establishment details of the charity regulators in seven common-law jurisdictions, along with their annual budgets, their staff sizes and the numbers of registered charities they were responsible for regulating as at year end 2016. Thus, it can be seen that, per capita, the best resourced charity regulator is the SCOC. With an annual budget of Sing\$5.37m in 2016, it had 31 staff to regulate 2,217 registered charities. Three quarters of the SCOC's annual budget was consumed by staff costs, which is a higher ratio than the 2/3 median staff cost to total budget ratio for most of the other regulators examined. This is in direct contrast to its regulatory counterpart, the NZCS, which while also situated within a government department had staff costs in 2016 of just half its total annual budget. Ireland and Northern Ireland follow closely behind Singapore in terms of budget and staffing vis-à-vis the number of registered charities for which they are currently responsible. The least well-resourced regulators in this regard per number of registered charities are the British regulators with the CCEW's budgetary and staff cuts placing it in a position of having to manage on tighter ratios than its counterparts elsewhere.³⁹ Interrogating the budgetary situation should force us to consider which is the 'fittest for purpose' regulator, whether there is administrative slack in certain regimes and which regulators will struggle to deliver their regulatory objectives because of underinvestment.

³⁹ Of the two, CCEW is worse placed than OSCR in this regard as CCEW is also responsible for the oversight of 'excepted charities' which are not required to register. When these charities are included (the National Audit Office estimated that there were at least 180,000 such excepted charities in 2012: see NAO, *Regulating Charities: A Landscape Review* at 15) the staff/charity ratio for the CCEW increases to 1:1,211 and the spend per charity against total revenue decreases to 1:69.

When we look at the ratio of staff to the number of registered charities, as set out in Table 2 below, further interesting aspects emerge.

Table 2: Staff and Budget Ratios to Registered Charities at Y/E 2016

Agency	# Staff	# Charities	Staff:Charity	Charity: Total Rev
SCOC	31	2,247	1: 72	1: 2,394
CCNI	29	5,288	1: 182	1: 340
CRA	31	8,003	1: 258	1: 333
OSCR	48	24,066	1: 501	1: 125
ACNC	94	54,354	1: 578	1: 272
CCEW	285	165,334	1: 580	1: 145
NZCS	37	27,990	1: 756	1: 214

The most ‘hardworking’ regulatory agency would appear to be the NZCS with 756 registered charities per member of staff, followed by the CCEW and the ACNC. The CCEW, however, is the least well-resourced of these three regulators when it comes to actual spend per charity. At the other end of the spectrum, once again Singapore tops the poll here with 72 registered charities per member of staff, followed by the CRA and CCNI who are both well off the median of 501.

These ratios, while interesting, can be deceptive. There is undoubtedly a base cost to maintaining a register and overseeing reporting regardless of size so sunk costs must be considered before economies of scale kick in. Nevertheless, this does raise interesting questions regarding optimum regulator size and resources. Scotland in 2016 had 24,066 registered charities and 48 staff. In its 2017 Business Plan, the Irish CRA estimates that it will require 50 staff to achieve its business and strategic objectives; yet it has only one third of the number of charities on its register as OSCR and its increased 2017 staffing level falls only slightly short of the NZCS level of 37. The NZCS, however, regulates over four times the number of registered charities as the Irish CRA. Arguably, when examining staffing arrangements, it would be more informative to know in the case of well-established regulators (ie in existence five years or more) the number of compliance staff vis-à-vis the number of registered charities (as opposed to overall staff numbers) and then to use this information to interrogate the level of audits or investigations carried out per region and to examine whether greater resources and greater staff levels are causally related to better regulatory outcomes. This level of detail is not always available however.⁴⁰

Equally, having a better breakdown of the allocation of staff would enable a richer analysis of staff deployment. Thus, in the case of a new regulator establishing a register of charities for

⁴⁰ OSCR is (and the former NZCC was) particularly transparent on matters relating to staff numbers and allocation, system requirements and regulatory costs in corporate reports. It is more difficult to unearth this information when the regulator forms part of a government department (as in New Zealand and Singapore) and is no longer required to produce autonomous corporate reports or be as answerable to select committees as previous independent regulators such as the NZCC were.

