ANZTSR
AUSTRALIAN & NEW ZEALAND THIRD SECTOR RESEARCH

THIRD SECTOR REVIEW

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THIRD SECTOR REVIEW

Australian and New Zealand Third Sector Research is a professional and academic organisation that aims to foster research and the dissemination of knowledge concerning the third sector in Australia and New Zealand. The third sector is constituted by all those organisations that are non-profit and non-government, together with the activities of volunteering and giving which significantly sustain them.

Third Sector Review provides a refereed publication outlet for scholars, researchers and practitioners who are working in the third sector.

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Australian New Zealand Third Sector Research Ltd (ANZTSR) is a network of people interested in pursuing and encouraging research into private, non-profit, community or voluntary organisations and the activities of volunteering and philanthropy.

What is the third sector?

The third sector is constituted by all those organisations that are non-profit and non-government, together with the activities of volunteering and giving which sustain them. These organisations are a major component of many industries, including community health services, rural, education, housing, sport and recreation, culture and finance. Although they differ amongst themselves, third-sector organisations differ as a group from for-profit businesses and from government departments and authorities. Third-sector organisations vary greatly in size and in their activities. They include neighbourhood associations, sporting clubs, recreation societies, community associations, chambers of commerce, churches, religious orders, credit unions, political parties, trade unions, trade and professional associations, private schools, charitable trusts and foundations, some hospitals, welfare organisations and even some large insurance companies.

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ANZTSR was launched in 1993. It arose from the growing awareness of the importance of the third sector in Australia and New Zealand, the paucity of reliable information about it, and the difficulty of working as isolated researchers. ANZTSR is an incorporated association. ANZTSR joins similar organisations in the USA (ARNOVA), the UK (ARVAC) and the International Society for Third Sector Research (ISTR) as active networks that promote communication between researchers and help develop synergies in the research endeavour. Research networks have also formed in several European countries or regions, in Latin America and Japan. These all testify to the growing interest in the third sector. The third sector is an important but hitherto undervalued and under-researched sector of societies, political systems and economies.

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Third Sector Review is explicitly cross-disciplinary, with both theoretical and empirical papers invited from a range of disciplines and fi elds of practice. Critiques of existing theory or practice are invited. Contributions are encouraged from both practitioners and academics. There is a special 'From the Field' section. Contributions are invited relating to characteristics of the third sector or any aspect of its management, including governance, human-resources management, the labour market, financial management, strategic management and managing change, community development, fundraising, user rights, relations with government, legal issues, historical development, etc.

Papers should be written in a jargon-free, non-technical style accessible to managers, workers and board members of non-profit organisations, and to academic researchers, teachers and students from a variety of disciplines. Papers are subject to rigorous peer review, normally by two independent reviewers. A blind review process is adopted. For that reason, authors should indicate their names and affiliations on a separate page.

Authors should also include a brief abstract (100 words) and up to five keywords. Papers should be between 4000 and 6000 words in length, in 12-point Times New Roman, double-spaced and with 2.5-cm margins. Please use minimal formatting and styles; indicate headings through the use of CAPITALS, bold and *italics*. Authors should submit an electronic version of their paper in Microsoft Word format or Rich Text Format (RTF). If any images are used, please ensure that a high-resolution image fi le (jpeg or tiff) is supplied separately. If graphs are included, please ensure that the data used to create them is available to our designer. Where quotations are more than 40 words, they should be indented, justified and set in italics, with the source following directly. Single quotation marks are to be used throughout the text, with double quotation marks within single when needed.

Citations

The Harvard style of referencing is used, with endnotes kept to a minimum. Examples: (Lyons 1999); (Lyons 1999: 20); (Lyons 1998a, 1998b); (Onyx & Bullen 1998). If there are three or more authors, use the form: (McDonald et al. 1998). List multiple references in ascending chronological order: (McDonald et al. 1998; Onyx & Bullen 1998; Lyons 1999).

References

List in alphabetical order by the first author's surname. List multiple references by the same author chronologically, the earliest first, with the author's name repeated. Refer to the following examples, including the punctuation and capitalisation.

Book: Verba, S., Scholzman, K. & Brady, H. (1995) *Voice and Equality: Civic voluntarism in American politics*. Cambridge, MA: Harvard University Press.

Book chapter: James, E. (1987) The Nonprofi t Sector in Comparative Perspective. In W. W. Powell (ed.), *The Nonprofit Sector: A Research Handbook*: 397–415. New Haven: Yale University Press.

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EDITORIAL

Fiona McGaughey, Not-for-profits UWA, University of Western Australia Law School

Introduction

The regulation of the third sector is the main theme of this Issue of Third Sector Review (TSR), a contentious and complex topic that is likely to remain relevant for the foreseeable future. TSR aims to be an explicitly cross-disciplinary journal for, and about, the third sector, with both theoretical and empirical papers of interest to those in Australia, New Zealand and our geographical region. This Issue of TSR meets these aims by: discussing research on Australia, New Zealand, India and China; involving practitioners and academics; offering both scholarly and 'from the field' papers; and covering a range of academic disciplines.

Despite the many challenges of the COVID-19 pandemic during 2020, as discussed by my colleague Professor David Gilchrist in Issue 1 2020 of TSR, academics and practitioners have continued their research on, and with, the sector related to longer term and ongoing research topics. The third sector has proven itself to be a critical and resilient staple in societies during COVID-19 and as such, merits our ongoing interest. More broadly across the academe and in industry, much recent research has focused exclusively on COVID-19, and the TSR editors and contributors will return to the topic and the challenges it has posed for some time to come. Indeed, Issue 1 of 2021 will focus on charity responses to crises such as COVID-19.

However, this collection focuses predominantly on ongoing policy questions and research topics of relevance to the sector, although there are inevitable references to COVID-19. In fact, preliminary discussions for this issue of TSR took place at the Institute of Advanced Studies, University of Western Australia, in early March 2020, just before COVID-19 restrictions were introduced here. In hindsight, little did we know what lay ahead. Organised by my colleague Professor Ian Murray, the seminar was entitled 'The Regulation and Self-regulation of Charities and Philanthropy' and involved colleagues from the NFPs UWA Research group and invited guests. Selected papers were progressed for publication here. These were joined by Mark Fowler's timely contribution on the expert panel's proposal for reform of the Charities Act in Australia.

The Articles

The first publication in this Issue challenges us to revisit recent history that shaped the government/not-for-profit nexus by examining the 'lost history' of the Welfare State. In 'Silver Bullets and TED Talks: Sketching Ideas on the Government/Not-for-profit Nexus in the Australian Welfare State', David Gilchrist cautions against simplifying public policy debates into the bite-sized chunks we find in popular forms of engagement, such as TED Talks. He argues that history has lessons for us, including the need for depth of analysis at a system-wide level in order to develop effective institutions. He concludes that the concept of the Welfare State remains a sound institutional base for building a systemic response to service needs.

We then cross the Tasman Sea but continue to look to history to better understand current and future policy and legislative developments relevant to the Third Sector. Sue Barker examines 'Charity Regulation in New Zealand – History and Where to Now', arguing that the current legal framework for charities in New Zealand actually inhibits charities' capacity to carry out their work. She suggests that improving the legal framework around charity regulation would significantly improve recovery from COVID-19 and that legislative reform in this area is badly needed in New Zealand.

Ian Murray takes up the theme of charity regulation in his article entitled: 'How do we Regulate Activities within a Charity Law Framework Focussed on Purposes?'. While focussing on Australia and New Zealand, the article includes a broad sweep of relevant regulatory approaches in other jurisdictions, particularly the United Kingdom, the United States and Canada and presents novel suggestions; most notably that existing laws such as anti-discrimination legislation that apply to all entities could more effectively be used to regulate charitable activities.

Mark Fowler's paper 'Attaining to Certainty: Does the Expert Panel's Proposal for Reform of the Charities Act Sufficiently Protect Religious Charities?' engages with similar questions but focuses more narrowly on the recommendation of the Australian 2018 Expert Panel on Religious Freedom to amend section 11 of the Charities Act 2013 (Cth). This amendment would mean that a charity which does not support marriage equality would not automatically be deregistered. He examines the separate elements of charitable status that are relevant to such entities, namely the 'political objects doctrine', the 'public policy doctrine' and the 'public benefit' requirement. He concludes that in the interests of clarity, more must be done.

Moving away from Australia and New Zealand, insights into India's regulation of NGOs are offered by Alka Sabharwal in her article 'Contested Spaces: A Coinciding Rise of State Regulations and Technomoral Politics of Rights-Based NGOs in India'. She positions both state and non-state actors as political entities which regulate and resist regulation respectively. Using India's Foreign Contribution (Regulation) Act 2010, she illustrates that regulation is a contentious process and that, in response, Indian Non-Governmental Organisations (NGOs) have developed strategies including drawing on human rights narratives and using technomoral and legal arguments to support and press their position.

The "From the Field" section of TSR is an important element in our pursuit of scholarly work with a more practical focus. We include here an article from Mark Sidel, 'China and its Regulation of Overseas NGOs, Foundations, and Think Tanks: Four Years of Implementation of a New Securitised Policy and Legal Framework'. This charts the development of China's restrictive regulatory framework for the control and monitoring of overseas NGOs, foundations, think tanks, trade associations and other non-profits. In this paper, Mark Sidel analyses China's goals for this regulatory regime and reviews the first four years of implementation, including both formal and informal enforcement actions taken by the state. He does not predict a loosening of the regulatory chains in the near future.

Discussion and Conclusion

This Issue of TSR has engaged with the perennial question of regulation of the third sector. A common theme in many of the papers is the inherently political nature of regulatory frameworks, actions and resistances and the sometimes-contentious nature of positions taken by both state and non-state actors. Read together, the papers present a rich tapestry of regulatory approaches in Australia, India, China and New Zealand; each deeply dependent – and reflective of - the local political and socio-legal context. Also, as a number of the papers explore, each jurisdiction has been shaped by historical state and non-state developments that continue to be felt in contemporary law and policy.

Nonetheless, the jurisdictions are not unrelated. Globalisation; the use of common law across common law jurisdictions (Fowler); the colonial roots of some of our current policies (Gilchrist); concerns about foreign NGOs (Sidel); fear of criticism by NGOs on the international stage (Sabharwal); and the possibility to learn from other regulatory regimes (Murray); all reinforce the global nature of questions of regulation. They also underline the

merit of comparative research and the importance of compilations of complementary studies, such as we have presented here.

Further, many of our contributions here provide solid policy recommendations and a wealth of expertise that could be taken up by regulators, policy-makers and others. In this way, this TSR Issue presents an opportunity to improve responsive regulation (Ayres & Braithwaite 1992) whereby regulators can better understand the context and motivations of those whose conduct they are regulating so that effective solutions can be developed accordingly.

Finally, this year in particular, I would like to extend a very special thank you to our authors, reviewers, editorial assistants and to my co-editors Professors Ian Murray and David Gilchrist, all of whom have persevered to continue with their research and service roles in challenging circumstances.

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Silver Bullets and TED Talks: Sketching Ideas on the Government/Not-for-profit Nexus in the Australian Welfare State

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Abstract

The government/not-for-profit nexus is critical in the context of ensuring effective and efficient delivery of human services. In modern history, developed countries such as Australia, have placed emphasis very much on the efficiency of service delivery while service effectiveness often attracts rhetorical attention but little real positive institution building or support. The trouble is, this is not the first time we have arrived at this point. The Welfare State, most commonly recognised as commencing immediately after World War II following the publication of the 1942 Beveridge report in the United Kingdom, was in fact developed in response to the socially destructive impact of institutionalised market economics identified well before the turn of the twentieth century. This paper positions modern debates shaping the government/not-for-profit nexus in the 'lost history' of the Welfare State, contextualising these lessons to highlight the continuing negative impact of market institutions on the delivery of effective and efficient human services in Australia, including in preventing effective collaboration in service funding and delivery. It highlights that history tells us we need deeper thinking at a system-wide level in order to develop the most effective institutions and that the Welfare State is a sound institutional base for building a systemic response to service needs.[i]

Keywords

Welfare State; welfare economics; Australian welfare

Introduction

The term ‘Welfare State’ has become derogatory in many (perhaps most?) policy settings globally. It has been condemned variously for being inefficient, ineffective, non-client centric, unrealistic, unsustainable, and supporting bad cultural values such as incentivising people to avoid work and live off ‘the public teat’ (Bartholomew 2013; Black et al. 2009). Partly in response to the acceptance of this thinking and partly in response to changing ideologies about how best to manage the economy, differing ways of funding the delivery of human services have been attempted over the decades since the formal establishment of the Welfare State in Australia (Mendes 2008).

Most recently, these changing funding arrangements are reactions to the negative press associated with the Welfare State (though not necessarily described as such) and the current popular acceptance of market institutions as being a better framework for service delivery. That negative press includes arguments about the ‘deserving poor’ and ideas related to personal responsibility in the context of an individualising ethic across almost all areas of public policy (Mounk 2017). Many readers would recognise these admonitions and may connect them to the popular thought of the Victorian era which emphasised individualism, personal responsibility and self-reliance. These ideas relating to self-reliance, mutuality and the deserving poor were circulating in the nineteenth century in the United Kingdom and the current twentieth-century versions are carry overs from that world (Gilchrist 2014). They were also very much apparent after the instigation of the formal Welfare State following World War II in the United Kingdom and in Australia (Woods & Gilchrist 2020).

What is forgotten though, in terms of the Victorian era, is the counter-argument circulating at the same time as those arguing for self-help and unadulterated free markets; arguments that recognised the hardship and lack of equality and opportunity inherent in an unmitigated and unchallenged market economy (Briggs 1984; Briggs 1961). Indeed, this thinking drove many of history’s greatest economists, including Marshall and Pigou, to consider these issues during the latter half of the nineteenth and early twentieth century (Groenewegen 2010; Medema 2010; Daunton 2010) because unmitigated market institutions were observed to be, at best, unfair and, at worst, destructive (Menard 1995). The longevity of this argument seems to run counter to the discussion we have today regarding the Welfare State.

This is for two reasons: firstly, we have forgotten the history and, particularly, the purpose of the Welfare State as an almost inevitable response to unbridled capitalism and the experience of those who went before us; and secondly, as time progressed, these discussions became simplified and dichotomised in the popular mind into only two possible positions, ‘for’ and

'against'—'for' the modern popular thinking as it stands from time to time and 'against' the Welfare State, exacerbated by fast-paced simplified communications exemplified by TED Talks and social media platforms.

This dichotomy was particularly evident after the development of New Public Management ideas in the area of public administration from the mid-1970s and with the rising popularity of public choice theory in channelling public policy over the last half-century (McLean 1987, Buchanan & Musgrave 1999; Bakvis & Jarvis 2012; Barzelay 2001). Accounts of the Welfare State became less specific and more loaded with judgement—indeed, these definitions took on a more rhetorical quality. From the Esping-Andersen (1990) definition describing the Welfare State as a method of securing basic welfare for citizens by the state, to the Pierson (1991) definition which considered the Welfare State to be a particular type of state organisation, gradually definitions and descriptions became less specific and more idealised. Critically, they emphasised the state's role in paying for specific services and de-emphasised the role of other structural players, including not-for-profit entities and even individual government agencies themselves, in setting the Welfare State institutional arrangements and participating as important actors in it. In reality the Welfare State exists as part of the mix of institutions in most developed countries, even in the United States, while rhetorically, it is a polarised argument as to whether we should have a Welfare State, without regard for the reality of mixed economic institutions created in all developed countries, (Galbraith 1952; Gilchrist 2011).

The dichotomy also serves those whose mind was set against the Welfare State. In simplifying the discussion in the popular mind and relying on embedded views about the Welfare State that people held, the pendulum swung away from popular support notwithstanding the obvious continued existence of the Welfare State in Australia. This includes not using the nomenclature - simply not referring to the Welfare State in policy discourse. With advancements in behavioural economic theory from the early 1970s (Thaler 2015), over time the development of silver bullets intended to be one-size-fits-all remedies to wicked problems focused on eliciting behavioural responses from members of the community have been supported by short, sharp TED Talks ('Technology, Entertainment, Design') and other fast-paced but very shallow promotional material. The discourse has been lacking in this, as in many other areas of public policy.

In this paper, I review the development of the Welfare State in Australia from the end of World War II in very general terms (noting that the publication of the Beveridge Report was, in many respects, the codification of the substantial development of Welfare State ideas in the seven or

so decades leading up to that point), its important impacts on creating the Australian social safety net and the trajectory for our arrival at the modern preference for market-style solutions to wicked problems through the lens of the not-for-profit human services sector.

A supporting proposition is that this sector is a critical partner to government in delivering on the Australian safety net but that current thinking has: served to discount the value of this national asset (Gilchrist & Knight 2017; Knight & Gilchrist 2014); to reduce the opportunity for real collaboration; and to undermine the advances that were made over the twentieth century in building a community response to challenging wicked problems. Overall, public discussion has slowly shrunk to restrict itself to the delivery of programs rather than considering systemic reform in human services developed out of collaborative work between all players, to the detriment of the effectiveness of those very programs.

I examine these issues by using the human services system in Australia as a foil to link the fundamental impact on service effectiveness and efficiency engendered by, at best, a misunderstanding of the Welfare State and, at worst, a deliberate desire to invoke Victorian ideas of self-reliance. For the system to be successful, it needs to be built such that it translates national and sub-national resource allocation processes to local and individual allocative decision-making frameworks. That is, the system must be designed to conform to an appropriate governance framework while programs must be joined up at the local level by users and their service providers.

As such, my central proposition is that the Welfare State, in its simplest definitional sense, is the national institution that facilitates these needs while flexibility in policy frameworks, even within program much less across them, is critical to actually achieving the outcomes desired.

This paper is divided into four sections. In section two I briefly outline the essential problem that I am trying to deal with here. In section three, I describe the trajectory of the development and implementation of the Welfare State in Australia. In section four, I examine the impact of the diminution of the Welfare State on the not-for-profit human services sector; and in section five I provide concluding remarks.

What is the problem?

In public policy and discourse, what is acceptable rhetoric and acceptable action is a deep-seated cultural reality specific to each nation. Indeed, the economic, social and political history of each nation, often over an extended period, serves to establish what is acceptable rhetoric

(that is, what is it that we want to hear political and other leaders say) and what is acceptable action (that is, what is it that we expect to actually happen notwithstanding the rhetoric). Perhaps a good example of this effect is that of the establishment of an insurance scheme in the first quarter of the twentieth century in the United Kingdom, offering protection against unemployment; whereas in Australia the same desire to protect workers resulted ultimately in a direct government transfer system (Watts 1980). Notwithstanding significant cultural, political and economic similarities between the two countries in the day, each country devised a different solution to the unemployment safety net problem as a result of their rhetorical and practice expectations—solutions that demonstrate a differing expectation on all players involved; government, tax payers, employers, and the unemployed and which impacted the design of future safety net arrangements.

In the modern day, this dichotomy between rhetoric and reality weakens our national discourse because political leaders particularly are hyper-responsive to their assessment of current sentiment in the community (McAuley & Lyons 2015), leaving little room for real debate about solutions to some of the most wicked problems much less allowing for confidence in politicians to be able to experiment, identify their errors and try new things (Garnaut 2014).

As such, a central theme of this paper is the concept that there is, in Australia, a marked separation between rhetoric and action across economic, political and social endeavours—the Welfare State continues to exist notwithstanding the national discussion. This is not a new or peculiarly Australian conception. Indeed, it has been observed at differing times in differing countries including in the United States—that bastion of free market institutions (Galbraith 1952; Gilchrist 2017). For my purposes, suffice to say that the national discourses relating to such things as human services delivery is often different to the actions undertaken—the economic, social and political received wisdoms are not applied consistently across the economy and do not add up when we compare actions to words.

Human services and supports are a case in point because they are complex, expensive and impact almost everyone in the community at some point. The move toward choice and control in human services delivery in Australia over the last decade or so has been a very welcome one for most. Indeed, it is hard for anyone to deny the efficacy and desirability of such an outcome. However, for choice and control to be achieved, service delivery needs to be holistic, culturally appropriate and locally decided. While much focus is placed on program level activity, and while funding governments are keen to maintain control of the decision-making processes associated with program delivery, a systemic approach recognises that the programs are only

part of the solution and that decision making capacity can be disbursed in order to achieve choice and control while governance arrangements can ensure appropriate oversight in terms of financial resource allocation but, most importantly in terms of transparently reporting on outcomes actually achieved.

