

Oonagh B. Breen, “Waiting for the Big Wave: A Fifty-year Retrospective on the Ebb and Flow of Irish Charity Regulation”

Chapter 3 in Oonagh B. Breen, Alison Dunn and Mark Sidel (eds), *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (Cambridge: Cambridge University Press, 2017).

I. Introduction

In common with many nations, Ireland has been subject to a perennial cycle of statutory and non-statutory regulation of the non-profit sector. One can identify with ease the major waves of statutory regulation that occurred in 1844, 1961 and 2009 respectively with the gap between regulatory bouts shortening in each successive wave. The stated purpose of these statutes remains remarkably consistent and aligned, implying either the continuation of a clear policy objective or a marked failure to attain the goal on the previous occasion such that the task must be tackled *de novo*. Thus, the Preamble to the Charitable Donations and Bequests Act (Ireland) 1844 declares that:

“Whereas it is expedient that the pious intentions of charitable persons should not be defeated by the concealment and misapplication of their donations and bequests to public and private charities in Ireland . . . and it is expedient and necessary that provision should be made for the better management of such charitable donations and bequests as have been heretofore made . . .”

One hundred and seventy years on, the desire to better regulate charitable organizations resonates as strongly. The long title to the Charities Act 2009 expressly provides for the regulation and protection of charitable organizations and trusts. Upon its commencement in 2014, the Act replaced the Commissioners of Charitable Donations and Bequests, as re-imagined by the 1844 Act, with a new statutory body, the Charities Regulatory Authority (the ‘CRA’). Bookended between these two important waves of statutory regulation one finds the Charities Act 1961, which prior to the commencement of the 2009 Act, constituted the primary charity legislation. Described simply as “as Act to amend the law relating to charities”, this statute was the mainstay of charity regulation for over 50 years. A creature of its time, and in common with similar enactments elsewhere,¹ it eschewed a statutory definition of ‘charitable purpose,’ devoting its efforts to enhancing the Commissioners’ powers. These enhancements, however, fell short of empowering the Commissioners to curtail or pre-empt charitable maladministration.

Turning from formal statutory regulation, there are also identifiable waves of self-regulation in which the non-profit sector has sought, at various stages, to improve its own conduct by developing codes of good practice. Somewhat paradoxically, the subject areas of self-regulation have been those normally viewed as central to a statutory regulatory regime, namely, charity governance, public registration and reporting, and fundraising.

Interpreting the interplay between these statutory and non-statutory waves is difficult. The timelines do not flow successively from one form to the other and yet one must suspect that the challenges, successes and failures of these regimes are closely interlinked. To fully

¹ See English Charities Act 1960; Charities Act (Northern Ireland) 1964.

appreciate the influence of one on the other, we must look below the waves at a strong undercurrent that influences and ultimately shapes both the expectations and the realities of the relationship between the Irish state and the charity sector. Political with a small ‘p’, this third strand weaves its way between statutory and non-statutory regulation, at times bringing state and sector into relationships of partnership; at other times comprising a relationship in which the state and sector, in turn, are dominant or dependent. Borne of interstitial conversations between government and non-profit actors on the periphery of formal government – in the corridors rather than the rooms of power – these exchanges take stakeholders outside of their express spheres of authority, giving rise to non-binding commitments that nevertheless determine stakeholders’ future actions. In a similar fashion to the regulatory waves, this third strand occurs and recurs on a small-scale episodic basis, experiencing slow but incremental growth, resulting in significant, albeit sometimes short-lived, collaborations that have the power to change the state/sector relationship dynamic.

Recent inclusions in this third strand would be the Community and Voluntary Pillar of Social Partnership (1996-2006) and the Implementation and Advisory Group for the White Paper on a Framework for Voluntary Action (2000-2004). Older examples of this state/sector dynamic comprise the Combat Poverty Agency (1975-2011) and the National Social Service Council (NSSC)/Comhairle (1970-2000).

This chapter argues that to truly understand how the Irish non-profit sector works and to predict the future direction of non-profit regulation, one must be fully familiar with all three strands – the waves of both statutory and non-statutory regulation and the undercurrent of state-sector dialogue and collaboration – and how they interact with each other. Viewing any one strand in isolation not only gives a distorted picture of the regulatory framework but also inhibits a

policymaker from taking proper account of important factors that continue to influence regulatory outcomes.

Part II reviews the pace of legislative reform in the charity sector, identifying key measures and trends and setting the context for Part III's discussion of the non-statutory measures of importance that influence the regulatory space. Part IV unpacks the hidden underbelly of the state/sector relationship, identifying key state-sector engagement, analysing where the balance of power lies and examining how this engagement has impacted on subsequent regulatory efforts. Part V brings these different strands together by exploring the causal links between them and the extent to which historical and political context dictates outcome before offering some conclusions on the nature of the cyclical relationship between statutory and non-statutory Irish charity regulation.

II. The Pace of Legislative Change: Key Measures and Trends in Charity Law

Legislative change comes slowly in Ireland and nowhere is this truer than in charity law reform. The waves of charity legislation over the past three centuries have been well-spaced and surprisingly consistent in the quest for better regulation of charitable institutions. King George III tackled the matter in the 1763, introducing An Act for the Better Discovery of Charitable Donations and Bequests, subsequently amended in light of the Act of Union 1800.² The 1763 Act provided for the first national inquiry into charities. It focused on tackling fraud, introducing a mandatory register of charitable donations, and requiring heirs, executors or trustees to "publish in the Dublin Gazette three times successively every charitable donation or

² 3 George III c.18, amended by 40 George III c.75. See Leonard Shelfer, *A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts* (London: S. Sweet, 1836).

bequest.”³ The Irish House of Lords’ establishment of a committee of inquiry to examine charities in 1764 reinforced this scrutiny.⁴

Forty years later, Queen Victoria signed into law the Commissioners and Charitable Donations and Bequests Act (Ireland) 1844, introducing a revised statutory committee that endured in the facilitation of charities and their operation until 2014.⁵ The Act’s purpose was to centralise responsibility for charity law.⁶ It is noteworthy that the Preamble expressly referenced the insufficiency of the 1763 Act, which it repealed, to protect charitable donations and bequests. Not without its own shortcomings, the 1844 Act was amended in 1867, 1871 and 1955; enactments that enlarged the Commissioners’ powers.⁷ The Charities Act 1961 repealed all of these earlier Acts but preserved the role and powers of the Commissioners; powers which were then subsequently enlarged in the Charities Act 1973. Apart from some miscellaneous

³ Ibid.

