

LONG DAY'S JOURNEY: THE CHARITIES ACT 2009 AND RECENT DEVELOPMENTS IN IRISH CHARITY LAW

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Introduction

It is now twelve years since the Irish Government committed in its Agreed Programme for Government to the introduction of a modern statutory framework for the regulation of Irish charities.¹ Twelve years on, in 2014, the promise of reform to ensure 'greater accountability and to protect against abuse of charitable status and fraud ... [and increased] transparency in the sector'² has never been more necessary and yet still remains to be delivered. Despite the passage of the Charities Act 2009, its non-implementation has created a regulatory void into which allegations of charity maladministration and misfeasance have filled the public consciousness.

In his seminal work on the formation of public policy, John Kingdon provides a persuasive theory to explain the opening, operation and outcomes of so-called 'policy windows'.³ According to Kingdon, at any given time, a 'problem stream' exists representing all the issues that are wrong in a given system. Running (often) parallel to the problem stream will be a 'solution stream' containing all of those suggested fixes to make a system work better. It is only when there is a convergence of those two streams within a third 'political stream' that policy

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1 Fianna Fail, Progressive Democrats Programme for Government, June 2002, 29.

2 Charities Bill 2007, Explanatory Memorandum.

3 John W Kingdon, *Agendas, Alternatives and Public Policies* (2nd edn, Longman Classics, 2007).

change occurs. The nature of the political stream within which this convergence occurs can take many forms. In the words of Kingdon, it can comprise ‘public mood, pressure group campaigns, election results, partisan or ideological distributions in Congress and changes of administration’.⁴ The collision of problem and solution streams within this political stream results in the temporary opening of a policy window, allowing policy change to occur. The form of such resultant change may be shaped further by coincidental influences or agenda issues hovering in the vicinity of the window which attach themselves to the coat tails of the newly minted policy outcome. This conception of the policymaking process is useful, providing as it does some insight into how certain policy solutions come to be advanced over others and why the resulting policy change may either differ from initial expectations or have other unintended consequences.

In an Irish context, Kingdon’s framework provides a useful lens through which to analyse the ‘fits and starts’ approach to charity law reform. Against the backdrop of the recent revelations concerning the Central Remedial Clinic and the Rehab Group charities and the catalytic effect of these scandals on the Irish charity sector and charity regulation more generally, this article reviews the current progress in the implementation of the Charities Act 2009, recent moves towards the establishment of the long awaited Charities Regulatory Authority and the prospects and challenges for better charity governance ahead.

Part one of this article reviews the existing Irish ‘problem’ and ‘solution’ streams in the context of charity regulation and outlines the political catalysts that are now instrumental in driving reform. Part two outlines the pending changes to be introduced over the coming months and the implementation challenges that will face the new Charities Regulator. Part three attempts to align the recent shortfalls in charity governance with the forthcoming statutory requirements and assesses whether the policy changes that the public are so desperately seeking will be delivered by the much anticipated commencement of the Charities Act 2009.

The Kingdonian Context - Problems, Solutions and Catalysts for Change

The Irish problem stream

The absence of a modern charity regulation framework has long been seen as a problem by charities,⁵ commentators,⁶ international bodies (such as the UN

4 *ibid* 145.

5 *Establishing a modern Statutory Framework for Charities: Report on the Public Consultation for the Department of Community, Rural and Gaeltacht Affairs* (Government Publications, September 2004).

Counter Terrorism Security Committee and the Financial Action Task Force) and technically, by the Irish government. The existing statutory framework dates from 1961 and sees charities subject to an outdated regulatory regime⁷ in which there is no public register of charities, no statutory definition of charitable purpose, no clear guidance on the application of the public benefit test, no specific regulator to whom the donating public or indeed charity beneficiaries can complain about the activities or omissions of a charity and no modern reporting framework that allows the public to see what happens to the money they give so readily and generously to the non-profit sector in Ireland.⁸

In the absence of a centralised regulatory framework for charities, the problems associated with the sharing of regulatory responsibility among a plethora of players, all with different levels of interest in charities, emerge. Such regulatory players include the Revenue Commissioners (from a tax perspective), the Attorney General (under the *parens patriae* jurisdiction), the Commissioners for Charitable Donations and Bequests ('CCDB') (under the Charities Acts), the Office of the Director of Corporate Enforcement (under company law), the Gardaí (with regard to public collection permits and broader matters relating to fraud), various government departments or statutory agencies (for example, Departments of Education and Health; the Health Service Executive) that fund specific charitable services through grants or contracting out of public services, the Comptroller and Auditor General and the Dáil Public Accounts Committee (to the extent to which charities spend public money), sector self-regulatory bodies to oversee fundraising and governance, and finally, the Department of Justice which oversees charity regulation. A difficulty associated with such an oversight model is that it can lead (and has led in the past) to under-accountability.⁹

When the Charities Act is fully commenced, the Charities Regulatory Authority ('CRA') will take over the functions of the Attorney General and the CCDB in

6 See e.g. Oonagh Breen and Kerry O'Halloran, 'Charity Law in Ireland and Northern Ireland - Registration and Regulation' (2000) 18 Irish Law Times 6; Law Society of Ireland, *Charity Law: The Case for Reform* (Law Society, Dublin, 2002).

7 Charities Acts 1961-1973.

8 Ireland's consistent global ranking amongst the top three nations for the percentage of donors giving money, volunteering time and helping strangers in the World Giving Index is evidence of an inherent culture of generous spirit. See Charities Aid Foundation, *World Giving Index 2012: A Global View of Giving Trends* (2012). See further Oonagh B Breen and James Carroll, 'Giving in Ireland: A Nation of Givers in an Unregulated Arena' in Femida Handy and Pamala Wiepking (eds), *Generous People, Generous Nations: A Comparative Study of Global Giving*. The Palgrave Companion to Global Philanthropy (Palgrave Macmillan, 2015 forthcoming).