This may be an attractive conception to many, especially public sector agencies charged with delivering services—administrative convenience can over shadow structural effectiveness as priorities. However, the reality of solely considering programmatic activities in any area of public endeavour, regardless of its intent, is fraught as it reduces the development of an institutional perspective across systems. The development of an institutional systemic approach to planning and investing is critical in a country like Australia, where not only is community diversity substantial, the constitutional settlement—the federation and the financial arrangements established by it—means that the maintenance of a programmatic focus effectively shortens the sight of policy makers reducing the opportunity for achieving the outcome sought.

Additionally, the lack of systemic approaches means that inter-government and intra-government co-operation is often poor and actors in agencies focus on the delivery of 'their' program over the development of a holistic resolution to service delivery need. They certainly do not perceive of a need to allow sovereignty to transfer to service users and providers, no matter how much choice and control features as a desired outcome in the rhetoric of TED Talks or on Twitter.

The place of actors in the system—for the system exists even if we ignore it—is not described adequately and this is a problem for planning, the allocation of resources and for prioritisation. Not-for-profit providers cannot be as efficient as they could be if they cannot make allocative decisions; for instance, even the provision of data about need is something that is not routinely shared much less the collection of demand data, demand often representing the number of people accessing programs rather than the number of people needing supports and services.

The lack of a systemic focus also reduces the opportunity for effective decision making at the local level. For choice and control to be realised, decision making about care needs, priorities and the allocation of resources needs to be taken at the individual and local levels, emphasising cultural and other priorities. These decisions also need to encompass all aspects of care and life, not just specific program aspects. Prioritising a programmatic focus ensures that comprehensive decision making is unable to be undertaken by individuals and communities.

A current and very relevant example here is that of the modern-day National Disability Insurance Scheme (NDIS). This scheme is a part of the Australian Disability Services System but is not the entire system (Gilchrist et al. 2019). Indeed, the whole system includes services funded by the Commonwealth and states that are not provided by the NDIS, including ancillary services, such as education and health. These services are central to the system achieving the outcomes sought but where only rudimentarily considered in the development of the scheme and the roll out process. Not-for-profit providers of services and, importantly, service users are not able to make local decisions because the system has not been developed to allow such notwithstanding the centrality of choice and control in the rhetoric of the NDIS.

Academics are contributing to calls for modified policy arrangements to help make them work (Reeders et al. 2019) and, now, *ad hoc* attempts are being made to rectify these issues in a piecemeal fashion when, really, we should be taking a mature systematic perspective with the intention of building an institutional framework that meets the purpose (Gilchrist et al. 2019). Without a systemic approach to planning and actualisation, the NDIS is likely to continue to tinker around the edges but fail to achieve the real opportunity inherent in a nationally funded, truly locally delivered program. Importantly, the Welfare State is the institutional mechanism by which such a system can be established.

One important aspect of all of this is the nexus between governments and not-for-profit service providers. This nexus is critical as it is really the point of realisation of the aspiration of what might be termed expansively the Australian safety net. However, the falling out of fashion of the Australian Welfare State combined with the over-emphasis on programs rather than systems and the increasing use of market-style resource allocation methods means that the nexus is increasingly de-emphasised to the detriment of the national interests generally and those of service users particularly. These problems are exacerbated because the Welfare State itself is not well understood nor is its importance to Australia's system of human services. Additionally, the predominance of the commercial perspective also places the not-for-profit human services sector in jeopardy without active consideration of the impact of a loss of capacity—a loss that will not be able to be replaced. This is not to say that we should save the not-for-profit human services sector but, if we are to lose it, we better know what we are doing and what it will mean for the community.

The Australian welfare state

There are many definitions of the Welfare State and these tended to vary over time and, in this section, I examine very broadly conceptions of the Welfare State and the Australian experience. However, it is in no way intended to be a comprehensive expostulation but, rather, a description designed to facilitate the reader's understanding of the subsequent discussion

The term itself was coined in 1941when it was used to compare the British state with the German 'Warfare State' (Gough 1987). Briggs (1961) described the Welfare State in terms that are probably most recognisable to modern readers: essentially it is a political arrangement in which organised power—the state—is used to modify market impacts by: guaranteeing a minimum income; enabling individuals and families to meet the contingencies of life (sickness, old age, unemployment); and ensuring all citizens are able to access the highest standards of a set of agreed social services.

Importantly, the many definitions of the Welfare State developed prior to, say, the 1990s describe two shared elements: that the state undertakes the action, and that this action is undertaken in two broad ways: the state provides social services and it mitigates the impact of market economics to reduce the negative impact of individual action (Briggs, 1961; Wilensky 1974; Goodin 1988). Additionally, differing responses were used to implement the above depending upon the nature of the problem being solved. Indeed, regulation, the courts, direct government transfers and charitable and philanthropic work were all described as being effectively part of the Welfare State (Barr 2004).

When describing the Welfare State it is common to consider the Beveridge Report (Beveridge 1942) as the effective commencement date in the context of the impact of the Great Depression—as a result of which the terms 'competition and market' became terms of abuse—and subsequently the burgeoning Cold War—as a result of which capitalism had to offer a plausible alternative to the rising tide of communism (Rajan 2020). However, the story begins in the nineteenth century.

The development of the Welfare State was neither sudden nor spasmodic, it was evolutionary not revolutionary—the result of at least 100 years of research, writing and discourse in Britain (Sowell 2016; White 2012) which resulted from dissatisfaction with respect to the impact of the market economy on the community. Indeed, the great economists including Marshall and Pigou prioritised the development of solutions to these problems via their examination of Welfare Economics and the Welfare State in the second half of the nineteenth century (Groenewegen 2010; Medema 2010; Daunton 2010).

Arguably, it was also the result of that belief in science that drove many human endeavours in the nineteenth century: scientific enquiry will make the solutions obvious and create the machinery for change (MacLeod 2000). For instance, Sidney and Beatrice Webb, exemplified the scientific approach by publishing their constitution for a socialist Britain (Webb & Webb 1920) and championed the establishment of the London School of Economics to house these endeavours (Eriguchi 2009). However, until well into the twentieth century, the common people were little involved in the development of theory and practice and the leaders of thought in these areas were less than representative of those they were looking to support (Barker 1984).

In the Australian context, the role of the state in economic development has a much longer history and one that has been told in many places (Butlin 1994, 1959; Butlin et al. 1982; Butlin & de Meel 1953; Gilchrist 2013). However, in a nutshell in Australia, local elites were able to socialise costs by laying off expenses to the Imperial government and then local governments, embedding the tradition of colonial and then state socialism in the Australian psyche. It became accepted that governments were important (sometimes the most important) actors within the economy in capital formation and as consumers, providers and suppliers; these developments were almost naturally occurring in that there was a general antithesis toward theoretical conceptions of the role of the state or in determining the expectations of the citizen (Gilchrist 2017; Métin 1977 [1901]; Pember Reeves 1969); and they acted as examples to the UK.

Watts (1987) and Beilharz et al. (1992) have documented the rise of the Australian Welfare State predominantly from the popularly accepted starting point of World War II. The war was critical in changing the expectations of the Australian community with regard to supports for vulnerable people. However, there were attempts at creating a Welfare State prior to the war which consisted largely of institutional development including the establishment of wage boards designed to protect workers' conditions (Neumark et al. 2008; Hammond 1913), of minimum wages via the courts system (Jamrozik 1994), and a non-contributory aged pension as a matter of right rather than charity[ii] (Macintyre 1985). To use a phrase of Métin (1977 [1901]), Australia was considered to be a 'worker's paradise'. However, there were still significant parts of the community that remained unsupported including women, sole parents and Indigenous families while poorly constructed policy continued to see injustice inflicted (Deeming 2013; Castles 1985; Castles 1987; Jamrozik 1994). Importantly, the charitable sector continued to be a significant part of the Welfare State structure with government enacting legislation and providing funds to support it before any other country in the world (Hetherington 2009).

During World War II, the development of the Welfare State stepped up with the introduction of the family allowance or child endowment scheme. The 1941 Menzies minority government introduced the scheme soon after the Arbitration Court failed to raise the minimum wage. The Commonwealth was demonstrating the people's expectation that government manage these elements. It also marked a positive change in that the family allowance was the first benefit that included Indigenous Australians in any social security scheme though it was still not administered equitably (MacIntyre 2015).[iii]

The Curtin government made improvements to such areas as: the widows' pension in 1942; the medical service in 1944; and unemployment and sickness benefits were introduced in 1945. These schemes were financed by the National Welfare Fund which was funded by income tax rather than via an insurance scheme. Between 1945 and 1949, important changes in the Commonwealth government's perspective regarding the Welfare State were realised. The attitudes of government surrounding welfare in the 1940s acknowledged that through no fault of their own, individuals could be pulled into poverty through the lack of jobs available to them.

Between 1949 and 1972 there were very few advances. The social policies that were developed were 'characterised by a cautious regulatory administration of incremental change that generally favoured the middle class' (Mendes 2008). These included the extension of the child endowment to include the first child, free pharmaceutical and medical benefits for pensioners and the passing of the *National Health Act* (1938) which subsidised private insurance benefits universally. During this period, the government also began making grants to voluntary bodies including the Australian Council of Social Service (ACOSS).

The philosophy that politicians of the time followed was one of individualism, incentivisation and self-reliance, provision for people by family or charity rather than by the state, and private insurance over taxation. The results of these attitudes can be shown in a study of Melbourne published in 1970 found that 7.7% of family units in Melbourne lived on or below the poverty line, with 5.2% further families living close to it (Henderson 1970).

Between 1972 and 1975 welfare provision by government moved into a more structured model that emphasised the need for a broad redistribution of income from rich to poor via macroeconomic reforms. The election of the Whitlam government in 1972, with a mandate to expand welfare provision as well as to make additional social investment, saw 'the first substantial exercise of social democracy in this country' (Macintyre in Mendes (2008)). The

new goal of government was to promote equality of opportunity for all Australians and these three years saw universalistic programs including Medibank, the abolition of tertiary education fees, the establishment of the Australian Assistance Plan (AAP), the introduction of superannuation, and of a national compensation scheme for victims of road accidents amongst other improvements.

The years 1975 and 1983 saw a return to the more austere attitudes where 'Government policy was based on cutting the public sector and reducing the alleged growing dependence on big government in favour of providing incentives for private expenditure' (Mendes 2008). However, the Commonwealth did introduce new support schemes such as the Community Youth Support Schemes (for addressing youth unemployment) and introduced the Social Welfare Research Centre (later the Social Policy Research Centre) to undertake and sponsor research in social welfare. Importantly though, the rhetoric had changed to favour a secure welfare safety net as 'no individual should fall through circumstances beyond his control' (Prime Minister Fraser quoted in Thompson et al. (1986)).

Notwithstanding positive changes during this era, it was also a time of economic distress and, in response, the real level of the unemployment benefit was eroded through the abolition or dilution of the indexation of the quantum of benefit over time.

Increased numbers of people became reliant on social security benefits as a result of the recessions of 1977-78 and 1982-83. In particular, the number of recipients of unemployment benefits increased from 160.7 thousand to 390.7 thousand (4.6% to 10%)' (Cass & Whiteford 1989). The Fraser Government has been criticised for reducing welfare benefits right when a larger proportion of the population needed it. Not for the first or last time, the budget was placed ahead of the needs of people right when a Keynesian response to an economic downturn may have helped rather than hindered.

The rhetoric and the reality were separating. Neoclassical free market objectives were gradually prioritised over social justice outcomes while speeches continued to carry Welfare State-style rhetoric about justice and inclusivity. The Hawke/Keating years of 1983 to 1996 continued the trend but famously increased financial reform—placing focus on market-style financial models and ideas of reduced regulation across the economy which overlapped into the human services sector as rhetorical devices emphasising the need for finance system reform colonised the total national discourse.

The objectives of the economic rationalists were to lower taxes and decrease social expenditure believing that a strong economy will resolve social need. While the Hawke/Keating government was famous for seeking to prioritise accord above division, the rhetorical devices lead to an emphasis on the financial reform project (which was critical of course) and a reshaping of the rhetorical devices used to describe the method of achieving social policy outcomes. This rhetorical arrangement remained in place beyond the removal of the Keating government in 1996.

Importantly, these years also marked the beginning of the anti-welfare fraud campaigns and the introduction of compulsory training schemes for the long-term unemployed in order to get them 'job-ready'. Unemployment payments were slowly becoming payments associated with mutual obligation rather than a right of the individual in a time of need. Incentives were focused on the low-income employed and 'the initiatives that benefited low-income earners were coupled with attacks on the rights and living standards of other disadvantaged groups' (Mendes 2008). The tensions between the two philosophical ideas about welfare meant that social objectives were often subordinated to the operation of a free market on the basis that the free market would deliver the wealth needed to remove need—the idea of trickle-down economics set the scene for the discourse for the subsequent period.

The period 1996 to 2007 was a period of coalition retrenchment and government restricted access to social security payments while continuing to articulate the promise to maintain the social welfare safety net. This period saw continued pressure placed on welfare recipients as the coalition employed several measures to discipline any welfare recipients who were 'perceived to be underserving of assistance' (Mendes 2008). These included the introduction of the work-for-the-dole scheme which focused on the elimination of individual capacity issues in jobseekers and a 'crackdown' on welfare fraud through the introduction of the 'dob in a dole bludger' hotline. This period also saw the reduction of the disability support pension and the parenting payment as the recipients of these benefits were transferred onto Newstart Allowance which was paid at a considerably lower rate and had different, harsher recipient-compliance requirements including those of mutual obligation.

In the decade and a half since the Howard administration left the stage, we have seen Commonwealth government policy continue to reinforce market solutions and economic prioritisation ahead of systemic human services reform. The rhetoric has always been focused on putting the public first (Rainnie et al. 2012) while the action has been towards rationalisation of the Welfare State on the basis of austerity and ideas of trickledown economics (Cahill &

Toner 2018). Indeed, this was the period in which the word 'reform' came to mean 'change' rather than 'improvement' and when the power of the market to make allocative decisions seems almost inviolable; where the systemic gave way to the particular and specific. I now turn to the government/not-for-profit nexus to examine the impact of changing policy frameworks and rhetoric.

The impact of the diminution of the Australian welfare state on the not-for-profit sector

Dr Philip Mendes (2008) has written an important and comprehensive treatise on the development of the government/not-for-profit nexus and its many manifestations and mutations, principally focused on the period between World War II and the first decade of the twenty first century. Importantly, it records the developments in thinking during this period, tracing the various silver bullets applied in order to resolve the continuing conflict between needs and costs associated with the broadest conception of supports provided in Australia.

This trajectory ultimately considers the market institutions applied in the context of New Public Management ideologies controlling action in government and increasing public discourse relating to ideas of personal responsibility and budget primacy; conceptions that have also rated more specific studies in their own right (Mounk 2017; Blais & Dion 1991; Garnaut 2014). Overall, the impact of the changing policy perspectives has been to disaggregate the parts of the Welfare State as if they can act independently.

Market-style funding arrangements emphasise competition and cost control, and transfer risk from government to the human services sector and then, ultimately, to service users (Butcher & Gilchrist 2016; Gilchrist 2020; Gilchrist 2016; Gilchrist & Pilcher 2019; Gilchrist & Wilkins, In Press). Most of these restrictions are in place to provide certainty and accountability for the government and not for the benefit of not-for-profits (Carmel & Harlock 2008) or, most importantly, the end-users of the services. Finally, the increased focus on commercial-style governance issues means corporate survivorship rather than mission becomes the dominating driver within many not-for-profits.

The trajectory of development arriving at this position has been observed by Professor Mark Lyons (2001:183-188) who codified the forms of contracting into a typology identifying five different approaches to procurement between government and not-for-profits. The first is described as 'government as philanthropist' where organisations approach the government

which then bestows funding on the not-for-profit as it sees fit. The 'submission model' is Lyons' second type, where the government would put forward an idea or identify a need and not-for-profits submit proposals to supply for a grant.

The third conception is the 'planning model' whereby the government decides what services they require with not-for-profits tendering in response. Lyons highlights several major shifts in the service funding approach of governments that went with the change to the planning model—the government treated not-for-profits as extensions of agencies, clarified the services required, procurement processes became more commercial and funding became more uniform for similar services as compared to the earlier style of models which had significant variations between funding often based on the not-for-profit's approach and 'ask'. This led to increased reporting by not-for-profits to government to allow for greater government control.

Lyons' fourth form is what he called the 'quasi-voucher model', the first market-style approach. Under this style of funding for-profits and not-for-profits came to be treated the same over time. With this system, providers received a fixed amount for each client they had which is suggestive of a proto-pricing model. This was a way for the government to create a demand side market where the clients had a choice of providers. The last of Lyons' categories is the 'competitive tender model' causing a complete separation between the government as purchaser and not-for-profits as suppliers of human services. Inevitably, this separation also saw government lose critical knowledge of the requirements of the end users, of advances in service delivery and of the real costs.

The above last two models might be conflated due to their impact which was, essentially, to create a strong delineation between the roles of government procurers and not-for-profit (and for-profit) providers (Alford & O'Flynn 2012). This weakened the inherent advantages in maintaining a collaborative approach to the organisation of the Welfare State—for instance, in one examination it was found that government procurers did not know what they wanted. While its affects were substantial, it was the next transition that has highlighted the impacts of the de-emphasis on the Welfare State and intense emphasis on commercial models—Quasi-Markets.

Despite considerable evidence that quasi-market structures are not working in other countries including the UK and the USA, Australia is implementing this style of funding arrangement apparently without heading the warnings (Barron & West 2017; Brenna 2011; Considine et al. 2011; Coupet & McWilliams 2017; Defourny et al. 2010; Dumay & Dupriez 2014; Exley 2014). The cited rationale for utilising quasi-market structures is that it is expected to provide

greater choice and control. However, this does not necessarily play out for a number of reasons, including the following. First, pricing is generally not connected to the true cost of service delivery but, rather to the government's budget. Second, service providers are unable to invest to change their systems and train staff in new ways much less innovate which costs money. Third, data is not shared allowing for more effective and timely decision making; and fourth, because the use of commercial vernacular and the seeking of behavioural responses has a tendency to focus on the short-term and organisation-specific rather than on the long-term and systemic reform (Greener & Powell 2009; Glendinning et al. 2008; Glendinning 2008; Rodrigues & Glendinning 2015; Gilchrist 2020; Gilchrist et al. 2019).

Rhetorically, governments have sought to maintain a connection with the ethic of a strong not-for-profit human services sector. They have done this largely by providing limited funding to the various industry peak bodies and by establishing various structures in support of industry consultative processes (Butcher 2015). However, these compacts have largely not been successful primarily because there is a minimal link between the forum itself and the planning, structuring and commissioning process and because the links focus on short-term immediate problems and not on systemic change for the better.

In short, these structures have failed for a variety of reasons including: the political instability of changing governments and changing political priorities sees a change in personnel on the government side. These structures also typically have limited secretarial capacity, no authority and no funds ensuring they are unable to execute policy decisions and have autonomy and government investment in itself is often lacking in terms of government personnel capacity improvement needed to enact the policy framework changes. Further, limited data collection and poor data sharing structures mean that assessments are unable to be made within government and between government and providers as to what is working and what is not working (and whether initiatives are even being implemented) and collaboration is stifled by an unchanging governance framework within government ensuring sovereignty remains centrally located (Gilchrist et al. 2020; Butcher & Gilchrist 2020; Gilchrist 2020; Gilchrist & Pilcher 2019; Knight & Gilchrist 2015).

Perhaps most importantly, the issue is not so much whether quasi-market structures should be used or not, but rather what is the most appropriate relationship structure needed in order to achieve the outcome sought and what investment is required to achieve the outcomes themselves? Otherwise, the policy really becomes a rhetorical tool rather than an opportunity for real reform, with the advantage to governments being that the human services sector can be

identified as culpable for failure because it has failed to innovate and/or respond to client needs notwithstanding both hands are tied behind its back.

Concluding Remarks

Combining the increasingly simplistic media coverage of public policy debates and TED Talks that seek to posit game changing policy responses in ten minutes or less with the argument that we can move forward without a Welfare State in the context of individualism, personal responsibility and market prioritisation, is seductive. But it is a combination that is also destructive because it results in a breakdown of collaboration, focuses on the particular in the form of programs rather than the systemic, and allows governments to lay off their responsibility by leaving it to the market as if that is some naturally occurring phenomena outside of human control. Perhaps most importantly, it does not allow for the consideration of all possible responses so that fit-for-purpose is less often considered leaving a vacuum encouraging a one-size-fits-all response.