⁴ 40 George III, c.75 dissolved the Irish House of Lords Committee of Inquiry into Charities, first established in 1764, then continued on a year-to-year basis. It replaced it with the Commissioners of Charitable Donations and Bequests. Drawn from the Protestant faith, the Commissioners had power to recover all property belonging to charities withheld, concealed or misapplied and to apply all charitable funds according to charitable and pious purposes. F.A.P. Hamilton, *The Law Relating to Charities in Ireland* (Dublin: E. Ponsonby, 1879), 124.

⁵ 7 & 8 Vic. c.97. Unlike its predecessor 40 George III, c.75, the Commissioners under the 1844 Act were comprised equally of Protestants and Catholics and lasted until the Charities Act’s commencement in 2014 – S.I.s 456/2014 and 457/2014.

⁶ Nicholas Acheson, Brian Harvey, Jimmy Kearney, Arthur Williamson, *Two Paths, One Purpose: Voluntary Action in Ireland, North and South: a Report to the Royal Irish Academy’s Third Sector Research Programme* (Dublin: Institute of Public Administration, 2004), 156 .

⁷ Charitable Donations and Bequests Act (Ireland) 1867, 30 & 31 Vic. c.54; Charitable Donations and Bequests Act (Ireland) 1871, 34 & 35 Vic. c.102; and the Charitable Donations and Bequests (Amendment) Act 1955.

amendments,⁸ no further statutory reform followed for over 40 years until the enactment of the Charities Act 2009.

Despite Ireland's early foray into public accountability for charitable donations received, the mandatory register did not survive into the nineteenth century and the Commissioners, as empowered in 1844, had no statutory role regarding the register's maintenance. Unlike the English Charities Act 1960, the Irish Charities Act 1961 did not establish a register of charities. However, the 1763 statutory obligation on executors to publish three times successively information on charitable bequests lives on in s.52 of the 1961 Act. Although the 1961 Act charged the Commissioners to protect charitable donations and bequests with powers to compromise claims; to sue for the recovery of charitable property withheld, concealed or misapplied; and to certify cases to the Attorney General, these powers were little used.⁹ The Act did not define an investigatory role for the Commissioners nor were they provided with sufficient resources to enable them to uncover instances of misapplied charitable property.¹⁰

In summary, then, we have come full circle. From the introduction of a statutory register and a requirement of accountability subject to public inquiry in 1763 to the subsequent replacement of the committee of inquiry with a statutory body of commissioners in 1800 and the loss of the public register thereafter. From a shoring up of the Commissioners' facilitative role over a one hundred year period until 1961 to a further rethinking of the need for greater transparency and accountability with the 2009 Act's (re)introduction of a new charities register and the

⁸ Social Welfare (Miscellaneous Provisions) Act 2002, Pt.2.

⁹ Kerry O'Halloran and Oonagh Breen, "Charity Law in Ireland and Northern Ireland - Registration and Regulation" (2000) 18 *ILT* 6-14.

¹⁰ *Ibid.*

establishment of a new statutory body with investigative and enforcement powers. The cyclical nature of legislation sees us once more attempting to tackle problems in 2014 first identified in 1763 and resorting to the very same tools of accountability and greater transparency.

III. Non-statutory Regulation: A late but welcome entrant to the non-profit arena

If one were to judge solely by the dates of the non-profit self-regulatory initiatives in Ireland, one might summarily conclude that non-statutory regulation is merely a belated afterthought. Sectoral mobilisation around self-regulation is predominantly absent before the year 2000, attributable to the lack of peak representative bodies, an absence of sector capacity to create self-regulatory regimes, and a sectoral focus on supporting the development of statutory regulation. The post-2000 picture, however, sees not only the emergence of non-statutory regulation but its impact in areas of core regulatory interest, namely: fundraising regulation, governance and accountability.

A. Fundraising

The first of these twenty-first century self-regulation models to emerge was the establishment of the Irish Fundraising Forum for Direct Recruitment (IFFDR) in 2003. The Forum developed a best practices code on person-to-person fundraising ventures to increase public confidence in this new fundraising method, learning greatly from the UK experience in this regard.¹¹

¹¹ Correspondence with Mark Mellett, founding IFFDR member, July 21, 2015. See IFFDR, *Code of Practice of Irish Fundraising Forum for Direct Recruitment*, 2003, reprinted in ICTR, *Feasibility Study* (2008), 29 at <http://www.ictr.ie/files/R1.%20Regulation%20of%20Fundraising%20Report%20-%20May%202008.pdf>, accessed January 6, 2016.

With the 2006 publication of the Heads of Bill for the Charities Act, the government proposed to extend the scope of non-statutory regulation of public collections fundraising. The Government commissioned Irish Charity Tax Research (ICTR), at the charity representative body's prompting, to carry out a public consultation¹² and a feasibility study on forms of fundraising regulation,¹³ the results of which, after much consultation with the sector,¹⁴ engendered a *Statement of Guiding Principles on Fundraising*.¹⁵ The Charities Bill's Explanatory Memorandum acknowledged the development of this code and made provision for self-regulation efforts, if effective, to replace the need for statutory intervention.¹⁶ Described by the European Centre for Not-for-Profit Law in its 2009 Report to the European Commission as "an innovative and flexible system for fundraising regulation, combining elements of both public and self regulation," ECNL commended Ireland's attempt at hybrid regulation as an outstanding example.¹⁷

¹² <http://www.ictr.ie/files/R5.%20Regulation%20of%20Fundraising%20Consultation%20Paper%20-%20Sept%202006.pdf>, accessed January 6, 2016.

¹³ ICTR, *Feasibility Study*, n.11.

¹⁴ The 2006 consultation led to draft proposals and a draft statement of guiding principles in 2007. See <http://www.ictr.ie/files/R4.%20Regulation%20of%20Fundraising%20Draft%20Proposals%20-%20Apr%202007.pdf>, accessed January 6, 2016.

¹⁵ ICTR, *Statement of Guiding Principles on Fundraising*, 2008, <http://www.ictr.ie/files/R2.%20Guiding%20Principles%20of%20Fundraising%20-%20Feb%202008.pdf>, accessed January 6, 2016.

¹⁶ <http://www.oireachtas.ie/documents/bills28/bills/2007/3107/b3107d.pdf>, 14, accessed January 6, 2016.

¹⁷ ECNL, *Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union*, (Brussels: European Commission, 2009), 24.

The Statement's subsequent rollout and the rate of non-profit sign-up, however, has been disappointing. Officially launched in 2010, delays in commencing and fully realising the Code's potential are directly attributable to the entanglement of state and sector in this area of regulation. To date, there are just 138 signatories to the Statement – a tiny percentage of the 8,435 tax-exempt charities and less than the total membership of ICTR, the sponsoring body.