the first time, a high number of staff devoted to registration would ensure timely formation of new charities and an opportunity to clean the register if it was created by the hand-over of revenue records for previously tax-exempt organisations for charitable purposes. The New Zealand Charities Commission adopted this approach to the allocation of registration staff when it was first established in 2005. Under the *New Zealand Charities Act 2005*, charities that wished to maintain their eligibility for tax-exempt status were required to register directly with the new regulator before June 30, 2008. The register opened for business in February 2007 and the strategic decision was taken to hire law graduates on fixed term contracts to process the expected high volume of registration applications. It was intended that once trained, these employees would deal with the ‘ordinary’ applications while more complex or unusual applications could be escalated to a senior analyst with greater experience. The annual reports of the NZCC reveal that of its 27 staff in 2007, eleven were on full-time fixed-term contracts, indicating the strong focus on building the register.⁴¹ The CCNI similarly has seconded staff from other government departments to assist in the registration process who ultimately will return to their permanent posts elsewhere.⁴²

The 2015–16 Annual Report of the ACNC provides another useful insight into staff redeployment as a regulator’s role evolves. 2014 was the first year in which registered Australian charities were required to file financial information as part of their Annual

⁴¹ Charities Commission, *Annual Report 2007* (15 November 2007); Charities Commission, *Annual Report 2008* (9 December 2008). Charities Commission, *Annual Report 2009* (27 November 2009) reveals that as the initial wave of registrations drew to an end and the NZCC turned to ‘business as usual,’ 31 fixed term contracts also came to a conclusion — indicating the level of manpower devoted to registration in the first two years of the NZCC’s existence when it registered from scratch over 28,000 charities.

⁴² Author correspondence with the CCNI, 16 February 2017.

Information Statement (AIS) return, with medium and large charities also filing separate financial returns. In a report released in 2015 reviewing the accuracy and quality of the submitted financial returns, the ACNC unveiled the results of its systematic review of the 2014 AIS data. According to the regulator, thousands of charities had made significant errors in their financial reporting with the three most common being classification errors (with charities incorrectly identifying themselves as small when in fact they were medium or medium when they were large);⁴³ calculation errors in the completion of the financial statements; and failures to lodge an annual financial report.⁴⁴ In its response to these findings, the ACNC embarked upon a major education campaign for registered charities and reallocated 12 of its staff to a data integrity project for three months to work with the 7,000 charities identified as having made errors in their financial reports. This staff re-deployment subsequently led to the ACNC establishing a dedicated data integrity project team to assist charities in amending their 2014 and 2015 Annual Information Statements.⁴⁵ The 2015–16 Report refers to ‘significant resources’ being invested in the data integrity project. The

⁴³ Australian Charities and Not-for-Profits Commission, ‘Working with charities to correct errors on the ACNC Charity Register’ [2015] 5 ACNC Quarterly 2 <www.acnc.gov.au/CMDownload.aspx?ContentKey=32345a7b-7ebc-4a9e-8658-e7323cc62c70&ContentItemKey=46d1c9af-daa7-4ae0-a09d-218d25142ee5> accessed 17 September 2017.

⁴⁴ Australian Charities and Not-for-Profits Commission, *Lessons on Reporting to the Australian Charities and Not-for-profits Commission* (Report, July 2015) <www.acnc.gov.au/CMDownload.aspx?ContentKey=a8a55fed-5800-4b27-afc4-bc087fbc4d58&ContentItemKey=655484f6-0cc2-4d30-bdfd-ce00c6d8b4c9> accessed 17 September 2017.

⁴⁵ See Australian Charities and Not-for-Profits Commission, *ACNC Annual Report 2015–16* (7 October 2016) 44. No information is provided as to the current staffing level of the data integrity project team or as to whether these staff are new hires or existing redeployments.

ACNC's Corporate Plan 2016–17 further signals the regulator's intention to leverage its 'digital by default' approach to sound data, to make the promised charity passport a reality whereby authorised government agencies would be enabled to access ACNC charity data, eliminating duplicative reporting for charities — a definite, if at present unquantified, saving.