The reality is that, unless we take a systematic and institutional perspective, approaching the many wicked problems we seek to ameliorate in a structural, planned way, we are doomed to continue to seek silver bullets and rely on shallow thinking to repeat our mistakes. In order to avoid this outcome, policy makers in government and the human services sector (and probably in other sectors too) need to work effectively together. As such, we should redefine the Welfare State to incorporate the institutional framing necessary to support this revised way of thinking. In short, we need to start with local decision making (which supports true choice and control), adequate funding via an appropriate mechanism (of which there are many to choose from), and genuine collaboration including data sharing between government agencies, between governments and with the not-for-profit human services sector to build up a system model that works. We can chew gum and walk at the same time, so we can act locally and nationally at the same time too.

NOTES

[i] Please note: A version of this paper was delivered to the seminar titled 'The Regulation and Self-regulation of Charities and Philanthropy' held at the Institute of Advanced Studies, University of Western Australia on 4th March 2020.

[ii] But not in all states, for instance, Victoria sought to provide pensions only to deserving poor notwithstanding an Australia-wide movement after federation that removed this stipulation
[iiii] Importantly, Indigenous Australians were still not treated equally with other Australians as they still had to undergo a test to demonstrate that they were assimilating into white culture.

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Charity Regulation in New Zealand: History And Where To Now

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Abstract

The legal framework for charities in New Zealand acts, in many ways, as a barrier to the ability of charities to carry out their work: improving the legal framework would significantly improve the chances of being able to 'build back better' in response to COVID-19. This article examines the historical context of the current charities' legislation in New Zealand, and looks at some of the issues causing difficulty in practice, as well as some of the headwinds to reform. The article also examines the interplay between the review of the Charities Act and the Tax Working Group, which in turn provides important insights into charities regulation in New Zealand. Finally, the article asks whether there might be a window of opportunity for charities to achieve some of the reform that is so badly needed in New Zealand.

Keywords

Charity law; charities; Charities Act review; tax; Tax Working Group; business activities; advocacy; regulation

Introduction

There is a saying that in a democracy, you get the leaders you deserve, a principle which might apply similarly to legislation. With that sentiment in mind, this paper looks at the history of charity regulation in New Zealand in three parts. Part I covers the period prior to the passing of the *Charities Act 2005 (NZ)* (*Charities Act*); Part II, the changes effected by the *Charities Act* and subsequent amendments; and Part III, the review of the *Charities Act*, which commenced in 2017 (Henare 2017), interspersed with a consideration of the interplay with the Tax Working Group, concluding by reflecting on where we might go from here.

Part I: Pre-Charities Act 2005

Prior to the introduction of the *Charities Act*, charities in New Zealand enjoyed high levels of public trust and confidence. However, there was a lack of information about the charitable sector, in particular, whether charities were continuing to act in furtherance of their stated purposes over time (Ashton 2002: 21-22; Russell 1989: iv-v, 10, 21, 63, 67; Cullen 2001a: 3.17, 8.7; McGregor-Lowndes & Wyatt 2017: Ch 10). Charitable trusts in particular were considered to be 'uniquely free from supervision' (Hutchinson 1979: 2; Cullen 2001a: 7.4, 7.5).

The lack of registration and reporting, and therefore monitoring, of charities meant the charitable sector as a whole was vulnerable to the inevitable presence of a few 'rogue' operators. By the time the *Charities Act* was passed in 2005, there was overwhelming support from within the charitable sector for the establishment of a charities register to address this concern: to provide information about charities, so they would have a means of demonstrating to the world that they were legitimate and worthy of support; as well as to provide a means for 'weeding out' 'bad' charities, such as those engaging in money laundering, tax avoidance, fraud, and the like.

The New Zealand tax agency, the Inland Revenue Department (IRD), appears to have seen the regime quite differently. However in the years leading up to the introduction of the Charities Bill in 2004, the Commissioner of Inland Revenue had been unsuccessful in a number of charities cases before the New Zealand Court of Appeal. For example, in 1996, a majority of the Court of Appeal held that the income of the Medical Council of New Zealand (Medical Council) was exempt from income tax. Although the principal statutory function of the Medical Council was to maintain a register of qualified medical practitioners, which provided private benefits to those individuals, the Court of Appeal interpreted the purpose of the relevant constituting legislation more widely, finding the 'true purpose' of the Medical Council to be safeguarding the health of the community. This purpose was found to be charitable (*Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 309, 318). Some years earlier, the Court of Appeal had held the purposes of the New Zealand Council of Law Reporting to be charitable (*Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA)).

These cases led IRD to surmise in 2001 that case law 'may have expanded the boundaries of what is charitable to such an extent that it is now too easy to become a charity' (Cullen 2001a:

4.2, 5.11). The subsequent decision of the Court of Appeal in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) (Latimer CA) may have reinforced this position: in Latimer CA, the purpose of the Crown Forestry Rental Trust to assist Māori to bring claims before the Waitangi Tribunal ('the assistance purpose') was found to be charitable (this point not in issue on appeal to the Privy Council).

In response to this trend of decisions of high authority, IRD put forward two proposals for changing the definition of charitable purpose, to limit the 'fiscal privileges accorded to charities' to those charitable purposes that accorded with 'current objectives'. Under both these proposals, the Government would have been permitted to override any registration and 'deem' a particular entity not to be charitable (Cullen 2001b: 4.3, 5.5, 5.15, 9). In this way, the scene was set for a fundamental tension that underlies the *Charities Act* regime to this day: IRD's view may have been reflected in the explanatory note to the original Charities Bill, which stated that the proposed new Charities Commission would 'register and monitor charitable entities…to ensure that those entities receiving tax relief continue to carry out charitable purposes and provide a clear public benefit' (Charities Bill 2004 (108-1) NZ, explanatory note, 1). However, a conceptualisation of the *Charities Act* as a *de facto* tax regime, directed to rationing the privileges of charity according to a government department's views of which charities were worthy of support, arguably did not survive the Charities Bill's passage through Parliament, as discussed further below.

Part II: The Charities Act and subsequent amendments

The *Charities Act* established a Charities Commission, as an autonomous Crown entity, separate and independent from IRD, responsible for running a registration, reporting and monitoring system for New Zealand's charities (Charities Bill 108-2: 1-2). Under the New Zealand Charities Act regime, registration is voluntary: an unregistered charity is still able to call itself a charity and collect funds from the public (Charities Bill 108-1, explanatory note: 1). The key change effected by the legislation was that, from 1 July 2008, charities had to be registered with the Charities Commission (as it was then) in order to be eligible for the charitable exemptions from income tax (*Income Tax Act* 2007, ssCW 41 and CW 42). The *quid pro quo* for income tax exemption was that registered charities had to make certain information publicly available on the charities register (*Charities Act*, ss40-42A). This information would

enable charities to be monitored, to ensure that they continued to act in furtherance of their stated charitable purposes over time, and to allow a means for identifying and removing charities and charity officers engaged in 'serious wrongdoing'.

However, although it had been many years in gestation (Hutchinson 1979; Russell 1989; McKay 1998; Cullen 2001a; Cullen 2001b; Ashton 2002a, 2002b), the Charities Bill as originally introduced was otherwise widely regarded to be fundamentally flawed: the original Bill was almost completely rewritten at Select Committee stage in response to hundreds of submissions (Charities Bill 108-2, Select Committee report, 1). These substantial changes were not subject to proper consultation and, together with further minor, but extensive, changes made by Supplementary Order Paper, were passed through under urgency, with all final stages occurring on one day. The comment was made in Parliament that 'we do not really know what we are passing tonight, or what the implications are' (New Zealand Parliamentary Debates, 12 April 2005 at 19944, 19950, 19980, 19981; McGregor-Lowndes (2017) chapter 10).

Concerns about 'fast law' not making good law were assuaged at the time by then Minister of Finance, Hon Dr Michael Cullen, who indicated that the *Charities Act* would be subject to a full first principles post-implementation review. Yet, in the 15 years since the *Charities Act* was passed, no such review has been undertaken. Instead, the period has been characterised by a series of piecemeal, arguably 'kneejerk', amendments that have similarly been rushed through under urgency without proper consultation, often against the strong opposition of the charitable sector (see for example Statutes Amendment Bill 2015 (71-1), Charities Amendment Bill (No 2) 2012 332-3C (which began as the Crown Entities Reform Bill 2011 332-1), and the Statutes Amendment Bill (No 2) 2011 271-2). The disestablishment of the Charities Commission in 2012 is perhaps the most notable of these, but there are many others. This situation arguably reflects the fundamental tension that underlies the regime, but also a deeper problem: the charitable sector is somehow seen by policy and decision-makers as a fiscal cost, something to be reduced, and otherwise unimportant and unworthy of the attention and care it appears to receive in other jurisdictions. The net result in New Zealand is an Act that is replete with unintended consequences, and much in need of review.

A key issue has been charities' ability to appeal decisions made by the agency responsible for administering the *Charities Act* (first the Charities Commission and, since 2012, the Department of Internal Affairs – Charities Services Ngā Rātonga Kaupapa Atawhai (Charities

Services) and the Charities Registration Board Te Rātā Atawhai (Charities Board)). The significance of this issue should not be underestimated.

Prior to the introduction of the *Charities Act*, charities were entitled to a full oral hearing of evidence as part of the process of establishing that their purposes are charitable (Foundation for Anti-Aging Research v Charities Registration Board [2015] NZCA 449 (21 September 2015) (FAAR CA) at [8] and [44]-[45]). The Charities Bill as originally introduced would have continued this, by providing charities with a right of appeal to the District Court (FAAR CA at [45]). However, in response to submissions, the Select Committee changed this formulation to the High Court, ostensibly to provide charities with a more fulsome right of appeal (FAAR CA at [46] and Charities Bill 108-2: 13-14).

In doing so, the Select Committee unfortunately did not clarify the nature of the hearing to be conducted on appeal: this means that appeals under the *Charities Act* fall to be determined under the general rules for High Court appeals set out in Part 20 of the High Court Rules. The rules in Part 20 are strict, based on an assumption that a full oral hearing of evidence has already been undertaken at first instance in the tribunal appealed from, in an adjudicated dispute between two parties. For example, Part 20 precludes appellants from having any automatic right to present evidence to the Court that was not before the decision-maker when it made its decision, and requires evidence to be presented by affidavit, rather than by witnesses giving oral evidence and being available for cross-examination. However, the decision-maker under the *Charities Act* (whether it be the Charities Board or Charities Services) does not adjudicate a dispute between two parties, and does not conduct an oral hearing (FAAR CA at [38]-[43], [13] and [20]). This effectively means that, in New Zealand, charities' ability to access an oral hearing of evidence has been removed altogether.

There is nothing to indicate that the removal of charities' ability to access a 'trier of fact' on appeal was anything other than inadvertent: an unintended consequence of changes hastily made at Select Committee stage. However it may have arisen, the inability to access an oral hearing of evidence puts New Zealand charities at a significant disadvantage in trying to prove important questions of fact, such as what their purposes are, and whether they operate for the benefit of the public. It also limits charities' ability to test the material Charities Services finds from internet searches, whether that material, and the conclusions drawn from it, are correct, and what weight should be placed on it (see for example *Re Family First New Zealand* [2018]

NZHC 2273 (31 August 2018) (Family First HC 2) at [20]; *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 (Foundation for Anti-Aging Research) at [32] and [71-75]; *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) (Greenpeace SC) at [84]; and *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [50]).

An added difficulty is that an appeal to the High Court within 20 working days of the date of decision sets such a high bar that, in practice, most charities are unable to hold Charities Services accountable for its decisions under the current framework. These factors are arguably causing New Zealand charities law to become distorted. It is important that cases decided under the New Zealand Charities Act are viewed through this lens. These factors may also be contributing to a culture within Charities Services, as discussed further below.

The Select Committee considering the original Charities Bill made it clear that the definition of charitable purpose was not intended to be changed (Charities Bill 108-2: 3, 21). The Supreme Court of New Zealand has since confirmed that the Charities Act did not change the common law definition of charitable purpose in New Zealand (Greenpeace SC at [16]-[17]). In other words, IRD's 2001 suggestions for amending the definition of charitable purpose were not accepted: the definition of charitable purpose that IRD acknowledged was very broad should have survived the passing of the *Charities Act*. It was therefore surprising that, following enactment of the *Charities Act*, a very narrow approach to interpreting the definition was taken, first by the Charities Commission and then even more so by Charities Services. Specific 'fault lines' include charities engaging in advocacy work in furtherance of their charitable purposes, charities running social enterprises or start-up businesses to raise funds for their charitable purposes, social housing, sport, economic development, art, charities that further their charitable purposes by helping individuals, to name only a few.

Particular cases of difficulty include *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) (Canterbury Development Corporation) and *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) (Queenstown Lakes). In both cases, the wider public benefit provided by the respective charity's purposes appears to have been put to one side in denying registration. How this approach can be reconciled with the Court of Appeal decision in Latimer CA, where the wider public benefits were determinative in finding the assistance purpose to be charitable, is not explained. The writer

submits that had the Latimer CA decision been applied, both charities could and should have been found eligible for registration.

The Queenstown Lakes' decision in particular provides important insights into charity regulation in New Zealand. The Government did not agree with the decision, describing it as 'arbitrary' (Fox 2014), but there was no clear mechanism by which the Government could appeal. Instead, the Government used $6 million of taxpayers' money to pay the Queenstown Lakes Community Housing Trust's income tax liability that arose as a result of the deregistration (Fox 2014). The Government also introduced legislation to 'work around' the decision by providing community housing entities with their own specific income tax exemption (*Income Tax Act 2007*, sCW 42B). In a tax environment based on the principle of 'broad base, low rate', the significance of this step should not be underestimated. Significant difficulty ensued in trying to bring these measures about. Underlying regulations were required before the new income tax exemption for community housing providers could be brought into force.

However, the complexity inherent in formulating the qualifying criteria caused such delay that further remedial legislation was required to defer application of the new 'deregistration tax' specifically for charities whose purposes or activities are 'predominantly the provision of housing' (see – *Income Tax Act 2007*, sHR 12, and Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill 2015, cl264). This amendment was intended to allow more time for Charities Services to complete a review of the charitable status of every single community housing provider in New Zealand following the Queenstown Lakes decision (Inland Revenue 2015a: 63).

In November 2015, following more than 12 months of work by officials from the Ministry of Business, Innovation and Employment, the Treasury and IRD, then Minister of Revenue, Hon Todd McLay, introduced a supplementary order paper proposing further substantive amendments to the community housing provisions (*Income Tax Act 2007*, new schedule 34 replaced s225D of the *Income Tax Act 2007*). The accompanying regulatory impact statement noted that 'although this approach will provide much needed certainty for potentially affected providers, there will be no opportunity to consult formally on the proposed changes' (Inland Revenue 2015b: 44).

Despite all of this effort to 'work around' the Queenstown Lakes decision, these measures did not fix the problem: a specific income tax exemption, although welcome, is a 'second-best' option as, without registered charitable status, housing charities are generally unable to access the funding they need to survive. The writer understands the provision has been very little used. Furthermore, the process of trying to formulate and implement the measures saw some 3,000 community housing providers in New Zealand subjected to months of unhelpful uncertainty and cost, distracting them from their work in the middle of a housing crisis (Jackson 2015; Barker & Ng 2016: 10). Community housing providers now eschew helping people into affordable housing for fear of putting their charitable registration at risk, at a time when New Zealand shockingly has working families living in cars (RNZ 2020). The Government's considerable efforts to 'work around' the Queenstown Lakes decision are clear indicators of the public benefit of the Queenstown Lakes Community Housing Trust's work. Yet, that trust's reapplication for charitable registration was again declined, on the basis of the High Court decision (Charities Registration Board, Decision No 2015-3, 2 November 2015).

In the writer's view, the social housing saga highlights the difficulties inherent in trying to fix problems at the level of symptom, rather than cause: had the definition of charitable purpose been interpreted so as to properly acknowledge the wider benefits of the Queenstown Lakes Community Housing Trust's work, the writer submits it would not have been deregistered, Charities Services' review of social housing providers would not have been undertaken, and arbitrary barriers would not now be being placed in the way of charities helping people into affordable housing and the consequential benefits of security of tenure and social cohesion that it provides.

The issue of advocacy by charities is another key area of difficulty. In 2014, the Supreme Court of New Zealand held that there was no political purposes exclusion in New Zealand law (Greenpeace SC at [3]). There is scope for argument as to whether New Zealand did in fact have a strict political purposes exclusion prior to the Supreme Court decision: a finding that a purpose was 'political' arguably simply meant that the public benefit test was not met on the facts of the particular case (compare the decisions of the *New Zealand Court of Appeal in Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) and Latimer CA at [40]). Nevertheless, following enactment of the *Charities Act* in 2005, a strict political purposes

exclusion was, rightly or wrongly, applied in practice by the agencies responsible for administering New Zealand charities' legislation.

The Supreme Court decision was heralded as a victory for charities, ostensibly correcting an unduly strict approach that had been taken. However, in practice, Charities Services applied an interpretation of the Supreme Court decision that was even more restrictive of charities' advocacy work. This approach was surprising, and led to a number of challenges to Charities Services' interpretation (the significance of which should not be underestimated given the very real difficulties inherent in challenging decisions under the current framework, as discussed above). Fundamentally, the problem appears to arise from an impulse to exercise control over charities' activities in a legal framework that is focused on purposes: the common law definition of charitable purpose developed in the context of trust law, where a charitable purpose trust is an exception to the general rule that a purpose trust is invalid (*Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at para 144, Iacobucci J).

Beyond requiring that activities must be carried out in furtherance of a charity's stated charitable purposes, the common law in fact says very little about charities' activities (Mercer 2019: 82). If the Supreme Court decision is to be interpreted as requiring charities to show public benefit in all of their activities, it would constitute a fundamental reconception of New Zealand case law in this area; such an outcome would be surprising given the specific comments of the Supreme Court that it was not purporting to make any 'radical change' (Greenpeace SC at [29]; Barker 2020 at 48-49).

In 2016, the High Court confirmed that the Supreme Court decision was not an indication that the Charities Act 'was intended to wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities inquiry' (see Foundation for Anti-Aging Research at [82]-[89]). Instead, her Honour Ellis J confirmed the orthodox position that the question with respect to activities, including advocacy activities, is whether they are 'consistent with or supportive of' the charity's stated charitable purposes: 'if they are, then there is no difficulty' (at [88]).

However, despite referring to Ellis J's judgment in every subsequent publicly-available decision made (see for example Nelson Grey Power Association Incorporated Decision No: 020-1, 21 May 2020 at [6]), there was no discernible change in Charities Services' or the

Board's approach. In response to a request under the *Official Information Act 1982* as to why Ellis J's test was not being applied in its terms, Charities Services replied that they prefer an alternative wording that allows them to be more 'lenient' (Charities Services 2019, [22]). However, the reality is that the alternative wording allows Charities Services to be more subjective: the net result is effectively the 'deeming' approach proposed by IRD in 2001. A key question is how such a situation could transpire when the 'deeming' approach was so comprehensively rejected by Parliament when the *Charities Act* was passed in 2005. This point is discussed further below.

A key element of the new approach being applied by Charities Services and the Charities Board is a search for 'unstated charitable purposes' on the basis of a charity's activities (see for example *Better Public Media Trust v Attorney-General* [2020] NZHC 350 (Better Public Media) at [45]-[46], at the time of writing under appeal to the Court of Appeal). How this approach sits with the duty of governors of charitable entities to comply with the terms of their constituting document (*Trusts Act 2019* ss24 and 26; *Companies Act 1993* s134; Exposure Draft Incorporated Societies Bill cl50) is not explained. New Zealand Courts have also recently reemphasised the primacy of the written word, and the constrained ability to resort to extrinsic material in interpreting documents (see for example *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2020] NZSC 115 (22 October 2020) at [24]): the decision-maker's role is one of 'interpretation, not creation' (*Inglis v Dunedin Diocesan Trust* [2011] NZAR 1 (HC) at [29]-[33] and *Public Trust v Cancer Society of New Zealand Incorporated* [2020] NZHC 615 (23 March 2020) at [11]). To say that a charity is acting in furtherance of unstated charitable purposes should be comparable to the terms of a written contract being put to one side as a sham. Yet, the approach is put forward as an alternative means of ascertaining a charity's purposes, seemingly without reference to the charity's constituting document.