Contributing factors to this malaise have been fourfold: first, the lack of government funding (and no provision for membership subscriptions) to publicly promote the code has greatly inhibited public awareness. Second, the non-realisation of state funds to develop the originally promised detailed codes of conduct has left the ethical *Statement of Guiding Principles* without the necessary support it requires for successful implementation. Third, delays in the appointment of the promised Monitoring Group to oversee signatories' compliance and to investigate donor complaints against charities has further crippled the regime's effectiveness. Finally, there is a misplaced assumption among certain charities that not signing up to the Statement frees them of ensuing responsibility for bad fundraising practices.

Applications for the Monitoring Group closed in April 2011. Intended to comprise an Independent Chair; three independent members; two charity sector members; and one Government Department representative, the Group remains un-constituted following a Department of Justice request to defer establishment pending the introduction of the Charities Act 2009. This direction has affected both sign-up to and enforcement of the code, making ICTR's role untenable. In 2015 ICTR filed a report with Justice outlining the project's achievements and challenges and expressing its desire to relinquish its secretariat role if Justice were willing to transfer the project to Fundraising Ireland as a more natural self-regulatory

home.¹⁸ Media focus on fundraising scandals,¹⁹ however, may have preempted matters with the Minister's recent announcement of her intention to convene a statutory consultative panel on charity fundraising to review regulatory oversight.²⁰

B. Governance

Prior to the Charities Act 2009, there was little statutory guidance for charities on probity and accountability matters. The Act introduces a necessary regulatory framework but many of the important substantive details require further delegated legislation. Legislative vacuums can lead to poor governance practices, a concern charities readily acknowledge.²¹ Charity leaders have been mindful of the need to encourage better governance. Beginning with overseas development charities in 2009, Dóchas (an umbrella representative body) in conjunction with the Corporate Governance Association of Ireland developed a *Governance Code for Development Organizations*. Dóchas requires its sixty member organizations to adhere to the governance code along with its *Code on Images and Messages*.²²

Building upon the *Dóchas Code*, a broader collaboration of non-profit interests developed a more sophisticated governance code model to tackle areas of common concern across the Irish

¹⁸ Correspondence with Sheila Nordon, ICTR CEO, June 2015.

¹⁹ Michael O'Farrell, "Charity Muggers' Dirty Tricks" *Irish Mail on Sunday*, October 18, 2015, 1.

²⁰ Department of Justice Press Release, "Minister of Justice Addresses International Charity Regulators Conference," November 26, 2015, available at <http://www.justice.ie/en/JELR/Pages/PR15000611>, accessed January 7, 2016.

²¹ Institute of Directors in Ireland, *Governance in the Charity and Not-for-profit Sector in Ireland* (Dublin: 2014). Of the 229 charity respondents to this survey, 75% rated governance levels in the Irish not-for-profit sector generally as average or poor.

²² See <http://www.dochas.ie/standards-excellence-codes-anad-guidelines>, accessed January 6, 2016.

non-profit sector.²³ Developed between 2009-11 and launched in 2012, the *Non-profit Governance Code* boasts 213 signatories with a further 746 organizations on the journey towards full compliance.²⁴ The code focuses on five key areas – organization leadership, exercise of control, accountability and transparency, working effectively and behaving with integrity. It caters for three different organizational types that vary according to size, turnover and staffing levels. Developed on a ‘comply or explain’ basis, the code drills down to specific requirements from ensuring proper internal financial and management controls are in place to encouraging review of all organizational policies, from volunteer policies through to conflict of interest policies. Of the self-regulatory codes discussed in this chapter, this Governance Code is the best known in the sector with the highest sign-up rates, although the number remains a small fraction of tax-exempt charities.

Two cautionary notes must be sounded. The first relates to oversight. Signatories to the code self-assess their own compliance and renew their adherence to the code annually but the code makes no provision for any external monitoring or enforcement. The Wheel, a network organization for the voluntary sector, acts as the Working Group’s secretariat. The Working Group’s responsibility is expressed in the following terms:

“The organisations involved in the Working Group share the responsibility for guarding the standards in this Code. They have a written agreement on this. They have committed to reviewing the Code within three years in light of the experience organisations have in adopting it.”²⁵

²³ See <http://www.governancecode.ie/about.php>, accessed January 6, 2016.

²⁴ Ibid.

²⁵ Ibid.

How this experience will be gathered or analysed is unexplained and whether the numbers of signatories will drop dramatically when the list is reset after the 12-month time period to include only those who have recommitted remains to be seen.²⁶ The biggest challenge, particularly in the absence of a clear oversight mechanism, will be in proving that signatories have gone further in self-reflective practices than merely signing and returning the Principles Statement sign-up sheet.

The second cautionary note concerns the current public mistrust of charities arising from recent charity scandals that highlighted exceptionally poor governance and accountability practices of some leading charities.²⁷ Following these governance scandals, public donations to many charities in 2014 fell significantly.²⁸ The public may not therefore view self-regulation as sufficient in an area as important as governance, encompassing as it does matters relating to mission delivery, stewardship and financial probity. Moreover, the 2014 Institute of Directors Governance Survey notes that “it is extremely concerning that . . . two-thirds [of charity respondents] believe that organizations in receipt of State funding are not adequately monitored or held to account for the appropriation of these funds. This is particularly worrying given that

²⁶ Correspondence with Diarmuid O’Corrbui, Chair of Code Working Group alluded to plans to extend the sign-up period of validity from one to three years (October 9, 2014).

²⁷ Oonagh B. Breen, “Recent Developments in Irish Charity Law: Tsunami or Rising Tide to Lift all Boats?” (2014) *Non-profit Law Yearbook* 105-123; Breen, “Long Day’s Journey: The Charities Act 2009 and Recent Developments in Irish Charity Law” (2014) 17 *Charity Practice and Law Review* 91-112.

²⁸ Marie O’Halloran, “€1.6 million charity donations drop shows transparency need – McGrath” *The Irish Times*, February 14, 2014; Mark Hilliard, “Majority of charities report drop in donations following scandals” *The Irish Times*, May 15, 2014.

a majority of the respondents indicated that their organisations are in receipt of State funding.”²⁹

C. Reporting and Accountability

The final non-profit sector initiative of note is the Irish Nonprofits Knowledge Exchange project (‘INKEx’), which set out to create an authoritative source of statistical data on Irish non-profits for a wide variety of users in the public, private and third sectors.³⁰ The main purpose of this initiative was information disclosure rather than self-regulation. Piloted with EU funding in 2007, the initial objective of the project was to explore whether a GuideStar model could work in a number of countries, including Ireland. Developed as a non-profit entity and funded by the Irish government and other philanthropic sources, INKEx undertook a three-year project to design, test, build and launch a free searchable website with extensive regulatory data on Irish charities and non-profits, built on a new, custom-built database.