The dissemination of regulatory procedural learning of this nature is invaluable as first-time receipt of returns under a new financial reporting system is bound to be subject to glitches. Failure to tackle common reporting errors in a timely fashion undermines the integrity of the charity register and any subsequent decisions made based on its data. History reveals that Scotland's OCSR experienced similar difficulties with the quality of financial information it received in its early days too. While the requirement to prepare annual accounts that were either audited or independently examined existed since 1992 in Scotland, regulatory oversight of the submitted accounts was new. Shocked by the poor standards of annual financial reporting, OSCR invested heavily both in educational guidance for the sector and in individual accounts review and feedback to charities.⁴⁶ Failing to produce the desired compliance level, OSCR switched tack in 2009 and failed 912 sets of submitted charity returns due to the unacceptable primary statements, forcing most of those charities to review, amend and resubmit their accounts in a compliant form. Some of the errors identified by OSCR in its 2009–10 Annual Review related to potential governance problems with several instances where the charities had simply been reluctant to provide financial information to the

⁴⁶ In addition to general accounting guidance it also produced a Receipts and Payments Work Pack and sent it to all registered small charities on the Register. See Laura Anderson, 'Debate: Regulation in the Charity Sector — Reflections from Scotland from the First 10 Years' (2017) 37 *Public Money & Management* 153, 154.

public required by Scottish charity law.⁴⁷ By 2012, OSCR's focus on better accounting procedures led it to report on its measures of success and its evolving plans for future regulation:

Accounting compliance has risen steadily as a result of our work as Regulator. In 2012–13, 90% of charity accounts met requirements or received a Qualified Pass. As part of our review of our services and procedures, we have begun a programme of work to develop a more risk-led approach to our monitoring of charities, focusing our resources on those areas we believe demand greater scrutiny and will examine the feasibility of publishing some charity accounts on our website to encourage transparency.⁴⁸

The lessons learnt through the process of report evaluation and the tried and tested incentives to encourage charities to file compliant returns on time will have relevance for other countries currently introducing new reporting regulations.⁴⁹

⁴⁷ Office of the Scottish Charity Regulator, *Annual Review 2009/2010* (2010) 16.

⁴⁸ Office of the Scottish Charity Regulator, *Scottish Charity Regulator Annual Review 2012–13* (2013) 13. It is worth mention however that the level of public complaints to OSCR relating to accounting irregularities rose from 4% in 2011–12 to 6% in 2012–13.

⁴⁹ To this end, New Zealand introduced new reporting standards on 1 April 2015. As such it is too early to judge the quality of reports submitted but the recent publication of further guidance for Tier 3 and Tier 4 reporting entities would suggest that the NZCS has already started to educate charities on improvements needed under the new standards. See, eg, 'Tier 4' (*Charities Services*) <<https://charities.govt.nz/new-reporting-standards/tier-4>> accessed 16 February 2017.

The financial crisis and subsequent economic recession adversely affected the resources available to many of the independent regulators over the past five years. In Ireland, lack of funding meant that Part 4 of the Charities Act 2009 concerning the CRA's investigation powers, intermediate sanction powers and its ability to protect charitable organisations was not initially commenced with the rest of the Act in October 2014. The dangers of false economies revealed themselves subsequently when media investigations revealed wide scale instances of charity trustee fraud and poor governance in a national bereavement charity in June 2016.⁵⁰ The scandal led ultimately to the liquidation of the charity, a criminal investigation by the Office of the Director of Corporate Enforcement and a formal investigation by the Revenue Commissioners.⁵¹ Throughout this period, the CRA had limited ability to respond under the Charities Act, prompting public outrage and forcing the government to empower the regulator.⁵² Commencement of the regulator's investigative powers in September 2016 set in train the Department of Justice's increase in funding for the CRA with an additional €1.7million allocation in its 2017 budget as well as providing additional resources to procure external investigation and forensic services.⁵³

⁵⁰ RTÉ Investigations Unit, 'Broken Trust' (*RTÉ News*, 24 June 2016) <www.rte.ie/news/investigations-unit/2016/0622/797434-broken-trust> accessed 17 September 2017.

⁵¹ Patsy McGarry, 'Decision Taken to Shut Down Scandal-Hit Charity Console' *Irish Times* (Dublin, 7 July 2016).