With respect, such a search confuses the distinction between purposes and activities, and is not reconcilable with the orthodox approach, as described in cases such as Latimer CA and Foundation for Anti-Aging Research (see the discussion in McGregor-Lowndes 2020 at 8-10). Charities Services' approach also puts New Zealand out of step with comparable jurisdictions, such as Australia, Canada and England and Wales,, in direct contrast to the comments of the New Zealand Law Commission Te Aka Matua o te Ture (Law Commission) that departure from internationally-accepted trust law principles should occur only where justifiable based on

the New Zealand context, and then only with caution (New Zealand Law Commission, August 2013 at [2.43]). There is nothing unique about the New Zealand context that justifies New Zealand charities being so peculiarly restricted in their advocacy work. For New Zealand to be an international outlier in this regard raises particular difficulties given that charities are operating increasingly internationally. The net result raises the spectre of original concerns that the *Charities Act* would be used as a means for government to exercise political control of the New Zealand charitable sector.

Charities Services' approach has been described as complex, highly subjective and unworkable in practice (Siebert 2018), and is resulting in incoherency in New Zealand charities law (compare the conflicting approaches of Foundation for Anti-Aging Research on the one hand, and Family First HC 2 and Better Public Media on the other). It is also contributing to a fundamental loss of confidence in Charities Services itself. In the writer's view, the fact that this situation could occur, when the definition of charitable purpose was so clearly not intended to be changed, acutely demonstrates the impact of the lack of proper accountability mechanisms under the New Zealand Charities Act as currently framed, as discussed further below. As at the time of writing, many questions remain unresolved, despite recent and welcome charity-friendly decisions such as *Family First New Zealand v Attorney-General* [2020] NZCA 366 (CA) (at the time of writing subject to an application for leave to appeal to the Supreme Court) and *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 (10 August 2020) (Mallon J), all of which underscores the need for a first principles post-implementation review of the legislation.

Part III: The review of the Charities Act

The Charities Act was introduced and passed during the third of three terms of a Labour-led Government. In 2008, a change of government saw a National minority government, with confidence and supply support from the right-wing classical liberal ACT party, the centrist United Future party, and the indigenous rights-based centre-left Māori party, ushered in. In an apparent acknowledgement of the indication given in 2004, a first principles review of the Charities Act was announced in November 2010, by then Minister for the Community and Voluntary Sector, Hon Tariana Turia, then co-leader of the Māori Party, and a Minister outside Cabinet (Turia, 2010).

The review was due to be completed by 2015. But then, something changed: in May 2011, less than 6 years after the Charities Act had commenced and less than 3 years after the tax provisions (requiring registration to access the charitable income tax exemptions) had come into force, the Government announced, without consultation, that it would disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs (DIA) (New Zealand Government, May 2011). The stated reason was that, in the 'current period of fiscal and economic restraint', the Government wished to reduce the number of government agencies as it seeks better value for money (Ryall, August 2011). Other stated reasons included reducing 'duplication of roles and back office functions' and improving the 'cohesion of frontline services'.

Although it is common for newly-elected National-led governments to undertake something of a 'quango-hunt', growing public controversy over the narrow approach taken by the Charities Commission to the definition of charitable purpose may in fact have been a driving factor (von Dadelszen 2011; Barker & Yesberg 2011).

The vehicle to effect this change, the Crown Entities Reform Bill 332-1, was introduced into Parliament in September 2011. In December 2011, Hon Jo Goodhew became the new Minister for the Community and Voluntary Sector. In May/June 2012, the Crown Entities Reform Bill controversially passed by only one vote, despite the strong opposition of the charitable sector (McGregor-Lowndes & Wyatt: ch10). By 1 July 2012, the Charities Commission was disestablished.

The independence of the Charities Commission was fundamental to the original agreement with the charitable sector when the *Charities Act* was introduced in 2005 (House of Representatives, May 2012: 1). When the Charities Commission was disestablished, all of the accountability mechanisms provided by the *Crown Entities Act 2004,* such as a requirement to report annually against a statement of intent, were correspondingly removed. Charities Services is subject to almost no accountability mechanisms, beyond minimal passing reference in a 193-page DIA annual report (DIA 2019c) Charities Services prepares its own 'annual review', but of course such a document cannot provide meaningful accountability as it contains only the information Charities Services chooses to include. The Charities Registration Board was established to provide an independent check on Charities Services' decision-making, but lack of resourcing, a framework whereby Charities Services provides secretarial and administrative

support to the Board (*Charities Act,* s8(6)), and an oracular mindset on the part of Charities Services, have effectively neutralised the Board's ability to carry out this role.

Then, in November 2012, and again without consultation, the first principles review of the *Charities Act* was controversially cancelled (Goodhew 2012). It subsequently transpired that the government had instead decided, again without consultation, to review the 'integrity and coherence of charities-related tax concessions', which led ultimately to the introduction of the 'deregistration tax' (*Income Tax Act* 2007, ssHR 12 and CV 17) (Inland Revenue & Treasury September 2018: [20]). In the short period since its introduction in 2014, section HR 12 has been subject to deferral, wholesale replacement, and a comprehensive series of amendments to fix faults and correct errors such that it is now a reasonably complicated provision. This experience of constantly amending section HR 12 again illustrates the difficulties inherent in dealing with symptoms, rather than cause. The real question is why so many New Zealand charities are being deregistered due to changes in jurisprudential interpretation of the definition of charitable purpose. Further, instead of taking the time needed to complete a proper first principles post-implementation review, the section HR 12 experience is an example of the kneejerk reactions that are bedevilling this area of law, giving rise to complexity, cost, and strained relations, while doing nothing to resolve the underlying problem (see – Inland Revenue & the Treasury July 2013: [1.3], [5.22], [5.23]).

Relations with the charitable sector were further strained when, in October 2015, a Statutes Amendment Bill 71-1 was introduced into Parliament containing proposals to amend 28 Acts, including the *Charities Act*. The Bill received its first reading on 9 December 2015 and was referred to Select Committee, with submissions due by 29 January 2016. This timing is significant as many New Zealanders take an extended holiday over the summer Christmas break. By definition, a Statutes Amendment Bill should contain only minor, non-controversial and technical amendments that do not affect the substance of the law or people's rights and obligations (House of Representatives 2017: s305(2)). However, one of the amendments proposed by the 2015 Statutes Amendment Bill would have effectively removed charities' ability to appeal the vast majority of decisions made under the *Charities Act*. There was no notification to the charitable sector that such an amendment was proposed. Fortunately, the amendment was noticed by the charitable sector, which galvanised against it. Eventually, the Select Committee removed the proposed amendment from the Bill 'due to community concern'

(Charities Amendment Bill (71-2B): 2). It then became policy of the New Zealand Labour Party (the Labour Party) to:

> *'Consult with the community and voluntary sector on whether the disestablishment of the Charities Commission and transfer of functions back to the Department of Internal Affairs has resulted in effectiveness and improved services and information for the sector'*
>
> *'Prioritise the long-promised review of the Charities Act that National abandoned, beginning with a first principles review of the legislation, including examining, updating and widening rather than narrowing the definition of charitable purposes.'* (New Zealand Labour Party 2017: 5)

This was the platform on which the Labour Party entered the 2017 general election.

A few months following removal of the impugned amendment from the Statutes Amendment Bill, a new Minister for the Community and Voluntary Sector was appointed: Hon Alfred Ngaro. In March 2017, during Alfred Ngaro's tenure as Minister, Charities Services convened a 'Sector User Group', subsequently renamed the 'Sector Group', intended to be a 'biannual meeting held by Charities Services where key members of the charities sector will be invited to tell us about their experiences and the issues and challenges they face' (Charities Services, March 2017). Approximately 25 organisations and individuals were chosen 'as they have comprehensive member networks, can reflect the collective view of their members and will be able to disseminate information through their regular communications'.

At the September 2017 general election, three terms of the National-led government were brought to an end by a minority coalition formed by the Labour Party with the nationalist and populist New Zealand First party, with confidence and supply support from the left-wing, environmentalist, social democratic Green Party. Surprisingly, the Labour Party spokesperson for the community and voluntary sector, and author of Labour Party policy in this area, Poto Williams, was not given the community and voluntary sector portfolio. In November 2017, the new Minister for the Community and Voluntary Sector, Hon Peeni Henare, announced that a review of the Charities Act would take place (Henare, 2017).

The decision to conduct the long-awaited and much-needed review was very welcome. However, draft terms of reference for the review of the *Charities Act* circulated in January 2018 to Sector Group members, including the writer, for comment surprisingly did not follow Labour

Party policy; instead, an attenuated, 'substantive issues' review was proposed that would not go back to first principles. Key issues, such as consideration of the definition of charitable purpose, were specifically outside scope, despite issues relating to business activities and advocacy being specifically included. The Sector Group responded, democratically and collectively, requesting that the commitment to a first principles review be honoured.

As the New Zealand Law Society has noted (2019a, 2019b: [vi]), the issues involved in this area of law are complex, and their impact far-reaching; it would be more cost-effective, and prudent, in the long run to take the time needed to carry out a comprehensive review of the legislative framework, as has occurred with the Law Commission's reviews of the law of incorporated societies (Law Commission 2013a) and trusts (Law Commission 2013b). Despite this, the updated draft that was circulated in February 2018, and the terms of reference that were ultimately finalised on 24 May 2018, were substantively unchanged from the version the Sector Group members had, collectively and democratically, said they could not support.

This outcome does not appear to have been a function of compromise within a coalition government: to the contrary, it appears instead to have reflected a power imbalance between a new Minister and incumbent officials. Such power imbalance may also have impacted the selection of the nature of the review: responsibility for conducting the review was given to the policy group of the DIA. Charities Services, although technically separate, also resides in the DIA, giving rise to concern that the Department was effectively being tasked with reviewing itself. The review also became cast in terms of a 'modernisation' exercise (DIA 2019a), an odd description for a relatively recent Act, apparently designed to lower expectations about what such an attenuated review might achieve.

An attenuated review also represents a missed opportunity to review the wider statutory framework as it relates to charities, such as the outdated *Charitable Trusts Act 1957* (the *Charitable Trusts Act*). While the terms of reference for the review include the interface with the *Charitable Trusts Act* 'with the aim of better alignment' (DIA 2018a: 3), it seems unlikely this would extend to important charitable trust issues that appear to have been 'kicked for touch' to the long-promised review of the *Charities Act*: the *Trusts Act 2019*, finally passed into law on 30 July 2019 after almost 20 years' gestation, was originally intended to be followed by two further reviews of areas of trust law. The second stage was intended to be a 'charitable and purpose trusts review' that would have included a review of the *Charitable*

Trusts Act. However, as at the time of writing, the Law Commission website describes the Trusts review as 'closed' (Law Commission 2020). Accordingly, trust law issues specifically affecting charitable trusts, such as the rule against accumulations (New Zealand Law Commission 2013: [17.15]) and how best to unlock the balance sheets of philanthropy, remain unresolved and unlikely to be addressed by the *Charities Act* review.

The advocacy of the Sector Group was successful in some areas, however. For example, the Sector Group was instrumental in having the terms of reference amended to include a Core Reference Group (CRG). The purpose of the CRG is 'to contribute diverse charitable sector knowledge, skills and experience to the review…[to] enable DIA to draw on a range of views…[which] will lead to a more robust outcome' (DIA 2018b). Following a dual process, the CRG was established in August 2018 comprising 6 people: 3 (including the writer) elected by the Sector Group, and 3 appointed by the DIA (2018c). The CRG's role is to 'work with DIA to identify problems and suggest solutions' (DIA 2018d: 2). Following concerted efforts by the Sector Group and the CRG, another area of preliminary success related to timeframe. The review, including legislation, was originally scheduled to be completed before the 2020 general election, a timeframe which would have required all policy work to be completed within only a few months. The shortness of this timeframe gave rise to concern that policy work had effectively already been done (a 'here's one we prepared earlier' scenario) (Breen, 2019), reinforced by the fact that limited consultation was originally scheduled to take place over the Christmas period.

However, although it would have been preferable for a more reasonable timeframe to have been heeded from the outset, the fact that the timeframes were ultimately extended was appreciated. Release of the Department's discussion document was deferred to a post-Christmas issue date (DIA 2019a), additional community engagement meetings were held during a more civilised time slot of March and April 2019, and the timeframe for making submissions was extended to 31 May 2019. It should be noted that, although the CRG was given an opportunity to comment on drafts of the DIA's discussion document, for the most part the CRG's comments were not reflected in the final version. However, with philanthropic support, the writer and fellow CRG member, Dave Henderson, were able to attend, speak and listen at all 27 community engagement meetings held around the country during March and April 2019, with the aim of providing an alternative perspective to Government on the review.

The key message was that, in a democracy, one gets the leaders one deserves; one will arguably also get the legislation one deserves and it is important to make the most of this once-in-a-generation opportunity to try to improve the legal framework for charities by making a submission.

The writer would like to extend grateful thanks for this philanthropic support, and the support of Minister Hon Peeni Henare, without which this work would not have been possible. In December 2019, the DIA issued a high-level summary of the 363 submissions received (DIA 2019). The Department's summary noted the concern expressed by many submitters about a range of matters, including in particular the nature and scope of the review. Despite the many capacity constraints under which the charitable sector is labouring, the charitable sector had finally been given an opportunity to speak, and it had spoken.

In November 2017, contemporaneously with announcing a review of the *Charities Act*, the new government had also convened a 'Tax Working Group' (TWG). Chaired by Hon Sir Michael Cullen, who had been Minister of Finance during the passage of the original Charities Bill through Parliament and had originally promised the full first principles post implementation review of the *Charities Act*, the TWG was tasked with providing recommendations that would improve 'the structure, fairness, and balance' of the New Zealand tax system. Specifically, the TWG was tasked with considering whether New Zealand should introduce a capital gains tax (Robertson 2017).

The interplay of the two streams of work provides insights into charity regulation in New Zealand. While the terms of reference for the TWG are entirely silent on the topic of charities (Robertson 2017), charities were considered at one TWG meeting: the agenda for the 6 July 2018 TWG meeting revealed that 1 ¼ hours were to be allocated to a discussion about charities (including consideration of a proposal from a scholarship winner to remove the charitable exemptions from income tax) (TWG Secretariat 2018a). TWG secretariat officials prepared a background paper for the July 2018 meeting, entitled 'Charities and the not-for-profit sector' (the background paper) (Inland Revenue & the Treasury 2018). The background paper focused on what officials described as 'two key policy matters': donations concessions available to private foundations, and the business income of charities (Inland Revenue & the Treasury 2018: 5-6). There does not appear to have been any consultation with the charitable sector in the preparation of this background paper, or in the selection of these two issues as 'key'.

The background paper did contain a brief table of seven other issues that might be considered, most of which focused on restricting tax privileges to registered charities only, or removing them altogether (Inland Revenue & the Treasury 2018: 20-21). The one exception that might be considered 'charity-friendly' relates to the refundability of imputation credits (broadly the New Zealand equivalent of Australian franking credits). However, the background paper dismisses this issue as having a 'material fiscal cost', even though it does not provide any analysis of what that cost might be, or how it might compare with the associated benefits (such as encouraging New Zealand charities to invest in New Zealand companies).

Of the two suggested 'key policy matters', the issue of tax exemption for the business income of charities has been considered before. In 1998, the Committee of Tax Experts recommended a review of the tax treatment of charities that engage in 'commercial activities unrelated to their purposes', on the basis that the ability of charities to earn business income free of tax gave them a 'competitive advantage' over other business operators (McKay 1998: 84-85). A review of the tax treatment of charities subsequently took place, but reached a different conclusion. In June 2001, Inland Revenue released a discussion document and concluded that the business income tax exemption for charities did not result in a competitive advantage: 'an income tax-exempt entity cannot rationally afford to lower its profit margins on a trading activity, as alternative forms of investment would then become relatively more attractive' (Cullen 2001a: 43). On this basis, a charity will charge the same price as its competitors: the tax exemption merely translates to higher profits, and therefore higher potential distributions to the relevant charitable purpose.

In other words, in principle, and subject to the general law, it should not matter how a charity raises its funds, provided all funds are ultimately destined for charitable purposes (which must be the case, by definition, for a charity). The 2001 discussion document noted that, in the short term, a large-scale tax-exempt entity could try to use its 'deeper pockets' to eliminate competitors by temporarily lowering its prices, but concluded there is 'no real evidence to suggest that this is occurring' (Cullen 2001a: 43). Also considered was whether the benefit of tax-free gains might be captured by individuals involved in the trading operation. However, these concerns were rightly put to one side (Cullen 2001a: 44); apart from being inherently consistent with charitable purpose, they would render the charity ineligible for the business income tax exemption under the 'control' provisions of what is now section CW 42(1)(c) and

(5)-(9) of the *Income Tax Act 2007*. Instead, the 2001 discussion document suggested that the real competitive advantage businesses run by charities have over their competitors would be if the charity accumulated its tax-free profits back into the capital structure of its trading activities, thereby enabling it to 'expand more rapidly than its competitors' through a faster accumulation of funds (Cullen 2001a: 43). Conceptually, the same argument might apply to other forms of income earned by charities, and the 2001 discussion document sought feedback on whether any rules to target the accumulation of tax-free profits should apply to investment as well as trading activity (Cullen 2001a: 45).

Having analysed that a competitive advantage for charities might arise from the ability to grow a business faster by accumulating pre-tax funds, the 2001 discussion document then put forward a number of proposals for addressing it. One proposal was for accumulations to be monitored; instead of imposing any specific limits on accumulations, the discussion document suggested that an accumulation of funds could lead to questions from the monitoring authority as to 'why this was happening' (Cullen 2001a: 44). At that time, there was no process for monitoring whether 'entities are pursuing the charitable purposes for which they were set up' (Cullen 2001a: 33), other than random Inland Revenue audits and the general powers of the Attorney-General to inquire into charities (*Charitable Trusts Act 1957*, s58).

Both of these processes were hampered by a systemic lack of information about charities, one of the key issues the *Charities Act* regime was intended to address (Ashton 2002: 21–22; Russell 1989: 10, 21, 63 & 67; Cullen 2001a: 19 and [7.5]; Foundation for Anti-Aging Research at [88]; McGregor-Lowndes & Wyatt 2017: ch 10; *Charities Act*, s 10(h)). In the context of charitable businesses, it was 'not always clear whether profits of commercial operations carried on by, or owned by charities are distributed to the charitable purposes for which the entity was established' (Cullen 2001a: 34). In other words, the discussion document itself identified that issues of possibly-excessive accumulations arising from business activity could be addressed by simply asking the charity to demonstrate how the accumulations were in the best interests of its charitable purposes. Failure to be able to do so may reveal a breach of duty to act in accordance with the charity's constituting document, including its stated charitable purposes (*Trusts Act 2019*, ss24 and 26; Exposure Draft Incorporated Societies Bill, cl50; *Companies Act 1993*, s134).

Such a monitoring approach should be facilitated now that the *Charities Act 2005*, and subsequent 2013 financial reporting reforms, have ushered in a comprehensive, tiered, and bespoke disclosure and accountability framework for New Zealand charities (*Charities Act 2005*, ss41 & 42A; External Reporting Board 2015): New Zealand arguably now has the most comprehensive set of financial reporting requirements for charities anywhere in the world. However, perhaps because the 2001 discussion document preceded these reforms, it did not progress the recommendation about monitoring. Instead, the 2001 discussion document recommended that the trading operations owned by charities be subject to tax in the same way as other businesses, but with an 'unlimited deduction for distributions made to the relevant charitable purposes' (Cullen 2001a: 44). In other words, the proposal was for undistributed trading operation surpluses to be prevented from accessing tax exemption (Inland Revenue & the Treasury 2018: 18). Noting that such a rule could be circumvented by distributing and then immediately reinvesting funds, the 2001 discussion document suggested that such an action would 'show up in the accounts of the charity' which could 'raise questions as to whether the charity was as a matter of fact pursuing its charitable objectives' (Cullen 2001a: 44). The 2001 discussion document also recommended a turnover threshold, so that small-scale trading activities would not be taxed, and sought feedback on what threshold might be appropriate (Cullen 2001a: 44). Feedback was also sought on whether an alternative approach of 'limits on accumulations of profits of businesses run by charities' would be preferable (Cullen 2001a: 45).

As at the date of writing, none of the above recommendations have been implemented. An amendment has been made to section DB 41 of the *Income Tax Act 2007* from 1 April 2008 allowing companies an unlimited deduction, up to the level of their net income, for donations made to charities and other qualifying 'donee organisations' (as defined in section LD 3(2) of the *Income Tax Act 2007*). This amendment reflected the confidence and supply agreement of the 2005 Labour-led minority government with United Future to 'lift the cap on donee status', a change intended to 'encourage philanthropy' and 'remove tax barriers to even more generous contributions to charities' (Cullen & Dunne 2006: Foreword, and the Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill 2007: explanatory note 2). In the intervening years, this sentiment somehow appears to have become lost. Nevertheless, the legal position in New Zealand remains that charities may operate a business, whether related or

unrelated to their charitable purposes, and with no limit on size, so long as any profit is ultimately destined for charitable purposes (a 'destination of funds' test).