The database went live in November 2011, with a medium term plan to use a mixture of grants and service fees to fund its operations. It was originally envisaged that the database could provide the “back office” for the Charities Regulatory Authority (‘CRA’) upon its establishment.³¹ Following national elections in 2011 and the re-allocation of responsibility

²⁹ See n.21.

³⁰ See now <http://benefacts.ie/history/>, accessed January 6, 2016.

³¹ A government amendment to the Charities Bill sought “to ensure there will be no impediment preventing the authority, under direction of the Minister, from engaging with an external data provider such as a future GuideStar Ireland with regard to the provision of material to assist in maintaining the register of charities.” *Dáil Eireann Debates* (February 11, 2009) Vol. 674 No. 2, 452, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2009021100022?openDocument>, accessed January 6, 2016.

for charity regulation to Justice, the Minister declared that the CRA's establishment was not an immediate priority in rescission-hit Ireland and he withdrew Government INKEx project funding, forcing it into voluntary liquidation.

In many ways, the life cycle of INKEx parallels the life cycle of non-statutory initiatives more generally in Ireland. Prompted by the lack of a publicly available, consistent source of comparably presented, regulatory disclosure information for charities, INKEx sought to fill that gap. Devising an information collection and management system, INKEx re-used existing public domain regulatory disclosures by Irish non-profits, classifying them according to internationally recognized norms and storing them in a harmonized way.³² Collation of this information created a rich data source that could be then used by government departments in reviewing and assessing grants; by charities in benchmarking their own performance against those of their counterparts; and by the general public, seeking a better understanding of how charities manage and spend their charitable assets.

The sustainability of the project, in the short term, was overly dependent on government funding. Given its statutory mandate to create a register of charities the state had a vested interest in the development of a comprehensive charities database, making its €1.1m (US\$1.9m) project investment an effective use of resources. Despite this apparent alignment of interests, political and financial priorities within Justice resulted in the project's abandonment at a crucial stage in its development.³³ In this context, the Department of Public Expenditure and Reform's 2014 decision to invest in the reactivation of the INKEx database

³² INKEx, *Irish Nonprofits, What do we know?* (Dublin: 2012).

³³ Sara Burke, *Case-Study of INKEx* (INKEx: 2013) <http://openknowledge.ie/wp-content/uploads/2015/01/INKEx-Case-Study-Sara-Burke-February-20131.pdf>, accessed January 6, 2016.

and to re-establish a single digital repository of non-profit financial, governance and other relevant data and documents is noteworthy.³⁴ How this non-statutory reporting mechanism will sit alongside the separate and evolving Charities Register remains to be determined.³⁵

D. Self-Regulatory Outcomes

The trend of non-profit self-regulation in Ireland has been to focus on important areas that normally fall within the statutory regulatory space. Although coming late to the scene, with non-statutory regulation first emerging in the early 2000s, certain non-profit leaders invested much time and effort in the development of codes and non-statutory approaches that have garnered praise internationally for their innovative and consultative form. To date, implementation success rates have not mirrored the level of effort invested. Common causes include the thwarting of the planned schemes either by a lack of resources for implementation (revealing an unhealthy level of state dependency) or the direct intervention of the state (as in the case of fundraising regulation), lack of effective enforcement and sanction mechanisms, and a reticence by non-profits to participate for fear that engagement will expose them to liability for subsequent shortcomings in a way that non-participation will not. With the Irish public beginning to seek greater evidence of good governance arrangements, non-statutory

³⁴ Secretary General Robert Watt, “Future trends in Community and Voluntary Funding,” *Conference on Social Investment – Common Cents 2014 Aligning Capital with Economic and Social Justice*, Dublin, October 16, 2014. INKEx was relaunched in June 2015 as Benefacts. See <http://benefacts.ie/>, accessed June 17, 2015.

³⁵ Access the CRA Register at: <http://www.charitiesregulatoryauthority.ie/Website/CRA/CRAweb.nsf/page/publicregister-reg-of-charities-en>, accessed January 6, 2016. An interdepartmental steering group has been established to explore the Benefacts database potential and how it might assist in reducing dual reporting and regulatory red-tape.

regulation will need to prove its effectiveness and capacity to self-enforce in the medium term in order to be an adequate supplement or alternative to statutory measures.

IV. Undercurrents influencing the Relationships between State and Sector

Unlike other common law jurisdictions,³⁶ Ireland does not have a grand-scale policy document that purports to frame the relationship between the state and the sector. To date, Irish efforts to develop such a charter and to implement its principles have been less successful. Thus, Irish state/sector engagement currently functions without a strong ideological exposition of the parties' rights and obligations. If anything, Ireland's approach to voluntary sector/state engagement has been pragmatic rather than theoretical.³⁷ The nature of State/sector collaboration has, in turn, influenced the form of charity regulation imposed: at times, creating a relationship of complacency such that statutory scrutiny was thought less necessary; at other times, opening the eyes of non-profits to the need for good governance standards, whether self-imposed or otherwise.

A. 1950–1970: Early examples of religious collaboration and the emergence of community development

³⁶ See, e.g., *Compact on Relations Between Government and the Voluntary and Community Sector in England* (London: Cabinet Office, 2010); the *Accord between the Government of Canada and the Voluntary Sector* (Canada: Voluntary Sector Taskforce, 2001) and *Australian Government, National Compact: Working Together* (Commonwealth of Australia: 2011).

³⁷ Michael Doherty, "It must have been love . . . but it's over now: the crisis and collapse of social partnership in Ireland" (2011) 17(3) *Transfer: European Review of Labour and Research* 371-385.

A common feature in the late nineteenth and early twentieth century political landscape was the clear separation between the activities and responsibilities of the state and those of the non-profit sector. These parallel, if separate, existences were driven by Ireland's predominantly Roman Catholic culture and Catholic Social thought, the foundations of which were widely considered to have been laid by Pope Leo XIII's 1891 encyclical letter *Rerum Novarum*, which advocated economic Distributism and condemned both Capitalism and Socialism.³⁸ Thus, in the areas of health, education and social rights, the Catholic Church played a leading role, using the principle of subsidiarity to sideline state involvement.³⁹ Throughout the nineteenth and twentieth centuries, Catholic social service provision operated as an independent alternative to a non-existent or very poor state service.