⁵² Catherine Shanahan and Conall Ó Fátharta, 'Charities Regulator Has No Legal Powers to Probe Charity Sector' *Irish Examiner* (Cork, 30 June 2016).

⁵³ Government of Ireland, *Revised Estimates for Public Services 2017* (Stationery Office, December 2016) 93.

See also Dáil Éireann Debates, 15 November 2016, vol 928, no 3, Written Reply No 120.

One of the worst hit regulators financially has been the Charity Commission for England and Wales. Its annual budget was cut from £32.6 million in 2007–08 to £24 million in 2015–16.⁵⁴ The effect of this fiscal retrenchment forced the CCEW to reprioritise its programmes with a move away from individual charity guidance to a greater focus on legal compliance, monitoring and investigation.⁵⁵ Although the Hodgson Report on the Review of the Charities Act 2006 was generally well disposed towards the operational effectiveness of the CCEW in 2012,⁵⁶ subsequent reviews by the National Audit Office (in 2013 and 2015) and the Public Accounts Committee (2014) of the CCEW were more critical. The NAO concluded in its 2013 investigation that the regulator represented poor value for money despite its best efforts, finding that:

[t]he Commission has tried to adapt to its reduced resources, but in doing so it has not put sufficient emphasis on the rigour of its registration process and its investigation of wrongdoing in charities. Its restructuring has not been informed by an assessment of

⁵⁴ See House of Commons Committee of Public Accounts, *The Charity Commission: Forty-Second Report of Session 2013–14* HC 792 (5 February 2014) 7 (PAC Report); Alison Dunn, ‘Regulatory Shifts: Developing Sector Participation in Regulation for Charities in England and Wales’ (2014) 34 *Legal Studies* 660.

⁵⁵ This approach continues to dominate in Charity Commission for England and Wales, *Strategic Plan 2015–18: Giving the Public Confidence in Charities* (June 2015).

⁵⁶ Lord Hodgson, *Trusted and Independent: Giving Charity Back to Charities — Review of the Charities Act 2006* (Report, July 2012) [5.25] (stating that ‘none of the evidence gathered during the Review process has given reason to doubt that [the CCEW] is largely effective as a regulator in a complex and disparate field’).

the costs, benefits and risk of different models for regulating charities, and it has not identified the resources it needs to meet its statutory objectives.⁵⁷

A year later, PAC found that ‘the Commission does not know how much its activities cost and has not focused its resources on its priorities’.⁵⁸ The timing of these reports’ comments on the poor performance and use of CCEW’s resources came in the wake of the Cup Trust scandal, a one-trustee charity tax-avoidance scheme largely uncovered by HMRC following the ‘astounding failure of the CCEW to close down the fake charity.’⁵⁹

While there may not always be a direct causal link between budgetary resources and performance standards, there comes a point at which investment in the fundamental elements of regulation is essential. In its 2015 follow-up report on the CCEW, the NAO highlighted an extra £8m one-off Treasury investment in the CCEW to enable the regulator to improve its IT systems and risk profiling, support proactive monitoring and investigations, provide more services online and fund the regulator’s transformation programme. Treasury gave an additional £1 million to boost the Commission’s annual budget in 2015-6 to fund immediate

⁵⁷ National Audit Office, *Report by the Comptroller and Auditor General: The Regulatory Effectiveness of the Charity Commission* (4 December 2013) [26].

⁵⁸ PAC Report (n 54) 5.

⁵⁹ Comments of the Chair of the PAC Committee, Margaret Hodge, in Rupert Neate, ‘Charity Watchdog’s “Astounding” Failure to Detect Tax Avoidance Condemned’ *Guardian* (London, 4 June 2013) <www.theguardian.com/politics/2013/jun/04/cup-trust-charity-watchdog-tax-avoidance> accessed 17 September 2017.

resource needs in the Commission's monitoring and enforcement work.⁶⁰ The NAO remained critical, however, of the CCEW's ability to understand the cost of regulating the sector effectively. In this regard, it stated that 'the Commission has not quantified the relative benefits of different activities, limiting its ability to take informed decisions about where best to direct its resources. It is important for the Commission to develop a good understanding of its unit costs to aid future funding negotiations with HM Treasury.'⁶¹