Unlike Australia, New Zealand makes a distinction between business and non-business income: the income derived by a registered charity from a business is only exempt from income tax if the additional requirements of section CW 42 of the *Income Tax Act 2007* are met (namely: the charity carries out its purposes in New Zealand; no person with some control over the business is able to direct or divert, to their own advantage, an amount derived from the business; and the entity is not (with limited exception) a 'council-controlled organisation'). For completeness, it should be noted that fringe benefit tax concessions for charities do not apply if the relevant benefits are provided in connection with an 'unrelated business' (*Income Tax Act 2007*, sCX 25(1)(b)). However, there is otherwise no 'unrelated business income tax' in New Zealand.

The question of whether business income derived by charities should continue to be tax exempt was described by officials as the 'most common charity-related theme addressed by submitters' to the Tax Working Group (Inland Revenue & the Treasury 2018: 16). Of 11 submissions on the topic, seven were in favour of removing the exemption, and four were not, with the latter pointing to matters such as (Inland Revenue & the Treasury 2018: 29-30):

(i) The flow-on benefits to society from charities running businesses, such as the provision of employment opportunities.

(ii) The increasing importance of charities diversifying their income streams in a climate of increasing costs, and increasing demand for services, but increasing difficulty in obtaining funding.

(iii) The fact that the income tax exemption offsets the disadvantages that charities face in accessing capital (due to their inability to provide private returns to investors like a for-profit entity can).

(iv) The inappropriate nature of firm rules on distribution, as charitable businesses need the flexibility of making their own decisions about the prudent retention of capital, particularly if the business is in a sector which experiences years of volatile profitability.

(v) The lack of evidence of competitive advantage, as indicated by recent reviews of the tax system in Australia (Henry 2009).

Nevertheless, the minutes of the July 2018 meeting describe the 'real question' as whether the charity is distributing funds for charitable purpose (that is, whether there is excess accumulation) rather than being concerned with the competitive advantage argument (TWG Secretariat 2018b: 5). In reaching this conclusion, no mention was made of the impact of the new financial reporting rules for registered charities, or the possibility of addressing any issue of perceived excessive accumulations by monitoring under the rules that already exist.

According to the minutes of the July 2018 TWG meeting, most of the discussion relating to charities centred around private foundations (TWG Secretariat 2018b: 4-5). Officials' background paper had suggested it may be 'useful to explore' whether the New Zealand tax system would benefit from a distinction between privately-controlled foundations and other charitable organisations, referring to specific rules 'as occurs overseas' relating to 'reasonable distribution requirements and restrictions on the extent of investments in related-party businesses' (Inland Revenue & the Treasury 2018: 16). The minimum annual distribution requirements imposed on private ancillary funds in Australia and private foundations in Canada were specifically mentioned. The backdrop to this suggestion appears to be the sale of a large childcare business undertaking to a charity (Nippert 2020). In this case, the business had been independently valued at $332 million and, as the purchasing charity had no start-up funds of its own, the sale was effected by loan, to be repaid interest-free at the rate of $20 million per year. The sale of shares did not include the physical childcare centres themselves. Accordingly, ongoing arm's length rental payments are made by the charity back to the vendor as owner of the underlying property. While the provision of childcare is itself charitable as for the advancement of education, distributions to independent charities of approximately $2.5 million per annum are also made (Nippert, 2020).

In principle, the sale is remarkable only by the size of the figures involved. There is no reason in principle why a charity should not purchase a successful business to carry out its charitable purposes. The absence of a capital gains tax in New Zealand means that the sale of the business was unlikely to have attracted income tax in New Zealand no matter who the purchaser. Rental payments that are calculated at arm's length should not be material even if paid to a related party. However, there is no indication from the minutes of the July 2018 meeting that any of these factors were considered. The minutes simply record that 'more thinking' is needed on the treatment of private foundations (TWG Secretariat 2018b: 5).

There similarly does not appear to have been any analysis of whether the rules regarding private foundations in other jurisdictions are working, or the context in which they sit. For example, minimum distribution requirements may in fact act as a target and therefore a barrier to higher levels of distribution (Walker 2020). In addition, while Australia has specific rules for public and private ancillary funds, unlike New Zealand, it also allows refundability of franking credits (the equivalent of imputation credits) (Australian Tax Office 2017). Many other jurisdictions also enable taxpayers to claim tax relief for donations of non-cash items, such as shares, art work or other property (as recently discussed in *Commissioner of Inland Revenue v Roberts* [2019] NZCA 654 (17 December 2019) at [58]-[66]). If minimum distribution requirements were to be imposed in New Zealand, consideration should be given to equivalent offsetting concessions.

In addition, New Zealand has comprehensive financial reporting rules for charities that arguably provide an elegant solution to many issues that may not (yet) be available in other jurisdictions. It would be a mistake for New Zealand to chart a course through comparable jurisdictions selecting only increasingly restrictive measures to impose on charities, out of context, and in a piecemeal fashion. It would also be a mistake for New Zealand to overlook the extent to which any perceived issues might be addressed by simply asking the charity to demonstrate how any particular accumulation, investment or other activity was in the best interests of the charity's charitable purposes. There may be any number of legitimate reasons why a charity may be accumulating funds, particularly for charities that take a long-term or inter-generational perspective.

Although the minutes noted that 'more thinking' on the topic was required, decisions on increasing regulation in this area appear nevertheless to have been made, as discussed further below. The updated terms of reference for the review of the *Charities Act*, which had been finalised only a few weeks prior to the July 2018 TWG meeting, referred to officials 'working closely' with officials supporting the TWG, with any interim findings of the TWG relevant to charities to be considered as part of the *Charities Act* review (DIA 2018a: 3). The charities review terms of reference also include consideration of the 'powers' of the agency responsible for administering the *Charities Act*. TWG officials considered this 'could include powers to address excessive accumulation' (Inland Revenue & the Treasury 2018: 38). This sentiment flowed through into the minutes of the July 2018 TWG meeting, which record that the *Charities*

Act review 'may consider' (TWG Secretariat 2018b: 4–5): 'How to address excessive accumulation (e.g. requiring a minimum distribution); and/or Whether businesses that fund charities (that do not undertake charitable activities themselves) should be able to register as charities.' The TWG concluded that (TWG Secretariat 2018b: 5): (i) for accumulations, the 'default setting should be distribution'; (ii) the rules for deregistered charities need to be 'more robust'; (iii) for private foundations, 'need to require distributions particularly when the capital has received a tax benefit going in'; and (iv) for GST, 'should charities be getting GST back?'.

These conclusions flowed through directly into the TWG's interim report, issued in September 2018 (TWG 2018: 23), and its final report, issued in February 2019 (TWG 2019: 103-104), with the above issues being identified as 'requiring further work' with no apparent further scrutiny. The interim report describes the charitable sector as 'using what would otherwise be tax revenue', and replacing 'Government decision-making and policy on how best to bolster our social, human and natural capital' (TWG 2018: 119). In other words, of the TWG's 16 months of deliberations, the tax treatment of charities received approximately one hour of formal consideration; the focus of this consideration appears to have been on the tax treatment of private foundations, without any apparent analysis of the mechanisms already in place to address any perceived issues raised. Issues of deregistration and restricting GST concessions were elevated to recommendations for reform with almost no apparent consideration at all (the issue of restricting GST concessions is given merely two sentences (Inland Revenue & the Treasury 2018: 20)).

The focus of the Tax Working Group was the introduction of a capital gains tax. Yet, on 17 April 2019, Prime Minister Jacinda Ardern announced that plans to impose a capital gains tax had been abandoned (Pullar-Strecker 2019). In the TWG's deliberations, charities appear to have been treated as an afterthought. Even though the charitable sector could assist government with every aspect of what it wants to achieve, in areas such as health, education, the environment, poverty reduction, social housing, and so forth, most likely more efficiently and effectively than government, the analysis does not appear even to consider how the tax system might better support charities or enable their work. The charitable sector instead appears to have been misconceived as an underfunded service delivery arm of government. The idea that the 'fiscal costs' of the charitable tax privileges might be outweighed many times over by the individual and collective benefits provided by charities to New Zealand society, particularly

in respect of social capital, appears to have been entirely overlooked: instead of 'replacing Government decision-making', the charitable tax privileges arguably localise and democratise the provision of support to parts of society that Government might not otherwise reach. The opportunity to create an overarching framework or vision for maximising the potential of the charitable sector has sadly been missed.

Yet, the TWG's conclusions appear now to have overtaken the Charities Act review, as discussed further below.

Both the DIA's discussion document for the review of the *Charities Act* (DIA 2019a), and the TWG's final report, were issued in February 2019. A few months' later, in August 2019, the tax policy work programme was updated to reflect almost verbatim the conclusions of the TWG discussed above. Also imported without apparent critical examination was the comment that 'Government periodically reviews the charitable sector's use of what would otherwise be tax revenue, to verify that intended social outcomes are being achieved'. The specific tax policy issues now listed in the work programme are: (i) accumulation '(will require coordination with DIA)'; (ii) business activity for significant charities '(coordination with DIA)'; (iii) deregistration tax; and (iv) GST and not-for-profits (NFP) (Inland Revenue 2019).

The updated tax policy work programme also lists some 'other sector tax matters that could potentially be subject to policy change and sector consultation', including: imputation credit refundability; tax rules for mutuals/the $1,000 NFP deduction threshold; rules for donating trading stock; removing out-of-date concessions; and resetting 15one concessions and clarifying the approach to social enterprises. The entry adds that Inland Revenue has 'consulted with DIA on these proposals and will be working with DIA on any policy or regulatory impacts associated with these initiatives. This work is on-going' (Inland Revenue 2019).

The updated tax policy work programme adds that the charities project will:

> *'include a report to Ministers before the end of 2019 to address recommendations of the TWG. It will take into account DIA's modernisation review of the Charities Act. On current timeframes, it is anticipated that high level policy decisions arising from DIA's review will be made by Cabinet before the end of 2019, with detailed policy decisions to follow in the first half of 2020'* (Inland Revenue 2019: 3)

In other words, the four issues put forward by the Tax Working Group in its final report are now specific items on the tax policy work programme. While the entry relating to imputation credit refundability is welcome, new items to 'reset' or 'remove' charities' concessions appear ominous. In addition, while the timeframes for the review of the *Charities Act* have slipped, the writer's request under the *Official Information Act 1982* for information about the 2019 report to Ministers was declined on the basis that its information was 'under active consideration' (Nash 2020).

To make matters worse, the new tax policy work programme also includes an entry entitled 'Tax exemptions', which compares income earned by charities and businesses run for charitable purposes, with state enterprises and council-controlled companies (both of which are subject to income tax). The entry states that the review will 'consider entity tax exemptions with a view to providing more consistency' and will consider: (i) how different entities fit within the Government's public policy purposes; (ii) the compliance costs and benefits; (iii) fiscal implications; and (iv) the impact of particular exemptions on competitive neutrality with the private sector (Inland Revenue August 2019).

In other words, charities appear to be being compared to state enterprises, and their income tax exemptions specifically considered for removal.

Meanwhile, the review of the *Charities Act* was progressing. In July 2019, a Cabinet reshuffle saw the appointment of Hon Poto Williams as Minister for the Community and Voluntary Sector. As author of Labour Party policy in this area, it was hoped the new Minister might honour the commitment to undertake a first principles review. Early indications were promising but, sadly, by February 2020, it was apparent that the new Minister had been persuaded by officials to 'continue the work Hon Peeni Henare started' (Meeting with Minister Williams, 20 February 2020).

From the writer's experience as a member of the Sector Group and the CRG, the review of the Charities Act appears to have been captured by DIA officials. It appears to have been Charities Services' intention to use the review to codify some of its more controversial areas of administrative practice, particularly in the areas of business activities and advocacy.

In relation to business activities, Charities Services currently requires an organisation with an 'unrelated business' to show that the business is capable of making a profit to go to charitable

purposes; and that the organisation does not provide any resources to its business operations at less than market rates (Charities Services October 2017: 3). A requirement to demonstrate to Charities Services' satisfaction that a business is 'capable of making a profit' may be particularly difficult for a start-up social enterprise, structured as a charity, to meet. Despite requests by the Core Reference Group, the legal basis for this approach has never been articulated. It is not clear why Charities Services eschews the approach suggested in the 2001 discussion document of simply asking charities to demonstrate how any particular activity is in the best interests of its charitable purposes. If the charity cannot do so, it is arguably using funds unlawfully, which constitutes 'serious wrongdoing' under section 4 of the Charities Act. As discussed above, providing the monitoring authority with the information necessary to ask and answer such a question was a key issue the *Charities Act* regime was intended to address. At Charities Services' insistence, the terms of reference for the review of the *Charities Act* include: 'the extent to which businesses that solely raise funds for registered charities can register under the [Charities] Act' (DIA 2018a: 2). In turn, the DIA's discussion document specifically asks 'what should be the registration requirements for unrelated businesses?' (DIA 2019a: 43).

It appears the underlying intention may have been for the review to create the legal basis for Charities Services' current approach that so far has been lacking, underscoring the significance of the attenuated scope, timeframe and consultation originally allocated for the review, and the significance of the charitable sector's response. The DIA's discussion document also asks whether charities should be required to be 'more transparent about their strategy for accumulating funds and spending funds on charitable purposes?', noting that this issue has been 'picked up' from the TWG: 'Holding accumulated funds without clear explanation may cause public concern that a charity is not using its funds for charitable purposes. For example, concerns have been raised regarding charities with businesses that apply very little or no funds to charitable purposes. Accumulating funds in a business or other investment over a long time can increase the risk that charitable funds are lost if it fails.' (DIA 2019a: 6, 15 & 21–22)

The default assumption appears to be that more 'rules' are required. However, the financial reporting rules already require registered charities to disclose the nature and purpose of their reserves (External Reporting Board 2015 Tier 1 & 2: [95] & [98]; Tier 3 [A139] & [A 196]; DIA 2019a: 21). While smaller charities do not need to report on accumulated funds, they must

report on the amount of cash and other resources they have (External Reporting Board 2018: s6). If readers of a charity's financial information are not satisfied with the reasons given, they then have an informed basis on which to make decisions about whether to support the charity. It is unquestionably good governance to have a reserves policy, and to communicate with stakeholders about why reserves might be being accumulated. However, it is not immediately obvious that formally requiring a reserves policy is either necessary or desirable, or preferable to an educative approach such as that used in Australia (ACNC 2016). It would be a mistake to increase regulation for regulation's sake.

It also appears to have been Charities Services' intention to use the review to codify its administrative practice in relation to advocacy. This explains the unusual wording of the terms of reference with respect to advocacy: 'the extent to which registered charities can advocate for their causes and points of view' [sic] (DIA 2018a: 2). It also explains why advocacy (and business activities) were included within the scope of the review, despite the definition of charitable purpose being specifically excluded. The issue of advocacy by charities was one of the key issues commented on by those who made submissions to the review (DIA 2019b: 2). Many referred to the complex and subjective approach adopted by Charities Services, and pointed out that charities were consciously limiting their advocacy for fear of losing their charitable registration. In the interests of democracy, CRG members fought hard to ensure that charities' ability to advocate for their charitable purposes was not extirpated by the review. The mood of optimism following release of the summary of submissions in December 2019 was short-lived, however.

In February 2020, CRG members received an email from the DIA Policy Group, advising of initial focus on three topics: (i) charities' business activities; (ii) accumulation of funds; and (iii) reporting requirements for small charities.

Charities Services' February 2020 newsletter added that the policy group will 'continue to involve the charitable sector – specifically the Core Reference Group – as work on these issues progresses over the next few months. No legislative change will be made this Parliamentary term' (DIA, February 2020). A CRG meeting was planned for March 2020. No consultation had been undertaken with the CRG prior to announcing that these three issues would be fast-tracked. While the issue of reporting requirements for small charities was a key theme of the community engagement meetings, charities' business activities and accumulation of funds

appear to have been taken directly from the report of the Tax Working Group and the tax policy work programme. It is surprising that these issues would be fast-tracked ahead of key issues of concern for the charitable sector, such as advocacy, appeals and agency structure.

Of course, a global coronavirus pandemic intervened, and on 13 May 2020 (the day before the 2020 Budget), the writer and other members of the CRG and Sector Group received a further email from the DIA policy group, advising that, due to COVID-19, the Minister for the Community and Voluntary Sector had paused work on Modernising the Charities Act for six months (that is, until after the general election). Surprisingly, the development was not mentioned on any of DIA's websites, nor does there appear to have been an official announcement.

In principle, a pause may be a helpful development, as the government's review was controversially narrow in nature and scope. However, a key risk is whether work on the government review of the *Charities Act* may be overtaken by tax policy work that appears reasonably hostile to charities. Having originally been captured by DIA officials, the review of the *Charities Act* may now have been captured by IRD. Sadly, charities appear to have been something of a government 'blind spot': as government searches for revenue in a COVID-affected environment, without a capital gains tax, the value and importance of the charitable sector to New Zealand, and what we might gain as a country by supporting and enabling, rather than restricting, their work, appears to be consistently overlooked.

Nevertheless, there may again be cause for optimism. Following the general election on 17 October 2020, the governing Labour Party won enough seats to govern alone, the first time that a party has done do since the mixed-member proportional representation system was introduced in 1996. On 2 November 2020, it was announced that Priyanca Radhakrishnan would be appointed Minister for the Community and Voluntary Sector. In her speech to Charities Services' annual meeting on 1 December 2020, the new Minister announced that she was discussing the review of the *Charities Act* with her officials and that progress on the review 'will continue', adding that it was incredibly important work, and that she wants to give it the 'respect and due diligence it requires and to proceed with care'.

Part IV: Where to from here

Critical to maximising the chances of being able to 'build back better', in the writer's view, is getting the legal framework for charities right: charities are currently labouring under a *Charities Act* regime that, in so many ways, acts as a barrier to their ability to carry out their work. Rather than forcing them to navigate an increasingly complex labyrinth of rules, much could be gained by developing a legal framework that is principles-based, and that focuses on and amplifies charities' strengths. In addition, 15 years of piecemeal reform that is replete with unintended consequences have demonstrated the need for a clear overarching vision or strategy for the charitable sector, perhaps along the lines of the civil society strategy adopted in England and Wales (HM Government 2018).

Structure and accountability of the agency that administers the *Charities Act* is critical. In 2002, the Working Party on Registration, Reporting and Monitoring of Charities concluded that having the charities registration function carried out by a government department would be 'considerably inferior to a Charities Commission': a government department would not have 'sufficient status and independence to gain the support and sense of ownership required from the charitable sector', and would also fail to recognise the 'independence and importance' of the charitable sector. The Working Party concluded that these issues would 'impact significantly' on its ability to carry out its role (Ashton, February 2002: 11-12). These conclusions have been borne out by public consultation and submissions on the review of the *Charities Act*. Recent decisions have also amplified calls to re-establish an independent body to make registration decisions (Stuff 2020). Proper accountability measures are also critical: lack of meaningful accountability impacts on the Charities Services' culture, which sadly has become one of increasing arrogance with respect to the legal parameters around decision-making. This in turn raises concerning implications regarding the rule of law. Providing for better structural accountability would reduce costs, for both charities and Charities Services, by encouraging better decision-making.

But to achieve all of this, the charitable sector in all its diversity needs to come together, no small ask in a COVID-affected environment of increasing costs, increasing compliance, increasing demand for services, but diminishing revenue streams and decreasing volunteers. Many charities are under pressure. But to achieve much needed reform, charities need a stronger collective voice, and a means to speak directly to power. More fundamentally, there needs to be a comprehensive, first principles, post-implementation review of the *Charities Act*

2005, and it needs to be carried out independently of the Department of Internal Affairs and in consultation with the charitable sector. Perhaps the impact of the pandemic, and an increased level of awareness of the importance of supporting the work of charities, together with the timing of the upcoming general election, might provide a window of opportunity for charities to achieve some of the reform that is so badly needed.

Post script

The writer is honoured to be the recipient of the 2019 New Zealand Law Foundation International Research Fellowship, undertaking research into the question 'What does a world-leading framework of charities law look like?', with a report due by September 2021. The purpose of the Fellowship is to enable research to be undertaken into the charities law frameworks of jurisdictions comparable to New Zealand, as well as to critically examine how the current regime is working in New Zealand, with a view to providing an independent perspective on what a world-leading framework of charities law might look like. The intention is for this information then to be fed into the government's current review process, to assist with the development of law reform in this important area. For more information, please visit www.charitieslawreform.nz.