A combination of weak central government⁴⁰ in the first instance and limited state capacity to provide universal social welfare services in the second⁴¹ meant that the Church's occupation of this space and its associated charitable endeavours were relatively uncontested until the 1960s. The innate conservatism of the Church and its resistance to broader social provision led to political conflict,⁴² and it took time for the state to carve out a national space for universal

³⁸ See http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html, accessed June 25, 2014.

³⁹ Pope Pius XI, *Quadragesimo Anno* (Rome: The Holy See, 1931) 1-34, 16.

⁴⁰ Acheson et al, n. 6, 158.

⁴¹ Tony Fahey, "The Catholic Church and Social Policy" in *Social Policy in Ireland. Principles, Practice and Problems*, eds. Seán Healy and Brigid Reynolds (Dublin: Oak Tree Press, 1998), 146.

⁴² See Noel Browne, *Against the Tide* (Dublin: Gill & Macmillan, 1986). Cf Eamonn McKee, "Church-State Relations and the Development of Irish Health Policy: The Mother-and-Child Scheme, 1944-53" (1986) 25 *Irish Historical Studies*, 159-194, 166.

social service provision.⁴³ Delivery of these services, however, still required partnership with the Church since the latter retained ultimate control through its ownership of schools and hospitals.⁴⁴

The passing of the Health Act 1953, with the state's express acceptance of responsibility for citizens in need of assistance, represented an important shift in public policy toward statutory responsibility for social services provision.⁴⁵ The Act enabled State funding of voluntary organizations providing 'ancillary or similar services' to those of the health authority, opening the door to State support of secular non-profits.⁴⁶ Thus Ireland moved from laissez faire dependence on religious organizations to state responsibility for social provision with an ability to fund non-profits to deliver such services. Notwithstanding funding availability, the act of "relationship building" between the state and the voluntary sector continued on an ad hoc basis and lacked a clear policy direction.

B. 1970s–2000s: First Forays into building and supporting a sector

By the 1970s with Ireland's accession to the EEC in 1973, access to external funding grew and community development organizations began to emerge amongst the predominantly religious-based charities of the 1940s and 1950s. A new voice of dissent was born and the state now had

⁴³ The Health Act 1953; Department of Health, *Cúrsaí Sláinte: Health Progress Report 1947-1953* (Dublin: Stationery Office, 1953), 21.

⁴⁴ Today, 96% of Irish primary schools are owned and under the patronage of religious denominations, of which the Catholic Church accounts for 90%. See *Report of the Forum Advisory Group on Patronage and Pluralism in the Primary Sector* (Dublin: 2012).

⁴⁵ Pauline Connolly, "The Public Funding of the Non-Profit Sector in Ireland: The Muddy Waters of Definitions" (2006) 54(2) *Administration* 85-96, 90.

⁴⁶ Health Act 1953, s.65.

to grapple with secular organizations focused on issues of social exclusion, a domain the state viewed as extremely political and off-limits. A new regulatory framework was thus necessary as much to contain, as to manage, these actors.

1. 1971 to 2000: From NSSC to Comhairle

In 1971, the Government established the National Social Services Council (NSSC) to stimulate and encourage the development of voluntary bodies in the area of social services provision and to promote liaison between central and local authorities and voluntary organizations providing social services.⁴⁷ Never fully reaching its potential, the NSSC was reconstituted as the National Social Services Board (NSSB) in 1984 with responsibility for encouraging voluntary community action.⁴⁸ Even this narrower outreach role of NSSB's development officers caused conflict with the Health Boards and in 1987 the Government decided to abolish the NSSB and reintegrate its functions within the Department of Social Welfare, much to the consternation of voluntary organizations.⁴⁹ Although ultimately surviving the threat of abolition, the Government further pared down the NSSB's responsibilities, removing its community development role and confining it to information-giving functions and the support of citizen's information centres alongside the promotion of volunteering and the provision of a social mentoring scheme.⁵⁰

⁴⁷ Ray Mulvihill, *Voluntary-Statutory Partnership in Community Care for the Elderly* (National Council of the Elderly: 1993).

⁴⁸ National Social Service Board Act 1984. S.4(1)(e) tasks the NSSB to "to promote . . . co-operation in relation to social services between boards, and other bodies, established by or under statute and voluntary organisations."

⁴⁹ Acheson et al, n.6, 91.

⁵⁰ Ibid.

The NSSB's role was further diluted in 2000 when it was merged with the National Rehabilitation Board to form Comhairle, an agency tasked with combining the NSSB's citizen information role with assisting and supporting disabled individuals to identify their needs and access their social service entitlements.⁵¹ The 20-year mutation of NSSC to NSSB and ultimately to Comhairle did little to achieve the initial aims of the agency. With each successive transformation the ability to act as a coordinating hub for non-profit action was reduced or lost. The political landscape throughout most of this period was one in which the state had no clear defined relationship with the non-profit sector despite repeated government commitments to review how the state and the sector might better work together.

2. 1975 to 2011: The Combat Poverty Agency

In many ways, the story of the Combat Poverty Agency ('CPA') provides an interesting contrast to that of the NSSB and throws up the inherent conflicts and tensions existing in the state/sector relationship between 1975-2011, which provide further insights into the effects of this relationship on the regulatory state that subsequently emerged. Conceived and funded as part of a €20 million European pilot programme in 1975, the CPA's objective was to eradicate poverty. Recognizing the central role of non-profits in the fight against poverty, the CPA carried out research on community and voluntary activities, funded resource centres and began to adopt a programmatic response to social inclusion issues, which focused on the role of NGOs.⁵² The CPA built non-profit sector capacity in Ireland and opened the door to European funding for NGOs for the first time.

⁵¹ Comhairle Act 2000.

⁵² See <http://www.combatpoverty.ie/publications/workingpapers.htm>, accessed July 8, 2014.

The 1980s proved to be a precarious time for the CPA. The centre-right Fianna Fáil government allowed the poverty scheme to lapse in 1981, passing legislation in 1982 to abolish the CPA.⁵³ It proposed its replacement by a new body, the National Community Development Agency (NCDA), which would support the seemingly less radical concept of community development over voluntary organizational involvement in poverty relief, which Fianna Fáil viewed as unacceptably political.⁵⁴ A change of government in 1982 reversed this decision, subsequently abolishing the NCDA, and re-establishing the CPA, although it took a further 4 years for it to gain a statutory basis.⁵⁵

The CPA's significance for the non-profit sector was more inspirational than financial. According to Acheson, its importance "lay in the agency's support for community-based and voluntary sector action that confronted social policy issues The agency helped to form, in the public mind, a strong connection between 'voluntary action' and the new battleground of 'social inclusion'."⁵⁶ In addition to channelling EU funding to Irish non-profits through Structural Funds and programmes such as EQUAL, HORIZON and PEACE I-III, the CPA's research capacity empowered many voluntary organizations in ways not always comfortable for the state and which, at times, led the state to classify the CPA as part of the non-profit

⁵³ National Community Development Agency Act 1982.