3. Measuring the Success of Regulatory Efforts

How then does one measure, much less compare, regulatory success in the field of charity oversight? What does good regulation look like? What are the hallmarks of efficiency and effectiveness and do these benchmarks change over the life cycle of the regulator? Is there a time for greater court based enforcement over the provision of soft guidance, is there an optimum level of sample audit and what factors feed into risk profiling for enforcement purposes? These questions, and indeed, their prospective answers are not limited to the sphere of charity regulation but have resonance for many other administrative regulators.⁶²

A useful starting point is to draw upon the wisdom of the OECD's 2013 report on best practices for improving inspections and enforcement. The OECD noted:

⁶⁰ National Audit Office, *Report by the Comptroller and Auditor General: Follow-Up on the Charity Commission* (Report, 22 January 2015) [1.17].

⁶¹ *ibid* [1.18]–[1.20].

⁶² In this regard see, for instance, Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000).

Governments should ensure that, when developing regulation, the priorities for the allocation of enforcement resources are informed by a cost-benefit analysis, based on effectiveness and efficiency criteria. This should include a consideration of whether compliance with the regulatory requirements can be expected to be achieved more efficiently through the mechanisms of civil litigation, market mechanisms and criminal law enforcement when needed. Going through such a process should also be used to ensure that, if it is found that inspection and enforcement by state agencies will indeed be needed, appropriate resources are foreseen and allocated, which is absolutely necessary to ensure results.⁶³

These comments are particularly pertinent in the context of charity regulation since in most cases neither beneficiaries nor the public have locus standi to enforce charity law directly and are dependent on the state agency (whether in the form of Attorney General, Charity Regulator or other agency) acting in a *parens patriae* capacity to enforce the law, thereby ensuring continuing confidence that donors' charitable wishes will be respected.⁶⁴ The absence of civil litigation routes and market mechanisms (unless one is willing to consider sector self-regulation or co-regulation with the state as a useful avenue here)⁶⁵ leave statutory enforcement, or at least its deterrent power, as the most viable route from an enforcement

⁶³ Organisation for Economic Co-Operation and Development, 'Public Consultation on Best Practice Principles for Improving Regulatory Enforcement and Inspections: Draft Report Submitted to the Public for Comments' (2013) [28].

⁶⁴ Breen (n 6).

⁶⁵ On the interaction of state and non-state mechanisms for the regulation of charities see further Breen, Dunn and Sidel (n 4).

perspective. Such enforcement, regardless of ultimate success, adds to the baseline cost of regulation.

Causality is another important issue. As the OECD has highlighted:

[E]ven though it may appear that conditions are better than expected following adoption of a regulation, they might actually not be any better than they would have been without the regulatory treatment. To make further improvements, policymakers need to know how well existing treatments have worked. They need to know if outcomes can be causally attributed to regulatory activities.⁶⁶

Many of the regulators' strategic and corporate plans provide an insight into what each one views as a prospective indicator of regulatory achievement, backed up in most cases by a target benchmark that if reached, would constitute success in their eyes. The corporate plans tend to cover a two- to four-year period and it is thus necessary to scrutinise the intervening annual reports to uncover actual performance against benchmarked standards.

The picture of regulatory success differs with the age and maturity of the regulator. Thus, for new kids on the block such as the Irish CRA and Northern Ireland's CCNI, the emphasis in both corporate plans is placed firmly on building the register. In the words of the CCNI,

⁶⁶ Cary Coglianese, 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy' (Expert Paper No 1, OECD, 2012) 37.

(Edward Elgar, 2018)

[t]he Commission has prioritised its roles and believes registration, compliance monitoring and investigation of concerns are essential. All other activities are categorised as desirable, and if registration and enquiries take longer and more resources than planned for, then work such as the development of advice and research will be delayed.⁶⁷

In 2017, the CCNI successfully registered all charities that had previously sat on what was known as the ‘deemed list of charities’ supplied by HMRC at the time of the establishment of the Northern Ireland Charities Register. Work has now commenced on calling forth for registration more than 900 organisations that have identified themselves as not previously having charitable tax exemption but which are required to register under the Charities Acts (Northern Ireland) 2008–13. This volume of further likely registrations means that for the moment no lessening in the CCNI staff numbers devoted to registration is envisaged. Yet, as each new charity is registered and becomes subject to the annual statutory reporting requirements, the work of the CCNI’s monitoring and evaluation team will increase accordingly. The new challenge for the CCNI will be to balance the parallel registration workload with the growing demands of annual return scrutiny and audit.