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How Do We Regulate Activities Within a Charity Law Framework Focussed on Purposes?

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Abstract

The law regarding when an entity is or is not a charity focuses on that entity's purposes, not its activities. Yet, much of the current civil society debate centres on particular charity activities: election campaigning, the discriminatory provision of goods and services, or carrying on large-scale commercial activities. The issue arises in many jurisdictions around the world. This article focuses on examples drawn primarily from Australasia to argue that there are alternative sources of regulation of relevance to Australasian charity activities and that evaluation and reform efforts would be best spent in focussing on these alternatives. In particular, broadly-applicable regulatory rules that apply to all entities engaging in activities such as anti-discrimination legislation; as well as charity-specific rules that might be justified as guarding against the charity/government or charity/business boundaries, or as rectifying charity deficiencies such as difficulties in raising equity capital. While the discussion focuses on how Australia and New Zealand might better regulate charity activities, the article informs that discussion by considering regulatory approaches to particular issues in the United Kingdom, Canada and the United States.

Keywords

Charity law; charities; for-purpose; activities; regulation

Introduction

In countries such as Australia, New Zealand, Canada, the United Kingdom (UK) and the United States (US), when the state marks out classes of civil society entities worthy of state approval

and eligible to receive state support (by way of tax and other concessions), it does so primarily by reference to the purposes intended to be achieved by those entities. Yet many of the current civil society controversies relate to the means – the activities – adopted to achieve those purposes. For example, civil disobedience activities are at the core of Australian government concerns about environmental charities, not whether the preservation of the environment is a charitable purpose (see, for example, Seselja 2019). While foreign influence and unstated purposes trouble politicians about civil society organisations speaking out on political issues, electioneering activities by home-financed entities routinely raise questions of charities 'sticking to their knitting' rather than becoming involved in the business of government. The extent to which civil society organisations may discriminate in pursuit of religious purposes underlies proposed legislative reforms in Australia and the *Family First* (2020) litigation in New Zealand. Despite the Australian High Court decision of *FCT v Word Investments* (2008) and subsequent in-depth analysis, the issue of commercial activities and the charity/business boundary remain live issues in Australia and are expressly being considered as part of New Zealand's taxation and *Charities Act* reviews.

In light of the controversy over such activities, this article emphasises the limited extent to which activities currently affect the charity status of civil society organisations in Australia and New Zealand. These charities are a subset of the broader group of civil society organisations. While charities are defined below, it is worth noting that civil society organisations (also referred to as the third sector or not-for-profits) consist of organisations that pursue their purposes in ways outside that of government, the business sector and the family (Garton 2009: 1-4). To help think about the ways in which we might wish to more closely regulate charity activities in Australasia, the article discusses how activity-based regulation already applies, in some cases fairly extensively, to charities. It does so in two parts. First by justifying and examining generally applicable regulatory rules that apply on the basis of activities rather than charity status. Second by considering when charity activity-specific regulation might be required and considering what can be learned from political advocacy and commercial activity examples drawn, not just from Australia and New Zealand, but also from the UK, the US and Canada.

The limited role for 'activities' in determining charity status

Taking Australia as an example, both under statute and at common law, for an 'entity'[i] to be charitable it must:

- have purposes that are all 'charitable' purposes (such as relieving poverty, advancing education, advancing religion, or advancing other purposes beneficial to the community);[ii]
- be for the public benefit (*Charities Act 2013* (Cth) ss5, 6; *Aid/Watch* (2010): [18]); and
- be not-for-profit (*Charities Act 2013* (Cth) s5(a); at common law this is contained within the public benefit requirement, see, eg, Garton (2013): [2.15]).

In addition, a charity cannot:

- be a government entity, a political party or an individual (*Charities Act 2013* (Cth) ss4, 5(d); at common law, see *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168[iii]); or
- have, at common law, a purpose against public policy such as an unlawful purpose (*Royal North Shore* (1938): 426)[iv] or, under the *Charities Act*, a 'disqualifying purpose', a term defined as meaning a 'purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy' or a 'purpose of promoting or opposing a political party or a candidate for political office' (*Charities Act 2013* (Cth) ss5, 11). Nor can a charity be a 'political party' or a 'government entity' ((*Charities Act 2013* (Cth) s5).

Activities are relevant to these various elements but, as discussed below, for entities with an overtly charitable set of objects in their constitution or trust deed, the legal test of charity generally does not regulate the means or activities adopted to pursue those objects other than at the margins. That is, party political activities, the activities of government and the provision of private benefits are broadly precluded. But, except for the public policy/unlawful purpose requirement, it is otherwise quite difficult to regulate specific activities. Parachin terms this the 'square peg, round hole problem' (Parachin 2020).

Charitable purpose

In particular, and especially for charities in a legal form other than that of a trust, activities may impact on the characterisation of an entity's purposes in a number of ways (Murray 2019: 33-

8; Garton 2014: 387-88). For instance, in construing an entity's purpose, the courts typically examine the objects stated in its constitution, its activities and the circumstances of its formation (*FCT v Word Investments* 2008: [17]-[18], [25]-[26]). Activities might also help determine the relative weight of an entity's stated objects to confirm whether its member-services object is incidental to its community benefit object, or *vice versa* (see – *South Australian Employers' Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation* [2019] SASCFC 125).

However, there is widespread recognition by courts and commentators that the character of most activities is ambiguous, depending largely upon what the activity is intended to achieve (*Vancouver Society* 1999: [54] (Gonthier J, L'Heureux-Dubé and McLachlin JJ), [152] (Iacobucci, Cory, Major and Bastarche JJ);[v] *FCT v Word Investments* 2008: [26]; *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [36]. For commentary, see Cullity (1990: 7; Murray 2008: 159-62). In essence, activities are the means to achieving a purpose – the end.[vi] As reflected in section 5 of the *Charities Act 2013* (Cth) and in *FCT v Word Investments* (*2008*), activities that appear non-charitable on their face but that are merely 'incidental or ancillary' to an overarching charitable purpose are not characterised as amounting to an independent non-charitable purpose, but instead as supporting the stated purpose. Cases that consider whether objects or activities are incidental or ancillary to an overarching charitable object broadly ask whether the object is 'conducive to promoting' an overarching charitable purpose (*Stratton v Simpson* (1970) 125 CLR 138, 148, 159-60; *Congregational Union (NSW) v Thistlethwayte* (1952) 87 CLR 375, 441-2). In *Word Investments*, the Australian High Court held that accepting deposits from the public to be invested at market rates with nil or nominal interest paid in return, operating a funeral business and distributing surpluses to other entities to support evangelical religious activities were indirect means to achieving a purpose of advancing religion (*FCT v Word Investments* 2008: [37]-[38]). While the High Court majority did not purport to lay down a nexus test for this conclusion, their Honours stated:

> In *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue*, MacDermott J said:
>
> > *'the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects.'*

Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities. (*FCT v Word Investments* 2008: [38])

As the statement was directed to when activities might evidence a separate non-charitable purpose, it appears to set the contours of the range of activities or objects that are in furtherance of an overarching charitable purpose. That is, would the natural and probable consequences of the activities or objects help to achieve the charitable purpose?

Thus, for charities with a set of overtly charitable objects stated in their constitution or trust deed, particular activities will only infrequently result in the finding of a different purpose. That is, to result in a non-charitable purpose, activities such as electioneering, discrimination or commercial operations would generally need to be shown to not support the stated objects in the constitution or trust deed. That is likely to be rare.

Public benefit and not-for-profit requirements

The not-for-profit and public benefit requirements also play only a limited role in controlling activities. The public benefit test requires that the achievement of the purposes would be of net benefit (not detriment)) (*Charities Act 2013* (Cth) ss5(b), 6(2); *Re Pinion* [1965] Ch 85; *Gilmour v Coats* [1949] AC 426). It also means that the entity must have purposes that are for the public benefit, which requires that benefit is widely available (*Charities Act 2013* (Cth) ss5(b), 6) or, at general law, that the entity bestow a benefit in relation to the public or a section of the public rather than a private class of individuals (*Thompson v FCT* (1959) 102 CLR 315: 321–3). Inherent in this requirement (at general law) and separately expressed under legislation, is the not-for-profit requirement that an entity must not distribute assets or benefits to persons falling outside the section of the public for whom the entity pursues its purposes (*Re Delius (deceased)* [1957] Ch 299).

As the public benefit requirement applies to an entity's purposes, rather than each of its activities, it is not a regulatory tool that readily controls activities. It may be relevant, for instance, where a charitable purpose entails particular activities. For example, some purposes may entail the pursuit of discriminatory activities. A purpose of promoting the traditional religious view of the family might require discriminatory activities against single parent or

same sex families that result in a net detriment (*Re Family First* 2018: [65]), though this finding was overturned on appeal: *Family First* (2020);[vii] and the same might be said of an entity with a purpose of 'provid[ing] adoption services to heterosexuals and such services to heterosexuals shall only be provided in accordance with the tenets of the Church' (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395).[viii] Some political advocacy purposes may require the generation of public debate by unlawful means. The stated purpose of a vegan organisation such as '[t]o end commercialised animal abuse and exploitation in Australian animal agriculture facilities by increasing industry transparency…' (Aussie Farms 2019: cl 2) might, in light of the publication of an interactive map of abattoir and animal farm locations, be construed as entailing activities of trespass. Following *Aid/Watch* (2010: [45]-[49]), one would have to closely question whether the generation of debate by such unlawful means contributes to constitutional processes or in fact detracts from them and hence is of net detriment.

However, courts are typically fairly cautious in finding that purposes are of net detriment. For instance, a charitable trust for 'treatment of White babies' has been held valid (*Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292; Dal Pont (2017): [15.25]). This reflects the general approach of the courts and the fact that the public benefit test is focussed on purposes not activities (Parachin 2020: 147-50; See also Synge 2018: 365). Courts have, however, been far readier to take notice of activities of distributing funds or services to members and to treat them as breaching the not-for-profit or public benefit requirement (see, e.g. Garton 2013: ch 6; Dal Pont 2018: [3.23]-[3.29]; *South Australian Employers' Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation* [2019] SASCFC 125 [191], [238]).[ix]

Government entity/party political limits

The restrictions on being a government entity or political party or having a purpose of supporting or opposing a political party clearly preclude certain party political activities and the pursuit of purposes through the deliberative, administrative and coercive processes of the state, which is consistent with the economic, social and political literature on the independence of the not-for-profit (including charity) sector from the state (Douglas 1983: chs 7, 8; Salamon 1987: 36–43; Weisbrod 1988; Harding 2014: 78–85; Jensen 2015–16). Thus, a purpose of

establishing and supporting a political party dedicated to protecting the environment, such as the Australian Greens, would preclude an entity from being a charity, even though that could be seen as a means of protecting the environment.

Public policy

The one part of the charity test that permits scrutiny of activities is the public policy exclusion. Although formally focussed on an entity's purposes, in practice courts have used the public policy test to render an entity non-charitable on the basis of activities, especially discriminatory activities. *Bob Jones University v United States* (1983) 461 US 574 is one of the most famous examples, in which the US Supreme Court found that religious tertiary education institutions that imposed racially discriminatory admissions practices[x] on the basis of religious beliefs, were non-charitable. This was even though the discriminatory admissions practices were arguably a means (from the particular religious approach of the university) to the end of advancing education. Having a purpose of conducting unlawful activities would also be against public policy or, under the *Charities Act*, a 'disqualifying purpose' (*Re Collier* [1998] 1 NZLR 81: 90; *Charities Act 2013* (Cth) s11(a)). However, upon moving beyond a purpose of conducting unlawful activities, public policy becomes a very unwieldy ground to strike at particular activities as it is very difficult indeed to draw any general guidance about the principles that determine what is against public policy (Parachin 2020: 133-8). Hence, courts use the ground sparingly (see, e.g. *Bob Jones University v United States* (1983) 461 US 574, 592).

There is also the issue that the public policy test is formally focussed on an entity's purposes and so merely carrying out discriminatory or civil disobedience activities, for instance, does not automatically breach the test. Those activities would generally have to be sufficiently material to colour the entity's purposes, as in *Bob Jones*. Australia provides slightly more leeway here for regulators than other jurisdictions such as the US, Canada, the UK and New Zealand. That is because, under the *Charities Act*, activities that are incidental or ancillary to a charitable purpose may still amount to a 'disqualifying purpose'. This is due to the statutory definition of charity separately referring to 'charitable purposes' and 'purposes that are incidental or ancillary' and then stating that none of those two groups of purposes may be 'disqualifying purposes' (*Charities Act 2013* (Cth) ss5, 11). Adding to this broadened power

of regulators is that some disqualifying purposes are defined by reference to sets of activities: '*(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or*' (*Charities Act 2013* (Cth) s11(a)).

Are there other ways to restrict activities if we move beyond the common law and statutory encapsulations of what is a charity?

We saw above that the legal test of charity status deters private benefit, party political and governmental activities through the charity form. The public policy rule potentially permits broader scrutiny of unlawful, discriminatory or other activities, but to invoke public policy requires a certain degree of materiality and the rule offers very limited guidance for regulators and charities. From a rule of law perspective,[xi] and from a regulatory perspective of seeking to influence behaviour, it is thus not an ideal vehicle upon which to rely.

This part therefore examines other legal rules that could be used to regulate charity activities. The first part examines rules applying broadly to all entities conducting particular activities – charities and non-charities. The second part investigates circumstances where we might wish to impose activity rules specifically on charities.

Broadly applicable rules based on the activities, rather than charity status

There is a rule of law argument for applying the same rules to all equivalent entities engaged in the same activities; that is, that the same laws should apply to all persons so that they are treated equally (Dicey 1959: Pt II Ch IV; Saunders and Le Roy 2003: 5; Santoro 2007: 163-4). It should therefore be no surprise to find that we do regulate some specific fields of activities in which charities – and other entities, including market and government entities – traditionally engage.

For instance, many education, health and aged care activities are highly regulated. Commonwealth funding for tertiary education providers is contingent on compliance with aspects of quality standards and accountability requirements, as well as with matters such as 'fairness' (Watt 2015: 8-26; Dow & Braithwaite 2013: 5-6). Fairness includes that providers

must 'treat fairly' or treat 'equally and fairly' all current students and all persons seeking to enrol as students (*Higher Education Support Act 2003* (Cth) s19-30, sch 1A s18; *Higher Education Support (VET) Guideline 2015* (Cth) s41). Quality assurance is also directly imposed for teaching and research training by way of registration and accreditation of institutions and courses (Dow & Braithwaite 2013: 5), on-going quality standards and on-going monitoring by bodies, such as the Tertiary Education Quality and Standards Agency and Australian Skills Quality Authority (Dow & Braithwaite 2013: 12-16). Non-government primary and secondary education providers are subject to state regulation relating to registration and to ongoing compliance in relation to a range of operational quality, safety and organisational capacity requirements regarding curriculum, staff qualifications and governance procedures (Varnham 2013: [160-5]). In addition, to access funding provided by the Commonwealth via the States, the *Australian Education Act 2013* (Cth) requires that non-government primary and secondary school providers have ongoing quality improvement processes in place; and generally within the year that it is received 'spend, or commit to spend' recurrent education funding, short term emergency assistance funding and capital funding (ss78(2)(a), 85(2)(a), 93(2)(b); *Australian Education Regulation 2013* (Cth) ss29, 30, 31).

In terms of health, individual states and territories have responsibility for licensing private hospitals and regulating the safety and quality of health services provided (Australian Institute of Health and Welfare 2016: 30-1). In broad terms, the licensing arrangements set safety and quality standards for differing classes of facilities or services, as well as imposing suitability requirements for operators and licence holders (Australian Institute of Health and Welfare 2016: Appendix 125-9). The *National Safety and Quality Health Service Standards* also apply. Residential aged care and home or community-based aged care service providers must be approved under the *Aged Care Act 1997* (Cth) and are subject to on-going safety and quality standards, as well as monitoring (*Aged Care Act 1997* (Cth) s7-1). Approval is based on ability to meet these standards, as well as the applicant's ability to provide aged care (*Aged Care Act 1997* (Cth) s8-3).

These safety and quality standards, along with expenditure requirements, where applicable, effectively require a minimum level of service delivery activities from year to year, and thus, indirectly limit the use of funds for other activities such as advocacy or electioneering. Fairness standards would preclude some (although not all) forms of discrimination.

Likewise, when it comes to foreign interference in Australian elections, recent Australian electoral legislation requirements apply across the board to charities and other non-party political actors (*Commonwealth Electoral Act 1918* (Cth) pt XX). If electoral expenditure (being certain expenditure on matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election) thresholds are exceeded then the relevant entity must register and report donations used for that expenditure to the Australian Electoral Commission. Depending on whether an entity meets the 'third party campaigner' or higher 'political campaigner' threshold, foreign donations are potentially either capped for use for electoral expenditure, or prohibited entirely beyond a cap. This electoral regulation can clearly affect foreign influence of charities and charity electioneering, but is intended to leave issues-based advocacy largely unaffected (Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) [66]), even if the border between electioneering and issues-based advocacy is a difficult one (Crimm & Winer 2014: 77-8). Third party campaigners and political campaigners are also required to disclose their 'electoral expenditure', which is to be placed on a public 'transparency register'.

Australian anti-discrimination legislation also applies broadly to all entities in relation to certain types of activities - described as 'covered areas' - such as the provision of education, provision of goods, services and facilities, employment etc. and on certain protected grounds such as age, sex, race, religion etc (Australian Human Rights Commission 2014). However, there are very material exceptions for charities, at least for purposes that entail but that do not explicitly promote discrimination (Dal Pont 2017: [7.20]). Section 70 of the *Equal Opportunity Act 1984* (WA) provides an example exemption for:

> *(a) a provision of a deed, will or other document… that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in this Act; or*
> *(b) an act that is done in order to give effect to such a provision.*

I explored above the difficulties in attempting to use the public benefit or public policy requirements of charity law to regulate discriminatory activities. Anti-discrimination legislation, which explicitly countenances balancing competing rights and freedoms, and currently does little to regulate discriminatory activities by charities therefore holds much

potential. For instance, in liberal societies, such as Australia and New Zealand, state intervention to restrict one set of rights to prioritise others is typically justified by reference to proportionality - does a law have a legitimate objective and implement measures that are suitable and necessary to achieve that objective? Also used is John Stuart Mill's harm principle - does the public benefit from advancing one set of rights outweigh the harm caused by limiting the other rights - as state coercion is only justified to prevent harm? (See Australian Law Reform Commission (2015: [2.63]; Harding 2014: 226-33). Such an approach could provide a principled basis for deciding between competing rights. While reasonable minds may differ on whether it is an improvement or not, there is a current Australian debate on proposed religious freedom legislation that seeks to balance freedom of association and freedom of religion against rights to equality and freedom from discrimination (Attorney-General's Department 2019; Australian Human Rights Commission 2020). This debate clearly demonstrates the way in which anti-discrimination legislation can be used to more explicitly guide which sets of activities are deemed acceptable where there is competition between such rights. For example, by providing targeted exemptions from discrimination laws for specified religious activities, unlike the blanket charity exemption discussed above. However, it must be acknowledged that various submissions characterised the second exposure drafts of the religious freedom legislation as departing from standard proportionality and harm principles in conducting the balancing exercise: Law Council of Australia (2020); Australian Human Rights Commission (2020).

Specifically targeting charity activities

The above discussion focussed on regulation of activities by all entities engaged in those activities; charities and non-charities. However, there are also examples of regulation specifically targeted at charity activities. Given the rule of law desire to apply the same rules to entities engaged in the same activities, it is worth considering why regulation might be limited to charity activities.

Tax concessions and other privileges provided by the state are typically proffered as the primary reason why charities should be treated differently and subject to additional oversight (see – e.g. Dal Pont 2017: [20.1]-[20.2]; Benson 2001: 230-1, 235-7; Weinrib & Weinrib 2001: 67-8). However, it is not so clear that all tax treatment is a privilege. For example, non-taxation

of social welfare charities may actually reflect the average tax rate of benefit recipients (Krever 1991: 3-5). This approach also ignores the fact that tax concessions (and some other privileges) are routinely provided to vast segments of the marketplace without similar calls for extra oversight (as to the enormous size and range of business tax concessions, see Treasury 2020; compare Malani and Posner 2007: 2031). In Australia, the resources industry is a case in point where material tax concessions are provided to encourage greenfield exploration and mineral development so as to make up for the risky and capital intensive nature of these activities (Treasury 2020: 77, 132, 134). Albeit a number of other industry groupings receive significantly more tax support, such as primary production and financial and insurance services businesses (Productivity Commission 2019: 26).