9 Jonathan Koppell, 'Pathologies of Accountability: ICANN and the Challenge of Multiple Accountabilities Disorder' (2005) 65:1 Public Administration Review 94.

relation to charities, but it will continue to operate in tandem with other existing regulators (such as the Office of the Director of Corporate Enforcement and Revenue) in the context of charity oversight. The establishment of the CRA has the potential to be part of the solution. Realisation of this aim will require a sufficiently resourced CRA to carry out its statutory functions and a regulator that learns both to draw on the strengths of other agencies in the discharge of their complementary functions and to avail of the possibilities of cooperation with other regulators in the achievement of their respective statutory goals.¹⁰ Failure to properly resource the CRA or future failure on its part to engage with other relevant agencies could conceivably see it form part of the problem it is being set up to resolve.

A further problem stemming from the inadequacies of the existing regulatory regime is the dearth of readily available, reliable information on charities. The absence of a charities register and related charity reporting requirements leads to a situation of both information deficit and information asymmetry. From an information deficit perspective, pending the commencement of the Charities Act 2009, there is no public filing requirement for unincorporated charities, leaving the public without any statutory right to sight of these charities' accounts. Even within the corporate sphere filing exceptions exist for religious corporations and those charities exempted by order of the CCDB of the requirement to submit annual accounts with their annual return,¹¹ as well as other company law exceptions to full disclosure.¹² Compliance with the Charities SORP is not statutorily mandated in Ireland, resulting in a very low adoption rate.¹³ Thus, Irish charities are not currently required to reveal the remuneration rates for their top paid executives in

10 It is worth noting in this regard that the Charities Act 2009, s 33 allows for administrative cooperation on regulatory matters between the CRA and other relevant domestic regulators. A similar power exists in s 34 for the CRA to engage in administrative cooperation with foreign statutory bodies on law enforcement matters. The latter may prove particularly useful in facilitating cooperation with the Charity Commission for Northern Ireland on the regulation of all-Ireland charities that operate on an all-island basis across the jurisdictions of Ireland and Northern Ireland.

11 See Companies Act 1963, s 128 and Companies Act 1986, s 2(1)(a). See further <http://www.cro.ie/en/annual-return-filing-exemption.aspx> (last accessed 7 March 2014).

12 See e.g. Companies (Amendment) Act 1986, s 17, which exempts subsidiary companies from the filing requirements of s 7 of the Act where the shareholders consent and where the annual accounts of the company for that financial year are consolidated in the group accounts prepared by the body corporate and the exemption of the company under this section is disclosed in a note to the group accounts. The Rehab Group availed of this exception in respect of both its Care Trust Ltd and Rehab Lottery accounts for 2012 although it subsequently furnished the statutory accounts at the request of the PAC. See n 66, below.

13 INKEx, *Irish Non-profits: What do we Know* (2012) estimates that the take-up rate for SORP in Ireland hovers at about 3% of those entities eligible to use it.

their statements of accounts. Although the Minister has power to make new accounting regulations under the Charities Act 2009, this power only applies to unincorporated charities and will not directly affect incorporated charities.¹⁴

Information asymmetries also abound. Thus, while Revenue has access to the governing instruments of more than 8,311 tax-exempt charities, it does not share this information with the public nor, on the basis of tax confidentiality, does it publish any of the charitable statements of accounts that it reviews.¹⁵ Of these tax-exempt charities, almost half are public companies limited by guarantee and company law requires them to make annual public filings with the Companies Registration Office (CRO). It is thus possible to glean more information about the purposes and activities of these bodies than it is of unincorporated charities. Interested parties may obtain copies of the memorandum and articles of association from the CRO as well as copies of annual audited accounts, subject to the exceptions mentioned above.¹⁶ Yet in the absence of enforceable uniform non-profit accounting standards, it is difficult to scrutinise effectively a set of corporate charity accounts in the first instance or to even compare one charitable company's accounts with another. Consultation of the companies register will not tell you if the entity in question enjoys charitable tax exemption and cross-referencing the Revenue list and the companies register often reveals differences in the names and contact details of the purported charity trustees.

A final problem worth mentioning is the enduring problem of political complacency about charity regulation. The conventional political and public perception that charities, by virtue of their charitable purpose, are good law-abiding entities that do not require active regulation has led to a situation in which the domestic political impetus for charitable regulation has been neither a priority nor consistently advocated. The struggle to find a departmental home for charity regulation following the formation of the Fine Gael/Labour coalition government in 2011¹⁷ and the five year hiatus in the implementation of the Charities Act 2009 since its enactment speaks to the orphan quality of this area of policy in Ireland.

14 Charities Act 2009, s 48(1) and (6).

15 It should be noted that other common law tax authorities do not share the Revenue's qualms in this respect. The United States' Inland Revenue Service (IRS) makes available to the public copies of the annual Form990 filed by charities as well as copies of the applications for exemption. See <http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Public-Disclosure-Obtaining-Copies-of-Documents-from-IRS> (last accessed 7 March 2014).

16 See n 11 above.

17 See Sara Burke, *Case Study of Irish Nonprofit Knowledge Exchange (INKEx)*, February 2013, 12 (noting the difficulties of finding charity regulation a new departmental home upon the reconfiguration of government departments in 2011).

The misplaced nature of such political complacency has been demonstrated in recent public scandals affecting Irish charities. Use of charitable funds to top up salaries and pensions of well-paid executives in the Central Remedial Clinic and controversy over high staff remuneration rates and alleged large-scale inefficiencies in raising and managing charitable donations in the Rehab Group have turned the public spotlight on the lack of charity accountability. However true these allegations turn out to be - and as yet, the full facts are not available in either case - what can be said with certainty is that the absence of a robust regulatory framework ensuring transparency and accountability has added to the problem.

The Irish solution stream

The suggested solutions to the problems raised above are manifold. On the analysis front, more than a decade ago the Law Society of Ireland produced a seminal report, categorizing the shortfalls in the charity regulation framework and making over 130 recommendations to reform Irish charity law.¹⁸ A number of these recommendations made their way into the legislative scheme for the Charities Bill 2007; none of which yet have been implemented.