⁶⁷ Charity Commission for Northern Ireland, *Corporate Plan 2014–17* (May 2014) 3. Similarly, the Irish Charities Regulatory Authority states that its primary strategic objective is ‘to establish and maintain a public register and reporting framework for charities operating in Ireland’: Charities Regulator, *The Charities Regulator First Statement of Strategy 2016–2018* (June 2016) 9. Its *Business Plan 2017* (n 23) targets the complete reconciliation of the Charity Register by year end 2017 but does not give any indication as to the scale of this task.

For those whose registers are up and running, the quality of the data maintained therein is highlighted as a key factor. The ACNC *Corporate Plan* puts it quite bluntly: ‘data is central to the ACNC’s success as a regulator’.⁶⁸ The importance of data is not lost on longer serving regulators either, with both Canada and England and Wales making it a strategic priority to refocus on data integrity. A chief aim of the Canadian CRA in this regard is to modernise its online application system and introduce electronic filing of returns between 2017 and 2018⁶⁹ while the CCEW’s first action point in its Strategic Plan for 2015–18 is to regulate ‘against an updated risk framework informed by better data, enabling us to focus resources on the highest risk cases and those where we will have the most impact on public confidence.’⁷⁰ New regulators starting with a blank slate and contemplating a ‘digital by default’ approach could learn much in customising their new IT systems from the shared experiences and previous pitfalls of other charity regulators.

Turning good intentions into pragmatic actions is something that the CCEW has been taken to task over by the UK NAO. In its follow-up report on the CCEW, although the NAO compared favourably the level of CCEW regulatory activity for 2014 with the previous year, it felt the regulator could go further to understand the costs of effective regulation.⁷¹ 2013-14 saw a distinctively more active regulator with the CCEW: conducting 64 statutory inquiries (compared to 15 in 2012); using its information gathering powers 652 times in 2014 (compared to 200 times in 2013); and exercising its enforcement powers 56 times (as

⁶⁸ Australian Charities and Not-for-Profits Commission, *2016–17 Corporate Plan* (2016) 13.

⁶⁹ See Canada Revenue Agency, *Summary of the Corporate Business Plan 2016–2017 to 2018–2019* (2016) 23.

⁷⁰ Charity Commission for England and Wales, *Strategic Plan 2015–18* (n 55) 2.

⁷¹ National Audit Office, *Follow-Up on the Charity Commission* (n 60) 21.

opposed to three times the previous year).⁷² The increased use of enforcement powers through completed investigations resulted in the protection of £31.3m of charitable assets with two statutory investigations alone leading to the recovery of £1 million for charities following legal settlements with the trustees.⁷³ Nonetheless, the NAO felt that

[t]op-down costing, although simple and cheap, can be sensitive to assumptions made when apportioning overheads to activities. The Commission has not tested the sensitivity of its unit costs to changing assumptions. ... The Commission has not estimated the quantifiable benefits of its different activities, for example the funds it might protect through early intervention on high-risk charity registrations [W]ithout work to consider the potential benefits of its different activities, the Commission cannot take informed decisions about where best to direct its resources.⁷⁴

One regulator with ten years of regulatory experience has taken this challenge to heart. In 2016, OSCR introduced its ‘Targeted Regulation Approach’ and sought to adapt its regulatory model to better focus regulator ‘energy and resources on areas of work that have the greatest potential to undermine confidence in the charity sector.’⁷⁵ By revising the information it sought annually from charities, making more annual charity reports directly

⁷² *ibid* 4.

⁷³ *ibid* 35.

⁷⁴ *ibid*.

⁷⁵ Office of the Scottish Charity Regulator, *Targeted Regulation of Scottish Charities: Progressive, Preventative and Proportionate — Post Consultation Report on Annual Reporting, Publishing Accounts, the Creation of a Trustee Database and Serious Incident Reporting* (March 2015).

available to the public on the Register, developing a new charity trustee database and introducing a serious reporting incident regime for ‘notifiable events’, OSCR sought to reduce the amount of information it required from charities while simultaneously improving charity law compliance and making more effective use of its limited resources. While still too early to evaluate the effectiveness of this regime change (which commenced on April 1, 2016),⁷⁶ it will be interesting to see whether targeted regulation will have a substantive or merely a negligible effect on charity behaviour.