⁵⁴ Acheson et al, n. 6, 92.

⁵⁵ Combat Poverty Agency Act 1986.

⁵⁶ Acheson et al, n. 6, 92.

sector, despite its state agency status.⁵⁷ In July 2009, the CPA was reintegrated into the Department of Social Protection.⁵⁸

C. 2000-2010: From Implementation Advisory Groups to Partnership and back again

1. 1976 to 2004: White Paper and the Implementation Advisory Group

The absence of a clear policy on statutory and non-profit organization engagement marred the state/sector relationship. First mooted in 1976 by Health Minister Brendan Corish, the promised policy on the respective roles and relationships of statutory and non-profit organizations in social welfare service planning and provision never materialised.⁵⁹ Similarly, the 1981 Programme for Government's commitment to the production of a charter framework for the state/non-profit relationship remained unfulfilled.⁶⁰ Another decade passed before the Minister for Social Welfare announced plans for a White Paper to examine the relationship between the state and voluntary organizations, renewing the commitment for a voluntary social

⁵⁷ Department of Social, Community and Family Affairs, *Supporting Voluntary Activity: A Green Paper on the Community and Voluntary Sector and its Relationship with the State* (Dublin: Stationery Office, 1997), hereinafter 'Green Paper'; Freda Donoghue, Helmut K Anheier, Lester M Salamon, *Uncovering the Nonprofit Sector in Ireland: Its Economic Value and Significance* (Johns Hopkins University/National College of Ireland:1999), 1-61,13.

⁵⁸ *Report of the Inter-Departmental Review of the Combat Poverty Agency* (Dublin: 2008) available at http://www.combatpoverty.ie/aboutus/2008-09_ReviewOfCombatPovertyAgency_Report.pdf, accessed October 31, 2014.

⁵⁹ John Curry, *Irish Social Services* (Dublin: Institute of Public Administration, 4th ed, 2003), 201.

⁶⁰ Ibid.

services charter in Ireland.⁶¹ Despite the 1992 establishment of an 18-member strong expert committee, unspecified difficulties with the Departments of Justice and Health stalled the promised White Paper for five years before it eventually emerged as a Green Paper in 1997.⁶² Its belated appearance was prompted more by EU developments than any domestic initiative to define the state-voluntary sector relationship.⁶³ Among its objectives the Green Paper sought to:

- Clarify the responsibilities of different Departments to the non-profit sector;
- Examine the effectiveness of existing programmes and support structures;
- Introduce Customer Charters in relation to specific social services and provide training for the statutory sector;
- Develop statements of good practice for both statutory and voluntary sectors.⁶⁴

The subsequent White Paper on Supporting Voluntary Activity in 2000 gave formal recognition to the sector's role in "contributing to the creation of a vibrant, participative democracy" and provided for the establishment of a joint Implementation and Advisory Group ("IAG"), comprising both state and non-profit sector representatives, to oversee its implementation.⁶⁵ In broad terms, the IAG was an experiment in blue-skies thinking – inviting

⁶¹ Acheson et al, n. 6, 106.

⁶² *Green Paper*, n. 57.

⁶³ See *Communication of the Commission on Promoting The Role of Voluntary Organisations and Foundations in Europe* (COM(97) 241 Final).

⁶⁴ Address by Dermot Ahern, Minister for Social, Community and Family Affairs at the Combat Poverty Agency Conference on 'Supporting Voluntary Activity', Dublin Castle, February 23, 1998.

⁶⁵ Department of Social, Community and Family Affairs, *White Paper on a Framework for Supporting Voluntary Activity and for Developing the Relationship Between the State and the Community and Voluntary Sector*, (Dublin: Stationery Office, 2000) 3, ("*White Paper*").

state and sector representatives to work together to improve state-sector relations in a mutually beneficial way. To this extent, the IAG process differed from Social Partnership (discussed below) because the IAG process was a vested interest process. It concentrated solely on improving the relationship between the state and voluntary sector. By common consensus, however, the IAG experience was not a happy or productive one.

The White Paper set out a bold agenda for the IAG: to advise the government generally on voluntary sector policy matters and to participate with relevant statutory bodies in the implementation of the White Paper's specific policy recommendations relating to state/sector consultation and funding.⁶⁶ For the first time in the history of Irish non-profit sector/state relations, the White Paper envisaged a forum bringing together statutory representatives and non-profit sector members, elected as representatives not of their own organizations but of "the sector." This cross-cutting approach to voluntary and community activity was a ground-breaking development in Ireland at the time.⁶⁷

Four years after its inauguration, the IAG process reached a state of impasse. The mandate of the voluntary sector representatives, known as the CV 12, expired in 2004. Pending a departmental review of the IAG process by the Department of Community, Rural and Gaeltacht Affairs, no new mandates were sought. Officially, the Group still had an important role to play in overseeing the implementation of the White Paper which, according to government sources, remained government policy.⁶⁸ Unofficially, all parties conceded that the IAG process was not

⁶⁶ *White Paper*, n. 65, ch.6.

⁶⁷ Correspondence with Deirdre Garvey, CEO, The Wheel, Dublin (January 10, 2005).

⁶⁸ Parliamentary Question 63 to Minister of State for the Department of Community, Rural and Gaeltacht Affairs, vol. 592 DÁIL DEBATES, December 14, 2004 (Minister Ahern responding that "the White Paper remains

working and that, if anything, the experience had deepened the distrust between statutory bodies and the non-profit sector by reinforcing a perception of “them” and “us.”

It is hard to identify policy changes towards the state/sector relationship directly attributable to the IAG. Government officials claimed that the White Paper (and implicitly the IAG) achieved greater state funding of the sector although it would be difficult to draw a causal connection in this regard. On the contrary, CV 12 members were quick to list the IAG’s wasted opportunities to influence policy change. With regard to supplementary outcomes, such as enhanced interaction between stakeholders or the nurturing of ideas for future cooperation, the IAG offered little collaborative benefit. Rather, relations between IAG partners deteriorated towards the end to one of ambivalence, if not quite hostility. Evaluating the IAG’s achievements against its initial terms of reference, it achieved little in its research and funding role. Government cuts eliminated the IAG’s budget for sector research and reduced the training budget. The IAG’s poorly run adjudication process for awarding training grants damaged state/sector relations. The IAG also failed to produce any codes of practice or manuals on funding.