The Heads of Bill 2006, the Charities Bill 2007 and ultimately, the Charities Act 2009 sought to introduce a new modern charity regulation framework with a statutory definition of charitable purpose, a new regulator of Charities, the CRA, a new register of charities and a requirement for all charities to make an annual report on their achievement of charitable mission with new financial reporting requirements for many unincorporated charities too. To date, the Charities Act 2009 awaits commencement, bar a few technical provision commenced in 2009-10.¹⁹

The charity sector has sought to be part of the regulatory solution and offered in a number of instances to play a proactive role in raising governance standards in the charity arena. We see this primarily in the spheres of fundraising regulation, non-profit governance and public accountability. The Charities Act provided that the operational and administrative aspects of fundraising would be regulated by agreed Codes of Practice to be developed with the sector. Not content to wait for the legislation to commence, a body known as Irish Charities Tax Research Ltd (ICTR) convinced the Department of Community, Equality and Gaeltacht Affairs (then in charge of charity regulation) to commission it to carry out research and to

18 Law Society of Ireland (n 6).

19 Statutory Instrument 284 of 2009 commences Charities Act 2009, ss 1, 2, 5, 10 (except s 10(3) and (4)) and s 99. Statutory Instrument 315 of 2010 commences Charities Act 2009, ss 4 and 90.

make recommendations on how the operational aspects of charitable fundraising could be effectively regulated through Codes of Good Practice. The work of the steering group assembled by ICTR resulted in a public consultation process,²⁰ a subsequent feasibility report on fundraising regulation in 2008,²¹ a draft set of principles²² followed ultimately by a Statement of Guiding Principles for Fundraising,²³ which was formally launched in March 2010 with the ICTR providing secretariat support. To date, 120 charities have signed up to the Statement although the promised monitoring group to oversee compliance has yet to be established.²⁴

On the governance front, further non-profit sector collaboration has led to the development of a Code of Practice for Good Governance of Community, Voluntary and Charitable Organisations in Ireland.²⁵ Based on five main principles of governance, the code is developed across three different organisational types from small volunteer charities through to large corporate charities with large numbers of staff and large budgets. Launched in 2011, the Code now boasts 81 signatories with a further 435 organisations publicly declaring themselves to be on the journey towards full compliance.²⁶

One final significant non-profit initiative in the solution stream is, or perhaps more correctly, was the Irish Nonprofit Knowledge Exchange project ('INKEx'). Established to encourage greater transparency and accountability in the charity

20 ICTR, *Consultation Paper on the Regulation of Fundraising by Charities through legislation and Codes of Good Practice* (September 2006).

21 ICTR, *Regulation of Fundraising by charities through legislation and codes of practice* (2008)

22 ICTR, *Statement of Guiding Principles for Fundraising: Draft Proposals* (October 2007).

23 ICTR, *Statement of Guiding Principles for Fundraising* (February 2008).

24 See:

<http://www.ictr.ie/content/organisations-signed-statement-guiding-principles-fundraising> (last accessed 11 May 2014).

25 The Code was developed by eight community organisations (namely, Boardmatch Ireland, Business in the Community, and the Carmichael Centre for Voluntary Groups, Clann Credo, Disability Federation Ireland, Irish Charities Tax Reform, Volunteer Ireland and The Wheel) in association with The Corporate Governance Association of Ireland, Arthur Cox Solicitors and Sheila Cahill Consulting.

26 See <http://www.governancecode.ie/2013%20Update.php> (last accessed 27 May 2014). The Governance Code is not the first or indeed only sectoral code on governance. In 2009, Dochas (the umbrella body for development organisations) launched its *NGO Code of Corporate Governance*, co-authored with the Corporate Governance Association of Ireland. Adoption of the code is mandatory for all Dochas members. See http://www.dochas.ie/Shared/Files/4/CGAI_Governance_Code_FINAL.pdf (last accessed 6 March 2014).

sphere and developed over a four year period from 2007, the INKEx database was launched in November 2011. Comprising a 40,000-page website with live regulatory and voluntary disclosures about most of the economically significant nonprofits in Ireland, INKEx was the first publicly available proxy charity register in Ireland. Using open data source feeds, the database held information on 8,000 charitable companies and 4,000 unincorporated charities with potential for charities to update certain parts of the database themselves. The project, which benefitted from EU, Irish government and philanthropic support, was to have been a key player in the establishment of a statutory charity framework by providing a usable source of big data to the new charity regulator charged with establishing the register of charities.²⁷ A change of government and recession-driven public spending cuts resulted in the Department of Justice's premature termination of INKEx funding in 2012. The loss of this financial support cut off access to other potential government funding and forced the non-profit into voluntary liquidation in 2013, just two months after delivering the project.²⁸

Catalytic moments from home and abroad: the political stream

The triggers that lead to policy change by bringing problem streams and policy streams together with the political stream are as diverse as they are often unexpected. In Ireland's case, in the wake of 9/11, a United Nations Security Council Counter-Terrorism Committee request to Ireland to review and update its charity legislation amid fears that charities set up in Ireland could be abused was the political driver that prioritised the enactment of new charity regulation.²⁹ It galvanised the 2002 Programme for Government promise to 'enact comprehensive reform of the law of charities; to ensure accountability and to protect against abuse'.³⁰

27 Speaking in the Seanad debate on the Charities Bill on 11 February 2009, the Minister of State with responsibility for Charity regulation stated: 'By way of background, over the past two years my Department has provided funding, together with the EU and a number of philanthropic sources, towards a feasibility study to establish whether it might be possible to set up a GuideStar Ireland. For those Deputies who may be unfamiliar with the concept, GuideStar is founded upon the provision of an extensive, free searchable web data base of all non-profit organisations in a country. It is constituted as a non-profit entity in all countries where it has been established or is in development. These include the USA, the UK, Canada, Israel and Germany. In countries where they are established, GuideStars are regarded as the authoritative source of information about the entire non-profit sector. This would include the charity sector.'

28 For further details on the INKEx project, see its legacy website at www.irishnonprofits.ie (last accessed 7 March 2014).

29 See SC Res 816, UN Doc S/Res/816 (18 August 2003); see also, 589 Dáil Deb Col 3 (5 October 2004).

30 Fianna Fail (n 1) 29.

Similarly, the Financial Action Task Force's (FATF) interest in the vulnerabilities of charities to international terrorist financing abuse; its promulgation of Special Recommendation VIII (SR VIII) focussing on nonprofits and the ongoing scrutiny of Ireland's compliance with SR VIII put the Irish government's commitment to deliver charity law reform under the international spotlight.³¹ FATF SR VIII requires that the laws and regulations that govern non-profit organisations be reviewed so that these organisations cannot be abused for the financing of terrorism. Member countries are asked to identify, prevent and combat terrorist misuse of non-profits through a four-pronged approach involving:

- outreach to the non-profit sector concerning terrorist financing issues;
- supervision or monitoring of the non-profit sector;
- effective information gathering and investigation on the part of the State; and,
- effective capacity to respond to international requests for information about a non-profit of concern.