Empirical research conducted between 2007 and 2013 on the effectiveness of OSCR’s previous serious incident reporting mechanism found no statistical association between OSCR’s measured accountability concerns and subsequent tangible outcomes (eg dissolution and regulatory intervention).⁷⁷ Under the pre-2016 system, charities with a gross annual income greater than £25,000 submitted an annual return, a supplementary monitoring form and a copy of their annual financial accounts. OSCR assessed the supplementary monitoring form against 32 active triggers used for exception reporting. Triggered exceptions were then considered by OSCR in a risk based proportionate manner that could then lead to further correspondence with the charity.⁷⁸ Based on an interrogation of OSCR’s financial exceptions data and annual returns information, McDonnell has argued that the absence of a link between the financial exceptions and negative organisational outcomes calls into question

⁷⁶ Anderson (n 46).

⁷⁷ Diarmuid McDonnell, ‘Improving Charity Accountability: Lessons from the Scottish Experience’ (2017) 46 *Nonprofit and Voluntary Sector Quarterly* 725.

⁷⁸ Office of the Scottish Charity Regulator, ‘Written Submission from OSCR to the Public Audit Committee’ (4 June 2015).

whether the costs imposed on charities by the need to respond to the triggering of a concern were justified, particularly since the triggers were retrospective and too focused on technical accounting compliance rather than better governance and fundraising compliance concerns.⁷⁹

The effect of the changes introduced by targeted regulation may prove interesting in this light. The introduction of a new notifiable events regime puts the focus on charity self-assessment and sits alongside a revised annual reporting regime.⁸⁰ The new online annual return asks fewer questions of smaller charities and the qualitative information sought of charities differs greatly from the old financial exceptions regime. OSCR is currently developing a new way to analyse the annual return information, which remains unpublished at present due to the pilot nature of the scheme. By asking fewer but qualitatively more important questions of charities, OSCR hopes to use the charity responses, cross-referenced with the other information held on the charity (eg third party concerns) to allow it to identify in a more holistic fashion charities that potentially fall within one or more of the issues on its published targeted regulation framework.⁸¹ The driving force behind OSCR's new approach is to protect charitable assets and beneficiaries and to protect the integrity of charitable status.

⁷⁹ McDonnell (n 77) 16.

⁸⁰ Office of the Scottish Charity Regulator, 'Notifiable Events' (Guide, March 2016, updated August 2017) <www.oscr.org.uk/media/2155/2016-03-15_guidance-for-notifiable-events_web-version.pdf> accessed 27 February 2017.

⁸¹ See Office of the Scottish Charity Regulator, 'The Targeted Regulation Framework of the Scottish Charity Regulator' <www.oscr.org.uk/media/2165/2016-03-17-risk-framework-narrative-for-publication.pdf> accessed 23 February 2017. Ten areas of concern are identified, ranging from the non-compliant (acting without prior regulator consent or failing to meet reporting requirements) to the vulnerable (charities operating in fragile

The future outcomes of OSCR's targeted regulation will be awaited by all who profess an interest in aligning regulatory rationale, execution, cost and success. OSCR has had a good track record over the past decade in the building and maintenance of a robust charities register and in utilising annual returns to provide individual and sectoral feedback on both governance and reporting practices. Its second foray into risk profiling, which will see it revise its financial exceptions model, introduce its notifiable events regime and start to consider the data produced from these and other sources in a more holistic fashion, augur well for more joined up regulation. It may be that the new approach, when published by OSCR, will enable future researchers to find the necessary causal link between triggered exception and tangible outcome.⁸²

4. Concluding Thoughts

In all cases, whether in the case of a new regulator setting up shop or a well-established regulator seeking more effective oversight, three key messages appear to hold true across the board, regardless of the regulatory model chosen.