The IAG’s involvement in advising government on regulatory matters fared equally badly. Early on in the IAG’s lifetime, the government transferred the charity regulatory reform brief from the IAG to a Departmental charities regulation unit. In those regulatory areas left to the IAG, little progress was made. No agreement was reached on standard protocols for financial accountability for state funding of the sector. With regard to policy matters affecting the broader state/sector relationship, apart from limited progress on support of volunteering, the

Government policy. However, the context in which the White Paper policy is to be implemented has clearly changed with time.”)

dearth of IAG meetings prevented regular monitoring or reform of the administrative mechanisms that were meant to underpin the functioning of the voluntary sector/state relationship. Partnership paralysis set in.

2. 1996-2010: Recent Rounds of Partnership

Social partnership describes a national deliberative and bargaining process conducted between the government and four Social Partner groupings (known as “pillars”) – the trade unions, the employers’ confederations, the farming bodies and, from 1996 onwards, the community and voluntary sector. The purpose of Social Partnership was to negotiate an agreement between the parties that set out a socio-economic strategy for Ireland for the subsequent three years. This strategy addressed not only economic concerns relating to taxation, worker productivity and wage levels but also social concerns relating to the reduction of long-term unemployment, poverty and social exclusion.

Social Partnership existed as a process for more than 10 years without the participation of the non-profit sector. Admission to the process, which was by government invitation only, did not initially extend to non-profits because the existing players (the business, union and farming pillars) and government viewed Ireland’s problems as economic problems requiring an economic solution. The definition of the problem and the shape of the solution changed overtime. Measurement of societal success as something broader than just economic prosperity achievable through collective wage bargaining forced the social partners to tackle structural issues relating to social exclusion, namely, the challenges presented by disadvantaged

communities and the problems of long-term unemployment.⁶⁹ Acceptance of this agenda, however, opened the door to non-profit sector participation.⁷⁰

Prior to joining social partnership in 1996, non-profit participation in policymaking ranged from direct political access for elite players to outside lobbying by less well-connected non-profits. The policy impact achieved in both cases tended to be ad hoc and limited. Significant changes in the ways that government reached out to the sector at national and local level occurred in the 1990s with the creation of National Economic and Social Forum ('NESF') and Area Based Partnerships (ABPs). Both vehicles offered non-profits a formal, if still limited, role in policymaking. By making non-profit representatives equal players alongside business, union and government officials, NESF and the ABPs raised the sector's profile. This greater role for the sector in policy deliberation gave rise to tensions with other established players; tensions reflected in local councilors' mistrust of non-profits at ABP level and the lack of priority placed by unions and employers on the NESF at a national level.

In 1996, following ten years of informal involvement and lobbying for admission, the Irish government created a new Social Partnership interest group – the Community and Voluntary (or 'CV') Pillar – and invited a select number of CV organizations to join.⁷¹ Of the eight initial invitees, at least four had been actively involved in public policy debates for years and in outer

⁶⁹ Rory O'Donnell and Colm O'Reardon, "The Irish Experiment," (1996) 3(1) *New Economy* 33-38, 34.

⁷⁰ Niall Crowley, "Partnership 2000: Empowerment or Co-option?" in *In the Shadow of the Tiger*, eds. Peadar Kirby and David Jacobson (Dublin: Dublin City University Press, 1998), 74.

⁷¹ Department of An Taoiseach, *Partnership 2000* (Dublin: Stationery Office, 1996), [11.6].

policy circles and at NESF⁷² while one group (the Community Platform) was a new composite group representing 22 smaller CV organizations.⁷³ Over the 10-year period of its existence the composition and structure of the pillar changed as some parties departed the Social Partnership Process when they failed to sign up to negotiated agreements and the Government took the opportunity to revise the areas represented. Although there was no express mention of charities as public policy collaborators a majority of the organizations in the CV Pillar (10 out of 15) were charities.

The advantages of Pillar membership included access to the National Economic and Social Council where longer-term social and economic strategies are developed;⁷⁴ constant information updates on projects falling within the partnership remit;⁷⁵ and raised profiles of CV representatives amongst government departments and agencies, leading to increased invitations to participate in policy working groups and interdepartmental committees. A final procedural advantage of CV pillar membership was the political access enjoyed by CV pillar representatives. Through Social Partnership, CV pillar members formed valuable relationships with senior civil servants, raising their profile and credibility and giving them direct access to

⁷² Conference of Religious in Ireland, Society of St Vincent de Paul, National Youth Council of Ireland (NYCI) and the Irish National Organization for the Unemployed.

⁷³ For current Community Platform members, see <http://communityplatform.ie/membership.html>, accessed January 6, 2016.

⁷⁴ The CV Pillar strategically used its five seats on NESC to commission studies to support its policy agenda.

⁷⁵ Parties departing social partnership expressed frustration over their exclusion from the information circle by remaining CV Pillar representatives, illustrating the value of shared information within the pillar process. See Oonagh B. Breen, *Crossing Borders: Comparative Perspectives on the Legal Regulation of Charities and the Role of State-Nonprofit Partnership in Public Policy Development* (New Haven: Yale Law School, 2006), 422.

relevant Ministers when matters affecting their funding or remit arose.⁷⁶ Proponents argued that Social Partnership enabled CV representatives to make a substantive difference to policy design and policy outcomes.⁷⁷ Housing policy, child poverty and national performance indicators were three areas in which CV pillar interviewees claimed that non-profit stakeholders had successfully converted moral pressure into political leverage.⁷⁸ This political leverage, it is claimed, enabled the CV pillar to obtain policy outcomes through Social Partnership collaboration that individual organizations could not achieve through bilateral negotiation with government. Yet, Social Partnership, no more than the experiences of the IAG, did not lead to any direct collaboration on the reform of charity regulation. Government commitments in the final Social Partnership Agreement, signed by all pillars in June 2006, recognised that:

[C]ommunity and voluntary activity forms the very core of a vibrant and inclusive society. The great strength of voluntary activity is that it emerges organically from communities. While the Government should not seek to control and be involved in every aspect of voluntary activity, it does have a responsibility to provide an enabling framework to help the sector. Where this involves direct supports, a delicate balance must be struck between having a relatively light regulation and maintaining proper accountability.⁷⁹

⁷⁶ Interview with Dónall Geoghegan, Policy Officer with NYCI, Dublin (June 22, 2005).

⁷⁷ Ibid.

⁷⁸ Breen n. 75, 424-428.

⁷⁹ Government of Ireland, *Towards 2016: Ten Year Framework Social Partnership Agreement 2006-2016* (Dublin: Stationery Office, 2006), [34.1].