Whereas Ireland made good progress in modernising its anti-money laundering legislation in general, resulting in its removal from the regular follow-up list for partially compliant countries in 2013,³² the FATF continues to categorise Ireland as only partially compliant with SR VIII. A review of successive FATF Mutual Evaluation Reports reveals that progress on Irish charity law reform has been unconvincingly slow, notwithstanding the enactment of the Charities Act 2009.³³

31 FATF, IX Special Recommendations (October 2001) available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>. The FATF revised the 40 Recommendations and the IX Special Recommendations in February 2012, resulting in SR VIII being renamed Recommendation 8; see: http://www.fatf-gafi.org/media/fatf/documents/reports/combating_the_abuse_of_npos_rec8.pdf

32 FATF, In *Mutual Evaluation of Ireland: 11th Follow up Report* (July 2013) 5.

33 In *ibid*, the FATF rated Ireland as still only partially compliant with Special Recommendation VIII on Non-profit Organisations, 43 noting: 'The shortcomings identified in the [Mutual Evaluation Report 2006] have not been addressed as, at the time of drafting this report, the Charities Act 2009 is not yet in force. It is recommended that Ireland approve and put into effect a law regulating the non-profit organisations that is in line with the requirements of FATF SR VIII. While progress in this area has been made, Ireland's compliance with SR VIII cannot be judged as equivalent to an LC rating.' This wording is almost identical to that contained in the FATF, *Third Mutual Evaluation of Ireland: Detailed Assessment Report Anti-Money Laundering and Combating the Financing of Terrorism* (February 2006) 135, illustrating how little progress has been made in the overall regulation of nonprofits.

Domestic charity scandals, rather than international pressure, have provided the catalyst for the Department of Justice's recent appointments to the board of the proposed charity regulator and its plans to commence the Charities Act. The scandals relate to the governance of two large nationwide health charities, both of which receive substantial state funding. In both cases, questions arose over the charities' transparency and accountability for funds received with particular questions surrounding the levels of remuneration of senior staff and whether charitable funds had been wrongly applied in the payment of such staff. In both instances, additional concerns related to alleged conflict of interest transactions undertaken by officers. In one case (Central Remedial Clinic), further allegations existed of charity malfeasance and possible fraud while in the other (Rehab) poor returns on charitable lottery funds not only raised issues before the Dáil Public Accounts Committee ('PAC') but also form the basis of the charity's ongoing High Court litigation against the Minister for Justice.³⁴

The Central Remedial Clinic

In 2012, the Health Service Executive (HSE) undertook an internal audit of the Central Remedial Clinic (CRC), a national disability charity. The audit revealed that the charity was using €250,000 of charitable funds each year to top up the state-funded salaries of senior staff members. These revelations led to a Dáil PAC hearing into the matter in November 2013. The hearings discovered that the top-up payments represented only one of a number of misuses of charitable donations at the CRC. The Committee learned that in breach of public pay sector policy, the former CEO of CRC had received an annual top up of €136,000 on his public sector approved salary of €106,000 per annum. This top-up was funded from charitable donations. Upon his early retirement in July 2013, the former CEO had also benefited from a €750,000 retirement package with the entire sum again being funded from charitable donations. This transaction was described in the books of the payor, the CRC's related charity 'Friends and Supporters of the CRC' ('FSCRC'), as a 'donation'³⁵ and represented half of the available annual funds of the FSCRC.³⁶ Other breaches uncovered concerned a separate loan of charitable funds, valued at €3 million, also made by FSCRC to shore up a pension fund scheme for 70 members of staff at the CRC, alongside allegations of conflict of

34 *REHAB Group & Anor v Minister for Justice and Equality* 2012/951 JR.

35 Hearings of the Dáil Public Accounts Committee, Section 38 - Agencies Remuneration, 16 January 2014, available at: <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeesetakes/ACC2014011600001?opendocument> (last accessed 7 March 2014).

36 Finding of the Interim Administrator, John Cregan, in a letter to the Director General of the HSE, 14 January 2014 as produced in evidence before the PAC on 16 January 2014.

interest and other poor governance practices of Board members in their dealings with the charity and its associated entities.³⁷

The political fallout from the CRC scandal, culminating in the resignation of the entire CRC Board in December 2013, forced the Health Services Executive to take over the charity and appoint an interim administrator.³⁸ The administrator undertook to carry out a detailed report on the internal workings, transactions and activities of the organisation. That report was presented to PAC in July 2014 at which time it invited a number of former CRC executives to reappear before it to answer further questions, all of whom declined.³⁹

The Rehab Group

The Rehab Group is an Irish-based charity providing services, support and training to people with disabilities. Its turnover in 2012 was in the region of €183 million and it received €83 million in state funding, its use of which has been the subject of public concern on a number of fronts.⁴⁰ Relations between the state and the charity have become strained in recent times, in large part due to the Department of Justice's decision to phase out a state scheme which had provided a total of €114 million in public funding to lotteries operated by charities since 1997, and of which Rehab was the largest recipient each year.⁴¹ Rehab mounted two separate legal challenges to this decision, which are currently before the courts. A Departmental audit of Rehab's use of the Charitable Lotteries Scheme funding in

37 See further, Oonagh B Breen, 'Recent Developments in Irish Charity Law: Tsunami or Rising Tide to Lift all Boats?' (2014) *Non-profit Law Yearbook* 105.