It seems easier to justify regulation of charity-specific activities on either of the following two grounds. First, to guard boundaries between charities and government; and charities (for-purpose) and the market (for-profit). That is because state endorsement and public recognition of an entity as a charity marks it out as a different and socially sanctioned entity – an expressive function (compare Harding 2014: 38-41). Also, because, to some degree, the point of the charity sector is that it pursues the public good by non-governmental means (Salamon 1987: 36–43; Jensen 2015-16; Harding 2014: 78-85) and that, unlike the market, it better promotes other-regarding or altruistic modes of action (Dees 2012; Harding 2014: 78-85).

Second, regulation might help to address problems that are relatively specific to the charity form (Garton 2009: ch 4), such as the 'philanthropic failures' identified by Salamon, like the difficulty that charities and other not-for-profits have in raising equity capital (Salamon 1987). Tax concessions provided to charities play a role in this way to address difficulties in raising equity capital (in relation to the income tax exemption, see Hansmann 1981). Likewise, regulation might assist to bolster trust in charities so as to address the information asymmetries discussed by Hansmann and Garton that are particularly prevalent in areas where charities operate and in some areas seem to apply almost entirely to charity activities, such as the provision of overseas or other aid where benefits are provided to persons who will not give feedback to the funders (Garton 2009: ch 3; Hansmann 1980: 843-5). The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) regulatory regime could be viewed in this regard, especially (divs 40, 45, 50, 60):

- governance standards 1 (amongst other things, a charity must comply, in an ongoing way, with its character as a not-for-profit entity) and 5 (which requires a charity to ensure that its directors/trustees comply with duties of loyalty and diligence);
- external conduct standards 1 (amongst other things, a charity must take reasonable steps and maintain reasonable internal control procedures to ensure that its activities outside Australia and the use of its resources outside Australia (including resources given to third parties) are consistent with the charity's not-for-profit character) and 3 (anti-fraud and corruption); and
- annual information disclosure requirements and publication of much of that information on a public charities register.

Given controversy in these areas, political activity and commercial activity restrictions are examined below to determine their scope and whether they fit within the proposed justifications for targeting charity activities.

Political activity restrictions

As discussed at the outset, there are some restrictions on political activities in Australia. However, other jurisdictions go further. In New Zealand, while purposes of changing the law or government policy are no longer viewed as against public policy (theoretically permitting lobbying or advocacy activities), the *Re Greenpeace* [2014] NZSC 105 decision means that one must enter into a detailed examination of whether the end that is advocated, the particular means promoted to achieve that end and the manner in which the cause is promoted will generate public benefit. (Murray 2019: 50-1; Harding 2015). The test is very difficult to satisfy for advocacy purposes and their corresponding activities, though this obviously does not preclude the more common circumstance of advocacy activities in support of a non-advocacy purpose.

The US and, until recently, Canada, have gone further in limiting charity lobbying and prohibiting charity campaigning (that is, electioneering) through tax rules. For instance, in the US, section 501(c)(3) of the *Internal Revenue Code* provides that for charity registration, 'no substantial part of the activities of [the charity] is carrying on propaganda, or otherwise attempting to influence legislation', with some ability to elect out of this vague test into a more certain cap or percentage of expenditure test under section 501(h), albeit the caps are relatively

low, going up to only the lesser of 20% or $1m of expenditure. In relation to campaigning, section 501(c)(3) states that the charity must 'not participate in or intervene in … any political campaign on behalf of (or in opposition to) any candidate for public office'.

In Canada, the case of *Canada Without Poverty v A-G (Canada)* (2018) ONSC 4147 has led to legislative amendments that retain the prohibition on campaigning (*Income Tax Act* (Canada) ss149.1(6.1) and (6.2) provide that a registered charity must not 'devot[e] any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office'), but that expressly permit non-partisan 'public policy dialogue and development activities', ie political advocacy (*Income Tax Act* (Canada) ss149.1(1), (10.1)).

Restricting campaigning activities, rather than just purposes (as Australia does) makes some sense in terms of drawing a boundary between charities and party political actors. However, as already identified above, there are material difficulties in working out when a charity's activities are campaigning versus issues-based advocacy. GetUp's activities provide a case in point. GetUp is a grass roots independent political activist organisation. Although it is not registered as a charity, its activities have nevertheless been the subject of several Australian Electoral Commission inquiries to investigate which side of the line they fall upon (Australian Electoral Commission 2010). We might also question whether charities should be singled out for this boundary drawing and whether generally applicable electoral regulation as in Australia might be a better way to address the boundary issue, since the party political boundary seems equally relevant for the for-profit sector.

The US and Canadian experience provides some evidence of the difficulties in using charity-specific regulation of campaigning activities. For instance, although interpreted broadly in the Treasury regulations, the US campaign restriction is not always robustly enforced, with the US Internal Revenue Service (IRS) still reeling from the fallout over its targeting of politically aligned charities (Fishman et al. 2015: 463-97; Treasury Inspector General for Tax Administration 2017). President Trump has also issued a vaguely worded executive order to the IRS requesting that it *not* take compliance action against campaigning by religious organisations (Exec Order No 13798, 3 CFR 346 (2018)). Furthermore, the US institutional response has included the proliferation of tax concession categories to explicitly political lobbying and campaigning entities that can remain connected in various ways with registered charities – for example via Internal Revenue Code §501(c)(4) social welfare organisations and

§527 political action committees (Fishman et al. 2015: 494-502; Hopkins 2019: 399-400).[xii] Moreover, this is in the broader US context of the existence of some general electoral law regulation of campaign financing, but with that regulation materially limited by the *Citizens United* 130 S Ct 876 (2010) decision, which effectively removed caps on not-for-profit and for-profit corporation electoral expenditure (Fishman et al. 2015: 502-6). In Canada, the *Canada Without Poverty* case resulted from the imposition of increased political activity reporting and audits by the Canada Revenue Agency which has led to a partial governmental about turn and much public criticism of (and support for) the Agency (Parachin 2016: 1048, 1050–4).

Given these overseas experiences, Australia may be better off relying on its generally applicable electoral legislation to regulate charity campaigning activities. Beard has looked in detail at the regulation of Australian charity political activities and suggested that the electoral legislation can fill this role, but that it ought to be better focussed on the independence of charities (and other non-political parties) from government and political parties (Beard 2019: 40-2). As discussed at the outset, Beard is right to look to 'independence' as a key boundary demarcation. However, as acknowledged by Beard, more work needs to be done to consider how concepts of 'autonomy' or 'voluntarism' (in respect of the charitable sector) and of 'undue influence' (in respect of political parties) could be employed to help elaborate that boundary (Beard 2019: 42-4). Beard's insight is that part of that process should involve recourse to public law values such as transparency, integrity and representativeness, to ensure electors can make their choice without undue influence being brought to bear (Beard 2019: 42-4). Ideally, similar concepts should also have the potential to be applied to the for-profit/political party divide. Looking at the Australian electoral regulation framework, as noted by Beard it could do more to illuminate charities' political influence over political parties, because, at present, much campaign activity expenditure is omitted as being too remote from the tightly-focussed definition of 'electoral expenditure' (Beard 2019: 52-3). Though, to be fair, in capping foreign donations or the use of foreign donations, the regime does protect the representativeness of Australian views.

Commercial activity restrictions

As demonstrated by the earlier discussion of *Word Investments*, Australian charity law and tax rules do not prohibit charities from conducting commercial activities or seek to tax the income from unrelated business activities. In New Zealand charities are also permit ted to undertake commercial activities and business income is exempt from income tax to the extent that a charity 'carries out its charitable purposes in New Zealand' (*Income Tax Act 2007* (NZ) sCW 42(1)(a)). However, from 2011 to 2013 Australia contemplated taxing unrelated business income (Sinodinos 2013; Chia & Stewart 2012) and New Zealand is currently contemplating taxing such commercial activities (Robertson and Nash 2019; Tax Working Group 2019: 21–22, 103–104).

Other jurisdictions do restrict business activities. The US and UK tax certain forms of unrelated or non-primary purpose business income of charities (Internal Revenue Code §511; HMRC 2019). Canada simply prohibits unrelated business income for charities that register for tax concessions (*Income Tax Act* (Canada) s149.1(2)).[xiii] Restrictions are usually justified on the basis of competitive neutrality between charities and for-profit businesses. However, the general consensus is that neutrality is typically not undermined by income tax concessions (though input tax concessions, such as fringe benefits tax exemptions, may do so) as their very purpose is to make up for charity difficulties in raising equity finance (Chia & Stewart 2012). More fundamentally, the focus here seems misguided in that commercial activities do not define the business/charity boundary. Instead, it is the purpose of distributing profits to members and controllers that is the key boundary issue. As noted by Lind in a recent issue of this journal, Australia (as is also the case for New Zealand) is only just starting to grapple with how to set that boundary in the context of social enterprises, presently one of the most pressing boundary areas (Lind 2019). Several of the trust-bolstering measures discussed above would help minimise profit distribution activities. For instance, the governance and external conduct standards and disclosure requirements. However, there is likely to be room for improvement. For instance, in New Zealand, the chief charity regulator, the Department of Internal Affairs does not have extensive governance standards or external conduct standards that it can enforce (Department of Internal Affairs 2019: 22, 45). Further, the US and, to a lesser extent, Canada, also provide fairly extensive excise tax sanctions specifically framed to apply to various private benefit activities and some of which can be levied upon the recipients of private benefits, rather than the relevant charity (see, especially, IRC §4958; *Income Tax Act* (Canada) s188.1(4); Fremont-Smith 2004: 252-64, 299-300).

Conclusion

Many current civil society controversies revolve around the divisive nature of the activities engaged in by charities. For instance, election campaigning and other political advocacy, the discriminatory provision of goods and services, or carrying on large-scale commercial activities. However, the law relating to charity status has little to say about *activities*, focussed as it is on *purposes*. Charity activities, nevertheless, are already subject to regulation – both that applying generally to all entities engaged in particular activities and that applying specifically to charities. This article has suggested that broad based activity regulation in Australia already meaningfully constrains a number of contentious charity activities in the education, health, aged care and foreign donation spaces. However, there is material scope for anti-discrimination legislation to provide more nuanced guidance on how to weigh competing rights and freedoms in the context of charity activities, a reform which could be achieved by replacing the blanket charity exemption with more specific exemptions for particular activities.

Specifically-targeted restraints on charity campaigning activities or commercial activities also exist in some jurisdictions and have been proposed from time to time in Australia. However, campaigning restrictions appear to miss the point that it is independence – of charities from political parties and government – and of political parties and government from charities, that is the key matter that needs to be protected by regulation. There is much scope here for general electoral legislation to perform this task and for the regulation to apply not just to charities but also to for-profits and other actors. Taxing or otherwise prohibiting commercial activities also seems to miss the mark. The real issue with the business/charity boundary is prohibiting private profits from being distributed to members or controllers, as highlighted by the social enterprise debate. Hopefully, by focusing attention on these alternative means of regulating charity activities a more productive discussion can ensue.

NOTES

[i] For brevity, the term 'entity' is used to include legal relationships, such as trusts and unincorporated associations, as well as legal persons.

[ii] The *Charities Act 2013* (Cth) rewords charitable purposes under twelve heads of charity that broadly reflect the scope of the general law heads. The reworded heads include, amongst others, advancing health, advancing education, advancing social or public welfare, advancing religion and advancing culture: s 12(1).

[iii] At [23], [40]-[44], [48] (Gleeson CJ, Heydon & Crennan JJ), [130]-[134], [143]-[145] (Kirby J, also noting that some bodies formed by and being part of government might potentially be charities), [181]-[185] (Callinan J).

[iv] Arguably, an entity also cannot have a purpose of being or supporting a political party or otherwise taking part in government (*Royal North Shore* 1938: 426). Dixon J's comment on party political purposes or involvement in government was noted but this portion of his Honour's reasoning was not rejected by the majority in *Aid/Watch* (2010).

[v] In the context of legislative references to 'charitable activities'.

[vi] Sometimes they may also be incidental consequences (*Latimer v CIR* [2004] UKPC 13, [35]-[36]). Litigation to defend charges arising from the unlawful pursuit of environmental purposes provides an example.

[vii] Due to its interpretation of *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, the first instance decision in *Family First* appeared to give only limited weight to the benefits arising from the generation of public debate. On appeal, the Court of Appeal adopted a more expansive interpretation of *Re Greenpeace*, according more weight to the benefits arising from public debate: *Family First* 2020: [153].

[viii] The case was decided under human rights legislation, rather than charity law. Compare *Canada Trust Co v Ontario Human Rights Commission* (1990) DLR 321.

[ix] Albeit that the provision of many private benefits is very hard to police. For example, it is difficult to track private benefits that controller-members provide to themselves, such as greater remuneration and better working conditions (Garton 2010: 217).

[x] Admission was denied to 'applicants engaged in an interracial marriage or known to advocate interracial marriage or dating'.

[xi] Being that laws should be 'prospective, open and clear', 'relatively stable' and formulated under a framework of open, clear, stable and general rules to as to permit people to be 'guided' by the law: Raz 1977: 198-202; Santoro 2007: 174.

[xii] The basket of tax concessions afforded such entities is less than for charities.

[xiii] The Canadian Special Senate Committee on the Charitable Sector has recommended loosening this rule.

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Attaining to Certainty: Does the Expert Panel's Proposal for Reform of the Charities Act Sufficiently Protect Religious Charities?

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Abstract

In jurisdictions that share the common law of charities the question of the charitable recognition of entities that hold a traditional view of marriage has created significant controversy. On the recommendation of the 2018 Expert Panel on Religious Freedom the Australian Government has committed to amending section 11 of the Charities Act 2013 (Cth) to recognise that a charity that holds a traditional view of marriage will not be deregistered on the basis that its position is 'contrary to public policy'. This article provides a critical analysis of the proposed reform and its opposition. It does so by introducing the separate grounds relevant to the question of the charitable status of an entity that holds a traditional view of marriage, namely the 'political objects doctrine', the 'public policy doctrine' and the 'public benefit' requirement. It then considers their application in common law jurisdictions where the matter has arisen as a question of law, namely Australia, New Zealand, the United States and Canada. In the light of recent developments in those jurisdictions, it is argued that, if the goal is to provide certainty against the deregistration of an Australian charity that holds a traditional view of marriage, more must be done.

Keywords

Charity law; religious freedom; international charity law jurisprudence; advocacy; public benefit; marriage; Aid/Watch; Family First New Zealand

Introduction

In jurisdictions that share the common law of charities, the question of the charitable recognition of entities that hold a traditional view of marriage has created significant controversy. On the recommendation of the 2018 Expert Panel on Religious Freedom, the Australian Government has committed to amending section 11 of the *Charities Act 2013* (Cth) to recognise that a charity that holds a traditional view of marriage will not be deregistered on the basis that its position is 'contrary to public policy'. This proposal has garnered some considerable opposition, with various bodies including the Australian Charities and Not-for-profits Commission (ACNC) and the Law Council of Australia opposing the amendment. This article provides a critical analysis of the proposed reform and its opposition. It does so by introducing the separate grounds relevant to the question of the charitable status of an entity that holds a traditional view of marriage, namely the 'political objects doctrine', the 'public policy doctrine' and the 'public benefit' requirement. It then proceeds to consider their application in common law jurisdictions where the matter has arisen as a question of law, namely Australia, New Zealand, the United States and Canada. In the light of recent developments in those jurisdictions, it is argued that, if the goal is to provide certainty against the deregistration of an Australian charity that holds a traditional view of marriage, more must be done.

Context

This article is composed in the aftermath of the debate over the legalisation of same sex marriage. During that debate the Australian Government established an Expert Panel on Religious Freedom (Expert Panel) to 'examine and report on whether Australian Law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion' (2018, p. iii). The Expert Panel recommended that '[t]he Commonwealth should amend section 11 of the *Charities Act 2013* to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'.' The resulting Government amendment proposes the insertion of the following at section 11:

> *'to avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose'* (Povey & Woodward 2019: 3)

> This is a welcome clarification. As Ridge has argued, for a court to deny a body 'charitable status on public policy grounds for its lawful religious activities' could undermine 'the very pluralism and diversity of viewpoints that charity law generally promotes' (Ridge 2020, p. 396). However, the Law Council's opposition to the proposal includes the argument that 'the fact of its inclusion implies that doubt exists', creating 'uncertainty where there was none' (Law Council of Australia 2020, p. 40). Contrary to this, I contend here that, not only is the uncertainty real, it also attaches to legal tests beyond that which the current amendment seeks to address.

In making its recommendation the Expert Panel appeared to act with some hesitation, noting that it was:

> *'reluctant to draw too many inferences from overseas experiences which turned on different legislation and specific facts in those cases. However, the Panel can see a benefit to assist certainty, and could see no particular harm, in an amendment similar to that suggested by the Acting Commissioner of the ACNC to put the immediate issue raised by the legalisation of same-sex marriage beyond doubt'* (Expert Panel on Religious Freedom 2018, [1.200]).

The 'suggested' amendment was proposed in a letter dated 24 November 2017 from then Acting ACNC Commissioner Murray Baird to the author of the same sex marriage legislation, Senator Dean Smith, penned shortly before the passage of the legislation through the Australian Senate. In that letter Acting Commissioner Baird gave an assurance that he would not administer the law so as to remove the charitable status of religious entities:

> *if a charity with a purpose of advancing religion currently holds and/or expresses a view or position on marriage that is based on the beliefs, tenets or doctrines of the religion it advances, its status as a charity as defined in the Charities Act will not be negatively affected by reason merely of its continuing to hold and/or express that view following the enactment of the Future Marriage Act* (Baird 2017: 2)

Mr Baird's reasoning was that, in propagating their religious view of marriage, religious charities advance religion. It may be observed, however, that the letter only references charities with a purpose of advancing religion. The reasoning on which Mr Baird relies does not extend to faith-based charities, such as schools or public benevolent institutions that do not have a charitable purpose of advancing religion. The proposed Government amendment is seemingly

not unaware of this concern. It extends to all charities, not only charities with a purpose of advancing religion. It does not, however, apply to the law of the States or Territories, which will each need to make separate provision against the concerns raised in this article.

Notwithstanding his assurance, the Acting Commissioner went on to acknowledge that overseas courts have entertained the proposition that 'opposition' manifested in various ways to same sex marriage might threaten an entity's charitable or tax-exempt status on the grounds that such opposition would be contrary to 'public policy' or not for the public benefit

> *'one way to address the concerns that have been raised may be to provide in the amending legislation that nothing in the legislation adversely affects an entity's charitable status by reason only that the entity holds or expresses a position on marriage'* (Baird 2017: 4)

This led Mr Baird to conclude that 'a legislative provision confirming the intention of Parliament that the charity status of such an entity should not change by reason of the new definition, would put the matter beyond doubt'. The astute reader will note that, while the Acting Commissioner refers to both the conformity with 'public policy' and the 'public benefit' requirements imposed on charities by the common law, the Government amendment deals only with the former requirement. This alerts us to the need to consider whether the Government amendment is then sufficient to, in the words of the Expert Panel, 'assist certainty' by putting the matter 'beyond doubt'. I argue that, when regard is had to the existing state of authorities, it is not at all clear that Mr Baird's reasoning (that in teaching a religious view of marriage religious charities advance religion) would survive application of either the public policy or public benefit tests.

With respect to the Expert Panel, my argument is that its failure to consider the 'public benefit' condition is sourced in a misunderstanding of the law of charities, reflected in its hesitance to 'draw too many inferences from overseas', and cases that 'turned on different legislation and specific facts'. To the contrary, as the following authorities demonstrate, it has long been recognised that the common law of charities is characterised by the cross-pollinating influence exercised amongst Anglophone courts. Further, the relevant tests for the determination of the charitable status of entities the subject of the Expert Panel's recommendation are not tests of statute, they are tests imposed by common law. The sole exception to this is the Australian *Charities Act,* for which, in any event, the 'common law … will … remain relevant for the

purposes of interpreting those principles, concepts and terms that have been derived from the common law and utilised in the statutory definition' (*Explanatory Memorandum, Charities Bill 2013 (Cth*) [1.19]).