V. Contextualising the Third Strand: The Glue that holds the Process together or the Quicksand in which it is stuck?

The value of these various forms of collaboration through the IAG, the CV Pillar of Social Partnership, NESF and NESC – whether viewed as partnership, consultation, cooption – lay in the opportunities presented to CV representatives to gain new negotiation skills, to participate in the decision-making process and to be part of a political process beyond the lobbying threshold. For the first time, the tangibility of the sector began to emerge through the necessary processes of selecting representatives for both IAG and Social Partnership processes. Political experiences taught the parties of the need to bring your constituents with you and the importance of good personal relations with your counterparts and not just your colleagues. Experience in not reaching agreement, particularly in the Social Partnership process, brought home to non-profits the value and challenges inherent in dissent. The rediscovery of the dissenting voice towards the end of Social Partnership in many ways laid the groundwork for the subsequent research of the Advocacy Initiative.⁸⁰

Another important lesson that emerged from the collaborative experiences was the non-profit realisation that the first party to fill a policy vacuum gains the upper hand in influencing, if not dictating, the shape of the future policy solution. ICTR used this lesson to its advantage in undertaking its feasibility study on the sector's ability to regulate public fundraising while The Wheel and Boardmatch adopted a similar approach in their development of the *Non-profit Governance Code*, both of which emerged post the Social Partnership era.

⁸⁰ See <http://www.advocacyinitiaative.ie>, accessed January 6, 2016.

Although the third strand of collaboration itself did not necessarily hinge upon matters of charity regulation, the sector's involvement in this arena inevitably influenced all stakeholders. The partnership space provided an incubator for non-profit leaders who, up until this time, had little experience of working together as a sector or engaging with the state on a multilateral consensual basis. It allowed sector representatives to witness and participate in high-level negotiations between the trade unions, business and the state and again to learn from their partner peers. These experiences changed the attitudes of those involved both in terms of how the parties sought to represent themselves and their capacity to contribute. It awakened the state's realisation of the sector's potential, crystallising those areas in which the state was happy to involve the sector and those areas in which it was less enamoured.

Looking at any one event in isolation might lead one wrongly to assume that failure was the only outcome. It is true that on each occasion outlined the interaction fell short of its initial aims. Comhairle today is a pale imitator of what the NSSC was established to be in the 1970s. The Combat Poverty Agency, despite its valiant efforts, has been reincorporated into the Department of Social Protection. The White Paper's IAG – the closest the sector has come to a vested interest regulatory process – was not successful and left a bad taste in the mouths of all those involved. Social Partnership, while having its highs for those selected to sit in the inner circle, created a greater feeling of mistrust amongst the broader non-profit community of elite players looking after themselves and forging their own political connections.

And yet, it is arguable that these failed process experiences enabled the non-profit sector, and particularly the leaders in that sector to mature and positioned them to take up the core areas of governance and fundraising regulation that currently occupy the self-regulatory space by

raising their profiles and making them more credible participants in the regulatory game. The shifting pendulum of power from religious non-profits' domination of the early twentieth century to the State from the 1970s onwards, leading to secular non-profits' emergence on the policy scene during the 1970s-1980s, right up to the formal entrance of non-profits in the policymaking sphere in 1990s-2000s forms the background to today's regulatory context.

To turn then to preliminary conclusions: on the cycle of regulation, where does Ireland currently stand? The recent emergence of non-statutory regulation in the core areas of fundraising and governance has proved an interesting development. Whereas the initiative for both came from the sector, the state financially supported the fundraising project to a large extent. This support has not, however, ensured its successful implementation. If anything, the opposite has occurred: given its high financial dependency on the state, a downturn in financial support hindered an effective high-profile rollout. Moreover, a reverse-form of regulatory capture is evident in ICTR's failure to commence the proposed monitoring regime in light of the Department of Justice's request to delay the Monitoring Group's establishment pending the Charities Act's commencement. In contrast, the governance project, developed and financially supported by the sector, has had a higher public profile and managed to engage more non-profits. Although it faces its own enforcement challenges, the code's rollout has been more effective. It remains to be seen whether without an annual income, the code will be self-sustaining.

The impetus to develop these codes, along with a non-profit reporting framework for charities, following a 12-year wait for charity law reform, demonstrates that there are non-profit leaders who have been prepared to take the initiative when it comes to charity regulation. Many, although not all, have been involved in the earlier state-sector collaborations through Social

Partnership, NESF and the White Paper IAG. It is arguable that their experiences and exposure to political and regulatory decision-making enabled these individuals and their organizations to play a larger role in the sector's self-regulation; important in a sector that does not have a recognised representative body.

From a pure statutory regulation perspective, the Irish government approach over the centuries has been one conscious of the pitfalls of non-regulation but uncomfortable legislating for strong regulators.⁸¹ The former Commissioners for Charitable Donations and Bequests were never given the powers or resources to act as investigator, making their enforcement powers nugatory. The new Charities Regulatory Authority will not be an omnipotent presence in this regard either. Unlike many of its common law counterparts, it will require court authorisation to exercise many of its powers. Even the newly created Charities Appeal Tribunal will not transform matters as its jurisdiction is mirrored on the CRA's exercise of power and is thus mainly restricted to reviewing registration or refusal decisions.

The rationale for such a light touch approach, particularly following recent domestic charity scandals that revealed shocking disregard for public funding⁸² may, to some degree, lie in the state's past overreliance on charities to deliver public services in the areas of health, education and social welfare. When charitable provision is core rather than supplementary, a finding of lack of probity would undermine the ability to deliver "essential" (rather than charitable) services. In the absence of an alternative state system of delivery, such a finding would not only be damning but also crippling for service provision and have far larger political consequences.

⁸¹ Acheson et al, n. 6, 168-69.

⁸² Breen, *Non-profit Law Yearbook*, n. 27.

The limited resources available not only for regulatory purposes but also historically for service delivery purposes means that for the foreseeable future, consultation and cooperation remain necessary for success on both fronts. While the Charities Act 2009 will provide the necessary skeleton on which to hang the regulatory framework, the input of stakeholders willing to lead the way on governance, reporting and fundraising standards will be vital to the regime's future sustainability. The emergence of a symbiotic relationship between state and sector would be mutually beneficial. It would not be without its challenges both for the State (in allowing stakeholders' autonomy in areas in which the state is uncomfortable to be criticised) and the sector (in learning to charge and sanction its own constituents for both access to and breach of a regulatory regime). The time, however, is ripe for the next wave combining state and sector initiatives to break forth upon Irish shores.