38 Martin Wall, 'HSE takes over CRC after Board Resigns' *The Irish Times* (Ireland, 14 December 2013).

39 Report of the Interim Administrator Appointed by the Health Service Executive to the Central Remedial Clinic and Friends and Supporters of the Central Remedial Clinic Limited (May 2014) available at: <http://www.hse.ie/eng/services/publications/corporate/Report%20of%20the%20Interim%20Administrator%20appointed%20by%20the%20HSE%20to%20the%20CRC.pdf>. See also 'PAC will be discussing the CRC today, but who is going to turn up?' *The Journal.ie* (July 3, 2014) available at: <http://www.thejournal.ie/crc-public-accounts-committee-2-1550270-Jul2014/>

40 Rehab Group Annual Report 2012, available at <http://www.rehab.ie/about/PDFS/Rehab-AnnualReport2012.pdf> (last accessed 18 March 2014). See also Daniel McConnell, 'PAC told €120m of Rehab funds not used efficiently' *The Irish Independent* (Ireland, 13 February 2014).

41 Of the 19 recipients of lottery funding in 2013, Rehab received €2.5m out of a total fund of €4m. See: <http://www.justice.ie/en/JELR/CLF%202013%20Allocation.pdf/Files/CLF%202013%20Allocation.pdf> (last accessed 18 March 2014).

2010 found that the charity had a very low profit margin on its lottery products. The charity's gross lottery sales in 2010 of almost €7.2 million yielded a net profit of €558,000 or just 8 per cent. The figures indicated bingo sales of €3,190,000 yielded profits of only €548,000 while scratch card sales of €3,969,000 yielded profits of only €9,452 - less than 1 percent. The Minister for Justice concluded that Scheme criteria did not take account of either the profitability of the lottery or the proportion of the revenue that reached the charitable cause in whose name the products were sold. This meant that the scheme did not provide any incentive for charities to operate lotteries with a low cost base or to ensure that a high proportion of the revenue generated would go directly to the cause with which the ticket is identified.⁴²

Parallel to this public dispute over lottery funding, Rehab also faced public pressure to reveal its pay-policies for its top level executives in the wake of the CRC scandal. Despite initially refusing media requests to do so, the charity finally caved into the demands of the PAC and disclosed that its CEO received a total remuneration package worth €272,400. The lack of transparency and accountability over levels of remuneration within the charity ignited public interest, particularly in light of Rehab's claim that it would not be under any legal obligation to disclose remuneration information until new accounting rules came into force in 2015.⁴³ The rules referred to relate to the introduction of FRS 102, the new GAAP rules for Ireland and England, due to commence in January 2015. It seems, however, that the charity lost sight of the as-yet-to-be-exercised powers of the Minister to make regulations relating to the reporting requirements of charities under the Charities Act 2009.⁴⁴

As if the lotteries challenge and the CEO disproportionate salary scandal were not enough, Rehab found itself subject to further public ire when it emerged that it had hired its former CEO, Frank Flannery, to lobby on behalf of the charity. Flannery served as CEO of Rehab from 1981 to 2006, remaining on the Board until recent circumstances forced his resignation. In tandem with his role in Rehab, Flannery was a trustee of the Fine Gael Party, one of the Government coalition parties, and one of its chief party strategists for more than 30 years, credited in no small part

42 Minister Alan Shatter, Parliamentary Questions - Written Answers, Dáil Éireann Debate Vol 783 No 2. See also, Arthur Beesley, 'Shatter criticises Rehab citing low profits from lotteries' *The Irish Times* (Ireland, 22 January 2014).

43 Rehab subsequently gave in to political pressure and, in line with the Charity SORP, published information on its top salary bands. According to the charity, 11 Rehab Executives earn between €100,000-€180,000, excluding the chief executive, while all of the executive management team have a contractual entitlement to performance-related pay.

44 Charities Act 2009, ss 52 and 53.

with the re-emergence of the party after its disastrous electoral losses in 2002.⁴⁵ In this political capacity, Flannery had unrestricted access to the corridors of power in Leinster House, which he used to lobby Government Departments and Ministers on matters relating to Rehab; a position which the charity paid for right up until 2013.⁴⁶

The conflict inherent in Flannery working as a paid lobbyist for members of the charity sector, while also acting as a senior strategist with the main government party, was not limited to his role within Rehab. A further strand to this tangled web was the government's 2011 appointment of Flannery as the Chair of the revitalised Forum on Philanthropy. The task of the Forum was to increase the level of national giving in Ireland by 10 percent year on year by rolling out a national giving campaign and recommending further fiscal and tax initiatives to encourage philanthropy.⁴⁷ While Flannery's role as Chair was unpaid, he entered into a €60,000-a-year contract with Philanthropy Ireland, one of the member organisations of the Forum, to lobby government to change the tax law to boost charitable donations from wealthy people.⁴⁸

To date, Flannery has ignored repeated invitations to appear before the PAC to discuss his payment, pension and contractual associations with Rehab. Political pressure, however, has forced him to resign from the Rehab Board and as a trustee of Fine Gael. Flannery also stepped down as Chair of the Forum on

45 Author of the Flannery Report which proposed a series of changes in the organisation and structure of the party, Flannery was made Fine Gael's director of Organisation and Strategy in 2002 and was charged with implementing the report. The restructuring bore fruit for Fine Gael in the 2004 local elections and the 2007 general election, both of which saw gains for Fine Gael. Flannery later served as Director of Elections for the party in 2009 and has remained a close adviser to the Taoiseach.

46 Flannery received an average of €5,500 a month from Rehab for lobbying and consultancy work on the part of the charity. Flannery's company Laragh Consultancy Ltd invoiced Rehab for €66,000 in 2012 and €11,000 in 2011 for lobbying the Departments of Justice, Education and Social Protection, notwithstanding the fact that Laragh Consultancy was dissolved in 2009 for failing to file annual accounts. See Fiach Kelly, 'Rehab paid Flannery for lobbying until 2013' *The Irish Times* (Ireland, 13 March 2014).

47 Report of the Forum on Philanthropy, June 2012, available at: http://www.philanthropy.ie/wp-content/uploads/2012/07/PhilanthropyReport_final-print.pdf (last accessed 19 March 2014).

48 See <http://www.philanthropy.ie/information/forum-on-philanthropy/background/> (last accessed 18 March 2014). See also Arthur Beesley, 'Flannery got €60,000 a year to lobby charity' *The Irish Times* (Ireland, 12 March 2014).