First, having a reliable and robust register is key. A good register is the basis of good regulation. The right information needs to be present and its accuracy and ease of availability, not just to the regulator but to the public in general, is important. From the moment of

environments) to the illegal (lack of public benefit, misrepresentation as a charity or inappropriately benefiting from charitable status).

⁸² See McDonnell (n 77).

establishment, when the objective may be simply to map the sector, through to ‘business as usual’ when the reliability of register information becomes essential for the regulator’s monitoring and enforcement purposes, right up to the broader (but no less important) need for the state to have reliable data on the charity sector to facilitate better government policy and planning, the ongoing important role played by the register should be recognised and properly resourced.

Second, a charity register is only as good as the data that it holds. Data integrity, in turn, depends upon the accuracy and timeliness of the data received. This plays into the larger need for on-time reporting of the right information, captured in a way that makes it usable (by more than one regulator) and user-friendly. Asking the right questions of charities that will allow regulators to interrogate the data received, usefully compare it across the sector and then triage it for selective follow-up, is an ongoing challenge but much can be learnt from regulators’ experiences — both positive and negative — in this regard. Information sought from charities must earn its keep and have value when it comes to measuring compliance. Asking too much information of charities and underutilising it is as bad as seeking none. Finding a way to gather and process information on charities so that it can be recycled on demand for the needs of other interested regulators is a goal worth pursuing. The work of the ACNC on the development and roll out of the charity passport will thus be viewed with interest by many.

Third, and finally, a good data stream, while vital to good regulation, is not an end in itself. Risk profiling should, and finite resources will, push regulators to ask only for data that can answer the good stewardship question, or at least prompt further questions with which regulators should be concerned if they are serious about protecting charitable assets and

maintaining public confidence in charities. The squeeze on resources may even see a broadening of the requirement for charities to pay for the privilege of complying with charity law in the future beyond New Zealand to other countries.⁸³ The new Scottish approach to targeted regulation alongside the NAO mandated requirement for the CCEW to begin to causally link regulatory inputs with regulatory outcomes is likely to provide further food for thought. The jury is out on the effects on compliance of replacing general guidance, education and charity support to the sector as whole with a self-reporting regime for serious incidents requirement, with some querying whether there is a legal duty on charities to report serious incidents outside of the annual report.⁸⁴

Reviewing the rationale for charity regulation against the likely level of regulatory intervention required (whether at the investigation or enforcement stage) and staffing numbers across the various registration/investigation/engagement divisions in light of the achievements of those divisions may help to identify where regulatory effort is being placed

⁸³ The NZCS charges all charities with a gross annual income in excess of NZ\$10,000 a fee to file their annual returns, with a cheaper fee for those who file online: see 'Fee Summary' (*Charities Services*) <<https://charities.govt.nz/im-a-registered-charity/annual-returns/fee-summary>> accessed 17 September 2017. The Irish CRA has a statutory facility to charge charities for filing but it has not yet moved to do so: Charities Act 2009, s 39(2). The CCEW is currently exploring alternative funding models including an annual charge for registered charities in the future: Charity Commission for England and Wales, *Strategic Plan 2015–18* (n 55) 4.

⁸⁴ Rebecca Cooney, 'Regulator's Draft Guidance on Serious Incidents Queried by Charity Finance Group' (*Third Sector*, 16 January 2017) <www.thirdsector.co.uk/regulators-draft-guidance-serious-incidents-queried-charity-finance-group/governance/article/1420987> accessed 17 September 2017. The CCEW has acknowledged that financial circumstances lie behind its decision to no longer offer bespoke guidance to charities but to rather focus on monitoring and investigation: Charity Commission for England and Wales, *Strategic Plan 2015–18* (n 55).

and what is being counted as an outcome of regulatory success. The budgeting challenge ahead for policymakers and state funders when it comes to charity regulation may be one of walking the fine line between knowing the price of everything and the value of nothing. For regulators, avoiding the resourcing trap, known in other circles as the ‘non-profit starvation cycle’⁸⁵ in the context of charity regulation and oversight is essential and makes the process of aligning regulatory rationale, execution costs and measures of regulatory success ever more important.

⁸⁵ Ann Goggins Gregory and Don Howard, ‘The Nonprofit Starvation Cycle’ (2009) 7(4) Stanford Social Innovation Review 49.