Philanthropy⁴⁹ and Fine Gael revoked his unrestricted pass to Leinster House.⁵⁰ Another casualty of the Rehab controversy has been CEO, Angela Kerins, who resigned from her position on 2 April 2014. Ms Kerins' resignation came ahead of a scheduled appearance before the Dáil's PAC, at which she was due to answer further questions on her pension entitlements and on alleged conflict of interest transactions carried out between her family members and the charity. Following her resignation, Kerins refused to appear before the Committee on grounds of ill health.⁵¹

The absence of a Charities Regulator and Register, the lack of clear reporting requirements, and the dearth of information on the operation of charities has forced the PAC in the case of both the CRC and Rehab to become the champion of charitable stewardship as it has sought to root out poor governance practices and make those charities before it fully accountable for the funding received. The jurisdiction of the PAC in relation to these charities only exists because they have received public funding for which they must account. Thus, the de facto scrutiny and actions of the PAC are not a panacea for the absence of the CRA. The PAC hearings, however, have served as an effective catalyst for prioritising the establishment of the regulator.

The Policy Window Opens

The scandals outlined above and the resulting public outcry provided an opportunity for action on charity law reform. On foot of the PAC inquiries, the Minister for Justice invited applications for appointment to the Board of the CRA on 24 January 2014 and appointed a CEO to the new Regulator on 1 March 2014 followed by a Board of members comprising a Chairperson and 15 ordinary members in late April 2014.⁵² As Kingdon notes, policy windows open infrequently and do not stay open for long.⁵³ The moment must be seized when it

49 Tim O'Brien, Arthur Beesley, Fiach Kelly, Éanna Ó Caollaí, 'Flannery steps down from Rehab Board and FG roles' *The Irish Times* (Ireland, 10 March 2014).

50 Fiach Kelly, 'Flannery loses Leinster House access' *The Irish Times* (Ireland, 12 March 2014).

51 Paul Cullen, 'Kerins spent 10 days in hospital after PAC appearance' *The Irish Times* (Ireland, 5 May 2014).

52 The Minister for Justice designated Ms Úna Ní Dhubhghaill, former Principal Officer with responsibility for the Department's Charity Regulation Unit, to be the Chief Executive of the CRA on 1 March 2014. See <http://www.justice.ie/en/JELR/Pages/PR14000053> (last accessed 18 March 2014). The members of the CRA were appointed on 30 April 2014. See <http://www.justice.ie/en/JELR/Pages/PR14000110> (last accessed 11 May 2014).

53 Kingdon (n 3) 166.

comes along or the opportunity will be lost for a myriad of reasons, not least that the events that prompted the window to open may pass from the scene.⁵⁴ Since the media storm that forced the Minister to establish the CRA in the early months of 2014, public attention has already turned to new political controversies over Garda Síochána treatment of whistle-blowers.⁵⁵ The Minister for Justice's embroilment in this latter episode deflected media interest from the charity sector and greatly occupied the Minister's attention,⁵⁶ resulting in his subsequent resignation on 7 May 2014. Evidencing once more the 'fits and starts' trend in Irish charity law reform, we must now wait for the newly appointed Minister of Justice, Frances Fitzgerald, to commence the Charities Act 2009. If this event occurs in 2014 then certain other important events, outlined below, may occur.

The establishment of the Regulator

Implementation of much of the Charities Act 2009 is dependent upon the formal establishment of the Charities Regulator under the Act. At present, the Minister has appointed the Board and the CEO to the CRA and it is operating on a non-statutory basis pending the commencement of section 13 of the 2009 Act, which will formally establish the Regulator and allow it to exercise statutory powers conferred by the Charities Act. When this occurs, the Regulator will have the power to establish the Register, to require charities to register and file annual reports and accounts, to promote compliance with the Act, ensure charitable accountability and to carry out investigations under the Act.⁵⁷ While the Minister for Justice eschewed the appointment of the Regulator in 2011, citing fiscal constraints,⁵⁸ 2013 saw the Department of Justice engage in public consultation on the possibilities of implementing a pared-down regulator with the rolling out of statutory duties and powers on an incremental basis, as resources allow.⁵⁹ With

54 Kingdon (n 3) 169 ('An idea's time comes, but it also passes. There is no irresistible momentum that builds for a given initiative ... A crisis or focussing event, for example, is by nature of short duration.')

55 Fionnan Sheahan, Tom Brady and Dearbhail McDonald, 'Alan Shatter on Knife-Edge in Garda Tapes Scandal' *The Irish Independent* (Ireland, 26 March 2014).

56 To this end, it should be noted that the Minister for Justice has core responsibility for 11 named policy areas, with a key area being Garda and Policing. The regulation of charities is listed with 13 other sub-areas of responsibility under a separate heading of 'Other Regulatory Functions,' which gives some indication of the low level of priority in policy terms accorded to charity regulation within the Department of Justice.

57 Charities Act 2009, ss 14, 39.

58 Speech of Minister for Justice Alan Shatter at the Annual Conference of the Irish Charities Tax Research Group, Dublin, November 2011.

59 Department of Justice, *Implementation of the Charities Act 2009: Consultation by the Department of Justice and Equality*, 23 January 2013.

the CRA board and CEO now in place, the new regulator will have an additional ten staff drawn from within existing staff in the Department of Justice.

The creation of the charities register

The first task of the new regulator, or ‘CRA’, will be the establishment of the charities register under section 39 of the Act. All charities currently enjoying charitable tax-exempt status from Revenue will be deemed automatically registered under section 40 of the Act, thereby populating the new register with over 8,000 charities from its establishment. Much work will still be required in relation to these organisations to update their transferred Revenue details with the details required under the Charities Act. If the Department sticks to its announced plans under the public consultation on the implementation of the Charities Act, it will focus its intentions on these deemed charities primarily and will not seek to register new charities for a period of time. In this way, the CRA will be able to side-step, at least initially, the need to issue interpretative guidance on the new statutory heads of charitable purpose, laid down by section 3 of the Act, and on the meaning of public benefit.

In the context of creating the charities register, it will be interesting to see to what extent the CRA will draw upon the knowledge and experiences of the INKEx project and database, discussed above.⁶⁰ Had the INKEx database been maintained, the process of establishing the statutory register would have been greatly simplified. As matters stand, much work will be needed before the CRA will be able to stand over the accuracy of its register details.

The development of reporting requirements

Once the CRA has established the initial register of deemed charities its next major task will be to develop and agree reporting requirements with the sector. Given the experiences of other common law jurisdictions, this task benefits from user consultation and regulator reflection prior to implementation and normally necessitates a lead-in time of between 17-24 months. Two very different approaches to the introduction of charity reporting from Australia and Northern Ireland provide food for thought in this regard.

Established in 2012, Australia’s new regulator, the Australian Charities and Not-for-Profits Commission (‘ACNC’) has 60,166 charities on its register.⁶¹ At

⁶⁰ See n 28 above and accompanying text.

⁶¹ See also Fiona Martin’s article in this issue of CL&PR; F Martin, ‘Developments in Australian Charity Law: One Step Forward and Two Steps Backward’ (2014-15) 17 CL&PR 23.

present, registered charities are only required to file non-financial information, in the form of a 2013 Annual Information Statement ('AIS'),⁶² for the financial year ended 30 June 2013, with extensions for completion of this task granted until 31 March 2014. This will change with the advent of the 2014 AIS when registered charities will also be required to provide financial returns to the ACNC for the 2014 financial year-end. To facilitate comparability and consistent standards of reporting the ACNC, where possible, is mapping the financial reporting requirements for registered charities with the National Standard Chart of Accounts (NSCOA), a uniform system for capturing accounting information developed by that Australian Centre for Philanthropy and Not-for-Profit Studies.⁶³ This will help registered charities to prepare the AISs and financial reports required under the ACNC Act, using a common set of definitions of financial account categories, an approach from which Ireland could learn.

Closer to home, Northern Ireland established its charity register in December 2013 and, it too, has taken an incremental approach, establishing a 'deemed list' of 7,000 Revenue-approved charities which are subject to the regulator's statutory powers but which will not be entered on the official register of charities until they have been individually vetted by the Charity Commission for Northern Ireland (CCNI). At present, the CCNI estimates that it may take up to four years to register all existing deemed charities.

The creation of the NI Charity Register was preceded by a public consultation on interim reporting requirements,⁶⁴ with the effect that registered charities will be required to submit an annual report and financial returns from 1 April 2014. During this 'interim reporting phase,' which is due to run up to January 2015, charities must submit a narrative report along with an annual financial return but no particular format of presentation is imposed nor need the accounts be reviewed or audited prior to submission. The CCNI plans to hold a further consultation on reporting requirements during 2014 which will inform compliance with full reporting and accounting requirements, expected when the Department of Social

62 The 2013 AIS comprises 17 mandatory and three optional questions. Answers to these questions relating to the charity's officers, contact details, charitable purposes and activities will enable the ACNC to update its register of charities.

63 For further information see:
<https://wiki.qut.edu.au/display/CPNS/Standard+Chart+of+Accounts> (last accessed 18 March 2014).

64 See:
http://www.charitycommissionni.org.uk/Library/pdf_documents/Interim%20reporting%20consultation%20document%20inc%20response%20form.pdf (last accessed 18 March 2014).

Development issues new regulations early in 2015.⁶⁵ This release will coincide with the introduction of accounting standard FRS102 and the new Charities Statement of Recommended Practice (SORP) for accounting standards.

Applying these time-lines to the Irish situation, it is unlikely that a workable register will be in place before the end of 2015. Even then, the most one can hope for by this date will be a register consisting of deemed charities as opposed to new entrants. The pressure will be on the Department of Justice to issue accounting and reporting regulations for registered charities, particularly in light of the

approaching introduction of FRS 102 in January 2015. The Department will have to grapple with whether it will make the new version of the Charities SORP mandatory for registered charities in Ireland.⁶⁶ It will also have to consider the extent to which it will require charitable companies to comply with additional charity law reporting requirements in their Annual Reports⁶⁷ over and above those already imposed by company law.

The provision of interpretational guidance

An issue that will have to be addressed upon the formal establishment of the new Regulator relates to its proposed approach towards new entities that wish to obtain charitable status after the coming into force of the Charities Act. There has been no discussion to date of the principles that will inform the CRA's application of the statutory definition of charitable purpose or its likely approach to the related issue of public benefit.

In common with other common law jurisdictions, the Charities Act 2009 statutorily mandates the provision of public guidance.⁶⁸ Its effective delivery may cause headaches here, however, if the recent experiences of Northern Ireland and England and Wales (with regards to the interpretation of the public benefit

65 http://www.charitycommissionni.org.uk/Manage_your_charity/Submit_Annual_Return_index.aspx (last accessed 18 March 2014).

66 See <http://www.charitycorp.org/>. It is interesting in this regard to note that in its reply to requests for information put to it by the PAC, the Rehab Group prepared the sought after financial information relating to the remuneration of its staff in line with the requirements of SORP - see Statement from the Rehab Group Board, 11 March 2014, available at <http://www.rehab.ie/press/article.aspx?id=892> (last accessed 18 March 2014) and correspondence 3A.2(A) between Ms Angela Kerins, CEO Rehab and Ms Niamh Maguire, Committee of Public Accounts, 11 March 2014, on file with the author.

67 Charities Act 2009, s 52(3).

68 Charities Act 2009, s 14(1)(e) and (i) and s 39.

requirement) are replicated.⁶⁹ The Department of Justice's 2013 public consultation document on the implementation of the Act was completely silent on the Regulator's likely interpretational approach towards the issues of charitable purpose and public benefit.

It would be foolish or, at the very least, short-sighted to believe that these issues will not prove to be as problematic here as they have proven elsewhere. Given Ireland's statutory presumption of public benefit in favour of gifts for the advancement of religion,⁷⁰ the new provisions in section 3(10) of the Charities Act 2009 (aimed at stamping out the possibility of 'religious cults' benefiting from charitable status in Ireland), and the existing Irish case law applying a subjective donor test as to whether public benefit is present,⁷¹ it remains an open question as to whether when it comes to charitable purpose and public benefit application, learning from our neighbours' experiences will enable us to avoid new interpretative pitfalls of our own.

Aligning Current Identified Shortfalls with the Requirements of the Charities Act: Are we nearly there yet?

The tales of Rehab and the Central Remedial Clinic are similar in many ways - for many years both organisations have provided badly needed services to their beneficiaries that would not have otherwise been available. Initially, this was to the exclusion of the state but in more recent decades these services have been delivered on behalf of the state with state funding paying most of the salary costs within these organisations, resulting in them being classified as either fully funded for the services that they provide on behalf of the state⁷² (like the CRC) or grant-aided by the state⁷³ (like Rehab). As respective recipients of €16 million and €83 million of public funding in 2012, the interests of the PAC in these bodies is more than justified. Lack of transparency and accountability, poor governance standards, poor handling of conflict of interest transactions with related persons and companies, wrongful use of charitable funds to top up executive salaries and pensions, and potential allegations of fraudulent activity requiring further Gardaí

69 See further Breen (n 37).

70 Charities Act 2009, s 3(4).

71 *Re Cranston: Webb v Oldfield* [1898] 1 IR 431, 447 (Lord FitzGibbon: 'the benefit must be one which the founder believes to be of public advantage and his belief must be at least rational, and not contrary either to the general law of the land or to the principles of morality.').

72 Health Act 2004, s 38.

73 *ibid* s 39.

investigation⁷⁴ in both instances reveal an array of matters that one would hope the commencement of the Charities Act 2009 will mitigate. But will it?

Certainly, the establishment of the register of charities should aid transparency by bringing together for the first time a complete picture of a charity and its associated entities and enabling a better understanding of the organisational structure of a given charity and its holdings. Piecing together the relationships between the CRC and Rehab Group and their associated companies presented many challenges to the media, politicians, and the general public over the past few months that should not arise in future if the register achieves its purpose.

In its public consultation, the Department of Justice specifically asked what additional information should be publicly available on the register beyond the existing statutory requirements of section 39(7). The Summary Report of Responses Received⁷⁵ noted the recurring requests for inclusion of the following:

- information enabling easier identification and contact of charities and their subsidiaries;
- information about a charity's income, its sources and uses, together with a link to the charity's annual accounts;
- information about the legal structure and governance practices of the charity, and its status in other jurisdictions if applicable;
- information about the activities of the charity, both charitable and commercial, together with a link to the charity's annual report;
- information on the charitable objects of the charity and how these are fulfilled by its activities;
- information on the staffing and organisational structure of the charity; and finally,
- evidence of compliance with regulatory requirements.

Making this information easily accessible would certainly go a long way down the road towards greater transparency.

Accountability may be a harder nut to crack. The requirement to furnish an annual report in every case will only be as good as the regulations governing the content,

⁷⁴ Mary Regan and Fiachra Ó Cionnaith, 'CRC may face fraud probe in top-up scandal' *The Irish Examiner* (Ireland, 17 January 2014). Shane Phelan, 'Gardai asked to probe allegations about Rehab-linked individuals' *The Irish Independent* (Ireland, 14 March 2014).

⁷⁵ Department of Justice, July 2013.

which have yet to be released.⁷⁶ The new statutory obligation to file annual statements of accounts is more limited - with exemptions from filing for charitable companies, charities below certain thresholds, and educational charities.⁷⁷ Although the Registrar of Companies will share annual returns of charitable companies received with the CRA, these returns will continue to be prepared in line with company law rather than with any regulations made by the Minister under section 48(1) of the 2009 Act.⁷⁸ Whereas the introduction of FRS 102 in January 2015 will apply to charitable companies, making compliance with SORP mandatory for all charities preparing accrual accounts, confusion remains over whether the Charities Act 2009 now actually requires all charities to prepare accounts on an accrual basis, thereby eliminating the possibility of filing on a receipts and payments basis.⁷⁹

The adoption of SORP would resolve the issues around publication of staff remuneration rates and it would also require charities to break down revenue streams in a more systematic fashion than is currently the case. However, real accountability requires more than just account submission. It requires scrutiny and interrogation on the part of the regulator and an ability to read between the lines. It should not be forgotten that the HSE audit of the CRC's annual accounts that initially uncovered the unauthorised salary top-ups and prompted the PAC hearings, entirely failed to spot the FSCRC 'charitable donation' of €700,000 (i.e., half of its annual budget) to CRC to pay the outgoing CEO's pension package - a factor only identified by the subsequent interim administrator's forensic audit. With a staff of ten, it is unlikely that the CRA will be in a position to scrutinise every annual return or find every misdemeanour lurking in the books.

The emergence of a new public focal point in the form of a charity regulator, the development of a register of charities, the possibility for the public to easily access a charity's governing documents, annual report and annual accounts are significant developments. The ability to see how a charity is structured and run; to know who is in charge of an organisation and its related entities and to be able to discern a charity's operating costs as well as its programmatic costs are all equally important first steps in the journey of one thousand miles. None of these steps by themselves

76 Charities Act 2009, s 52.

77 *ibid* s 48(6).

78 With the exception of religious corporate charities for which separate provision is made under s 52(5).

79 Compare Charities Act 2009, s 47(3) and s 47(4). See further, Consultative Committee of Accountancy Bodies (CCAB), *International Financial Reporting for the Not-for-Profit Sector: Final Report* (February 2014) [2.6.1.2].

are groundbreaking or indeed a panacea.⁸⁰ Cumulatively, however, these changes begin to form a basis for a modern regulatory framework for charities; a framework that invites public and political discussion around the meaning of charitable purpose and public benefit in the twenty-first century. Such a framework should shed light upon private and public support for existing charities and, ideally, create a civic space in which we can begin to think about the value that we, as a society, wish to ascribe to essentially private actions undertaken for the greater public benefit. Whether all of these objectives can be accomplished within the existing public policy window is extremely unlikely. The larger policy question as to how many further cycles of policy change it may take to achieve effective charity law reform in Ireland remains for the time being, therefore, an open question.

⁸⁰ See e.g. the English House of Commons Public Accounts Committee Report on the Charity Commission, HC 792, 5 February 2014, which found that notwithstanding its £22.7 million budget and 331 staff, the Charity Commission had ‘no coherent strategy for delivering clearly defined priorities within its broad remit’ and had not regulated the charity sector effectively. In the words of the PAC, ‘The Commission has placed insufficient emphasis on the monitoring and investigation of charities relying mainly on receiving information from others, rather than actively generating its own information and intelligence to identify risks in individual charities’.