The history of charity and advocacy

As O'Halloran notes '[u]ntil relatively recently, the law governing charity, religion and the relationship between them was broadly shared by the 60 or so common law nations' (O'Halloran 2014: 110). That commonality was sourced in the *Statute of Elizabeth 1601* and the subsequent articulation of the four charitable 'heads' in *Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531* (*Pemsel*). The journey from the Statute of Elizabeth to modern times has been described as 'a maze of caprice, fantasy and historical humbug' (House of Commons 1958). Although the law of advocacy by charities is hardly immune to such a charge, the uncertainties in the law are sufficiently known as to provide a basis to ground efforts at targeted reform. Those uncertainties are only enhanced by the ongoing attempt to reconcile the historical framework of charity law with the rising prevalence of human rights norms and the modern welfare state, developments that have cast the law of public benefit and of charity advocacy into new uncharted territory (Parachin 2013). Notwithstanding the influence of these novel currents, as Chevalier-Watts recognises, there remains many 'interconnections' between jurisdictions (2018: 1). As the following discussion demonstrates, the most senior Australian courts continue to look to other common law jurisdictions when considering the ongoing development of charity law.

For the purposes of this analysis, it can be said that, at a broad level, the common law of charities has imposed conditions relevant to a charity that holds, or advocates for, a traditional view of marriage. They may be delineated in the following manner:

a. The 'political objects doctrine', comprised of:
    i. The rule that advocacy for 'a proposed change in the law' is not charitable because the courts have no means to determine whether the achievement 'will or will not be for the public benefit' (*Bowman v Secular Society* [1917] AC 406: 442; see also *McGovern and others v Attorney General and another* [1982] Ch 321 (*McGovern*): 340) (as

further discussed below, this common law test is now largely redundant in Australia); and

ii. The rule against 'partisan political objects', whereby, for example, a charity must not have a purpose of promoting or opposing a political party or candidate (see for example *Charities Act 2013*, s 11; *McGovern*: 340).

b. The 'public policy doctrine', whereby, 'any purpose which is contrary to the established policy of the law cannot be the subject of a good charitable trust'(*Royal North Shore Hospital of Sydney v Attorney General for New South Wales* (1938) 60 CLR 396: 426).

c. The 'public benefit requirement', being the general requirement that charities, regardless of whether they engage in advocacy, must have purposes recognised as being for the public benefit, as understood in common law (*Pemsel*, Lord McNaughten).

Each of these requirements found in the common law of England have also found their respective expression in the common law of Australia, New Zealand, the United States and Canada (Dal Pont 2017; Murray 2019). As is canvassed below, several of those jurisdictions have undergone processes of reform leading to the modification or abolition of these requirements, characterised by Chevalier-Watts as 'blazing trails' away from English limitations (2014).

The seminal statement in this area is Lord Parker of Waddington's dictum delivered during the height of World War One in *Bowman v Secular Society*:

> a trust for the attainment of political objects has always been held invalid … because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit (442)

Ironically, in the context of this discussion, the particular 'purely political objects' Lord Parker found to be non-charitable included the 'abolition of religious tests, the dis-establishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath' (442).

As the Australian High Court highlighted in *Aid/Watch Incorporated v Commission of Taxation (2010)* 241 CLR 539 *(Aid/Watch),* a degree of conflation between the 'political objects' and the 'public policy' doctrines has been with us ever since Lord Parker cited a case concerning the public policy requirement as authority for his political objects test:

The only authority to which Lord Parker referred in Bowman was *De Themmines v De Bonneval*. The trust in that case was for the promotion of the doctrine of the absolute and inalienable Papal supremacy in ecclesiastical matters by the printing and circulation of a treatise by thirty-seven French bishops. The trust failed, as the law in England then stood, but this was because the trust was considered to be for a superstitious use and thus at variance with English public policy (French CJ, Gummow, Hayne, Crennan & Bell JJ: 551).

Here the majority characterised the Tudor doctrine of 'superstitious uses' (see – Jones, 1969: 11; *Chantries Act 1547*) as an early expression of the public policy doctrine. For centuries that doctrine was applied to invalidate non-conformist (for example, see *Attorney-General v Hickman* (1732) 2 Eq Cas Abr 193 pl 14; 22 ER 166) or Catholic trusts (for example, see *Cary v Abbot* (1802) 32 ER 198 1802). In so doing the majority draws attention to the positioning of the currently contemplated reform efforts within a domain of the law that has for centuries demonstrated a seemingly perpetual ability to command the attention, and channel the ire, of lawgivers. During the course of oral argument in *Aid/Watch*, detailed consideration was given to the position in the United Kingdom, Canada, the United States and New Zealand. While the majority noted that, at least in the United States and Canada the influence of the common law on the 'political objects doctrine' had been affected by statutory provisions (for which there were no equivalents in Australia), the same limitation could not be said of either the public policy doctrine or the public benefit requirement (550).

Australia

In considering the recommendation of the Expert Panel, the focus of examination falls first on the target of the resulting proposed Government amendment, the public policy condition, now contained at section 11 of the *Charities Act 2013.* That section states that a charity cannot have a 'purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy'. The examples of 'public policy' provided in the Act include 'the rule of law, [and] the constitutional system of government of the Commonwealth'. As Ridge notes, 'the definition is

inclusive; hence other, possibly less fundamental, public policy concerns might disqualify religious purposes from charitable status' (Ridge 2020: 385). A note further clarifies 'Activities are not contrary to public policy merely because they are contrary to government policy.' This condition demarcates a boundary line to the newly recognised charitable 'purpose of promoting or opposing a change to any matter established by law' under section 12(1)(l). Where this boundary line falls in the resulting tension between the two must be explored by examination of its source: the *Aid/Watch* decision. Therein a majority of the High Court wielded the constitutionally protected 'implied freedom of political communication' to overturn Lord Parker's dictum, holding:

> *'the generation by lawful means of public debate … concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in Pemsel.'* (Ridge 2020: 557)

In so doing they confirmed that 'there is no general doctrine which excludes from charitable purposes "political objects" and has the scope indicated in England' (557, [48]).

Section 12(1)(l) of the *Charities Act 2013* extends the principles applied to a poverty relief charity in *Aid/Watch* to all charitable purposes. An Australian charity can have a main purpose of changing the law in and of itself (and thus of critiquing government policy), provided such purpose is in furtherance or in aid of a charitable purpose and provided it does not contravene the public policy condition. It is on that basis that the ACNC (2019) offered its opposition to the Government amendment:

> *'under the current Charities Act [the 'advocacy of traditional views of marriage'] is already not a disqualifying purpose in and of itself … A charity can promote or oppose a change to any matter of law, policy or practice, as long as this advocacy furthers or aids another charitable purpose'* (ACNC 2019: 3)

However, as Chia, Harding and O'Connell identify 'the further one reflects upon the [*Aid/Watch*] decision, the more unanswered questions one confronts' (2011: 383). During the course of the hearing French CJ sought to explore the interaction of the appellant's contentions on advocacy with the public benefit requirement. He asked 'if one dispenses with a political purposes exception or disqualification what are the boundaries of community benefit, or public benefit?' (*Transcript of Proceedings, Aid/Watch Inc v Federal Commissioner of Taxation*

[2010] HCATrans 154 (15 June 2010)), 1142-4 (French CJ)). In reply Counsel for the appellant directed the Court to the public policy doctrine, with discussion turning to a series of examples, including the pointedly relevant 'charitable trust to fund public debate on the repeal of anti-discrimination laws' (1219-20 (Gummow J)) and the decision of the US Supreme Court in *Bob Jones University v United States (Bob Jones); Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157 1983; *Transcript of Proceedings, Aid/Watch* 1655-1661) considered below. Counsel for the appellant also referred to the exercise of weighing of competing claims to the 'public benefit', of which *National Anti-Vivisection Society v Inland Revenue Commissioner* [1948] A.C. 31 was said to provide an example. In that matter the Law Lords held the political objects exclusion was grounded in an inability to determine whether the change to the law proposed by the appellant would or would not be for the public benefit (62).

The discussion on public benefit culminated in the majority postulating an excluded criteria of activities ('means') and purposes ('ends') whereby advocacy would be non-charitable:

> *'It may be that some purposes which otherwise appear to fall within one or more of the four heads in Pemsel nonetheless do not contribute to the public welfare [read public benefit] in the sense to which Dixon J referred in Royal North Shore Hospital. But that will be by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed "political objects" doctrine'* (557, [49])

Here the majority signal that the implied freedom of political communication does not present a complete salve against the loss of charitable status. They thus leave scope for a finding that certain types of advocacy do not extend the public benefit, determined according to 'the particular ends and means involved'. In so doing they apparently impose a further stand-alone common law exclusion, that operates in addition to the 'public policy doctrine'. However, as Turnour and Turnour (2014: 47) claim, discerning the 'sense' to which Dixon J referred is not straight forward:

> *'It is difficult to derive from this passage a clear understanding of what the majority meant when they referred to 'ends and means', and a review of Royal North Shore Hospital does not seem to shed further light'*

Similarly, O'Connell (2010: 5) recognises that 'the reference to RNS Hospital case does not provide guidance - that case was concerned with encouragement of technical education and did not appear to involve anything that was contrary to public welfare.' We are thus not provided with any clarification as to how the exclusion of 'means', seemingly a direction to consider activities, interfaces with the 'myth of charitable activities' (Cullity 1990: 7).

Chia, Harding and O'Connell (2011, p. 384) identify a further 'unanswered question':

> *'The real difficulty … in determining the extent of the ruling in Aid/Watch lies in the fact that the High Court judgment does not clearly indicate whether the 'public benefit' lies primarily in the generation of public debate itself, in the charitable purpose which is being publicly debated, or in some combination of the two'*

To the extent the public benefit lies in the charitable purpose itself, post adoption of section 12(1)(l) of the *Charities Act*, the *Aid/Watch* decision would provide authority that the public benefit requirement will still remain to be satisfied in respect of that purpose (subject to the appropriate presumptions of Division 2, as may be applicable). If so, the ACNC's opposition is unfounded, a traditional view of marriage must still itself be shown to be for the public benefit, a matter further taken up below in the discussion on New Zealand law. In the alternative, it might be argued that the distinction between 'charitable purpose' and 'public benefit' applied, for example, at the definition of 'charity' at section 5, has the effect that the reference at section 12(1)(l) to the charitable purposes 'in paragraphs (a) to (k)' disqualifies any consideration of the public benefit of those charitable purposes. Would it, however, reflect credit on the law to allow that the purpose of generating debate on a matter that is not itself for the public benefit could be for the public benefit? On the facts before it, the majority considered it 'unnecessary' to consider that question (557, [48]).

To the extent, as previously noted, that the 'common law … will … remain relevant' in interpreting the statutory definition (*Explanatory Memorandum, Charities Bill 2013 (Cth)* [1.19]), the doubts over the proper basis of the public benefit of advocacy and the limitations imposed by the *Aid/Watch* majority may remain under the *Charities Act 2013.* In sum, to the ongoing tension between, first, the ability of a charity to hold a 'purpose of promoting or opposing a change to any matter established by law' under section 12(1)(l) of the *Charities Act* and, second, the requirement that a charity not have a 'purpose of engaging in, or promoting,

activities that are … contrary to public policy' under section 11, the above analysis would add a further tension introduced by a third factor: uncertainty as to the lingering requirements of the public benefit requirement. We are left with a rather uncertain position as to when questions of the public benefit will disqualify advocacy by charities. To consider the extent to which this gives rise to a concern in respect of a charity's position on marriage, I now turn to consider the recent development of the public benefit requirement in New Zealand.

New Zealand

In New Zealand the question of whether promotion of the traditional view of marriage can be for the public benefit has spawned extensive litigation in the Family First series of judgements (*Re Family First New Zealand* [2015] NZHC 1493; *Re Family First New Zealand* [2018] NZHC 2273; *Family First New Zealand v Attorney-General* [2020] NZCA 366). At the time of writing the Attorney-General has sought leave to appeal the matter to the Supreme Court, the final course of appeal. The context of that litigation must be seen against the decision of the Supreme Court in *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (*Greenpeace*), that a '"political purpose" exclusion should no longer be applied', heralding the departure of New Zealand law from Lord Parker's dictum ([3]). In its place the Court posited a test that requires regard to whether the *pursuit* and the *achievement* of the purpose would both separately satisfy the public benefit test (Harding 2015: 183; Murray 2019: 50-51):

> *'assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute'* (*Greenpeace* 2014: 76)

In so holding, the Court imposed a requirement that a charity demonstrate 'tangible utility':

> *'Although, for the reasons given, a political purpose exclusion is inappropriately conclusive when considering charitable purpose, we consider that the promotion itself, if a standalone object not merely ancillary, must itself be an object of public benefit or utility within the sense used in the authorities to qualify as a charitable purpose'* (*Greenpeace* 2014: 103)

The search for the public benefit offered by the *pursuit* component (the 'means' and 'manner') is unique to New Zealand law. As Dal Pont summarises, '[t]he purpose in which the furtherance of which an activity is carried out, not the character of the activity, is what determines whether or not it has a charitable character (Dal Pont 2017: [13.4]).' However, to the extent the focus is on the public benefit offered by the *achievement* of the purpose ('ends'), this is stated to require application of the traditional test of public benefit in the common law (see for example, *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] A.C. 31).

That positions us to consider the relevance of the Family First litigation. In April 2013, prior to the judgement in *Greenpeace,* the New Zealand Charities Registration Board deregistered Family First, an entity whose purpose was subsequently characterised by the High Court as being 'first and foremost to promote the traditional family unit (*Re Family First New Zealand* [2018] NZHC 2273, [60]).' The reasons offered by the Board included that:

> *'the Trust's main purpose is to promote points of view about the family life, the promotion of which is a political purpose because the points of view do not have a public benefit that is self-evident as a matter of law… [and that this purpose] is not a charitable purpose … beneficial to the public within the fourth category of charity'* (Deregistration decision D2013-1: Family First New Zealand, New Zealand Charities Registration Board, 15 April 2013 (CC42358), [2])

Having been directed in June 2015 to reconsider its decision by Collins J in the High Court, in August 2017 the Board affirmed its decision that Family First 'has a purpose to promote its views about marriage and the traditional family that cannot be determined to be in the public benefit in a way previously accepted as charitable' (Deregistration decision D2017-1: Family First New Zealand), New Zealand Charities Registration Board, 21 August 2017 (CC10094), [2]).

In August 2018, on appeal from this second deregistration decision to the High Court, France J affirmed the decision of the Board. Critically, in the context of this discussion, France J's reasoning included an assessment that the 'ends' of Family First's advocacy activities, if achieved, would not be for the public benefit: 'The evidence does not establish that the achievement of these goals would be a benefit to the community in the sense required by charity' ([64]) and thus 'it cannot be shown that Family First's promotion of the traditional family unit, though no doubt supported by a section of the community, if achieved would be a

public benefit' ([65]). This was not expressed to be a requirement of the public policy doctrine, and the finding was not with reference to the public benefit of the advocacy itself, or the 'means' or 'manner' employed. It was a failure to meet the general requirement that all charities have purposes recognized as for the public benefit.

In August 2020 the Court of Appeal overturned the ruling of France J, with Clifford and Stevens JJ stating:

> *'we recognise the point made by [the Charity Law Association of Australia and New Zealand], of the public benefit associated with free speech and associated political discourse in a rule of law, liberal and democratic society such as New Zealand. That is an aspect of public benefit that activities of organisations such as Family First, albeit from a traditional point of view, and other organisations expressing more liberal views, can contribute to.'* (*Family First New Zealand v Attorney-General* [2020] NZCA 366, [153])

It is from that judgement that the Attorney-General now seeks leave to appeal to the Supreme Court. Ironically, it is arguable that the principles applied in the most recent determination have the same virtue that Harding sees in the rule against political purposes:

> *'decision-makers need not inquire into the public benefit of political purposes being achieved; in this way, decision-makers may avoid evaluating political purposes on which there is deep and abiding disagreement within the community'* (Harding 2015: 183)

Above I noted the concern that within Australia *Aid/Watch*, as expressed through the prism of the *Charities Act*, leaves some uncertainty as to the requirements of the public benefit condition when applied to advocacy. As is highlighted in the following discussion of the public policy doctrine, the High Court has shown considerable interest in the development of common law principles of charity overseas. Consistent with the cross-pollination evident in this area of the law, it cannot be discounted that the developments in New Zealand will not be influential for an Australian court called upon to consider these matters. Notwithstanding the most recent position outlined by the Court of Appeal, it is open to Australian courts to take notice of the reasoning of (at the date of writing) three decision makers that the application of the general public benefit test to Family First disentitled it from registration. In the least, against the

uncertainties in the public benefit test within Australia, the array of differing conclusions on the question of the public benefit of a traditional view of marriage reached by New Zealand decision makers only adds to the concern that the Expert Panel's recommendation does not, as desired, put the matter 'beyond doubt'.

The United States

Whereas the relevance of the law in New Zealand to this analysis of the Expert Panel's recommendation chiefly pertains to the public benefit requirement, the principal relevance of United States law is found in the public policy doctrine, which in *Bob Jones* the Supreme Court described as a 'corollary to the public benefit principle' (*Bob Jones*: 2017 [1983]: 591). Acknowledging that *Pemsel* 'has long been recognized as a leading authority in this country', (589) the Court upheld the revocation of the tax exempt status of a university whose segregationist policy contravened the requirement that the 'purpose of a charitable trust may not … violate established public policy' (574). It described this requirement as being directed against contraventions of 'deeply and widely accepted views of elementary justice (592).' The Court declared that racially discriminatory schools fail to exercise 'beneficial and stabilizing influences in community life' (595) and should not be promoted by 'having all taxpayers share in their support by way of special tax status' (595). The result was that such schools 'cannot be viewed as conferring a public benefit within the "charitable concept"' (595-6), as understood by reference to authorities including *Pemsel*.

Turning to the implications of the Supreme Court's recognition of the constitutionally protected right to same-sex marriage in *Obergefell v Hodges 135 S. Ct. 2584 (2015)*, Roberts CJ, in dissent, claimed that the tax exempt status of United States religious institutions that opposed same sex marriage 'would be in question,' as a result of the judgement. In so doing he directed attention to the following exchange between the Solicitor General for the U.S. Department of Justice and Alito J during the hearing:

> JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?

> GENERAL VERRILLI: You know, I -- I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I -- I don't deny that. I don't deny that, Justice Alito. It is -- it is going to be an issue. ('Transcript of Proceedings' Obergefell v Hodges, US. Supreme Court, Trans. 14556, April 28, 2015, [38])

The concerns expressed by Roberts CJ apparently moved John A Koskinen, IRS Commissioner, to clarify in a letter to Scott Pruitt, Attorney General, Oklahoma, dated 30 July 2015, that the IRS does not believe that *Obergefell v Hodges* has 'changed the law applicable to [tax exempt] determinations or examinations [and will not] change existing standards in reviewing application for recognition of exemption'. As Buckles has argued 'the position of the IRS might change, as it did with respect to the admissions policies of schools such as Bob Jones University' (Buckles 2017: 261). We await the realisation of Roberts CJ's prognostication that the issue will in due course come for determination before the Court. In the meantime, if the interest of the High Court Justices in the position in the United States and the wider implications of the public policy doctrine for discriminatory trusts expressed during the course of hearing in *Aid/Watch* is any guide (Transcript of Proceedings, Aid/Watch Inc v Federal Commissioner of Taxation [2010] HCATrans 154 (15 June 2010), 1645-1685; 2985-3005; 3490-3540; (16 June 2010) 4090-4145), the content of the common law public policy doctrine as expressed in the United States holds ongoing potential to influence the form of expression that doctrine now takes in Australia, as contained in section 11 of the *Charities Act*.

Canada

During the course of the hearing in *Aid/Watch* the development of the public policy doctrine in Canada also received considered attention (Transcript of Proceedings, Aid/Watch Inc v Federal Commissioner of Taxation [2010] HCATrans 154 (15 June 2010), 1970-2020; 2975-2985; 3220-3490; (16 June 2010) 4090-4140; 4735-4755). Similar to the position in the United States, the doctrine has also developed with unfolding equality norms. In *Canada Trust Co. v. Ontario Human Rights Commission (1990)* 69 DLR (4th) 321 Tarnopolsky JA considered a trust to provide scholarships determined according to gender, race, religion and ethnic origin to be contrary to public policy, declaring 'public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void' (352-3). Justice Robins concurred:

> *'the settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and respect'* (345)

In *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001, Decary JA stated the public policy test imposed a requirement of conformity to 'definite and somehow officially declared and implemented public policy' (6008).

This common law context is relevant to the current discussion as it explicates the adoption of the following amendment to subsection 149.1(6.21) of the *Income Tax Act* at the time of the amendment of the *Civil Marriage Act 2005* to recognise same-sex marriage:

> *'a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms'* (*Civil Marriage Act 2005*)

It will be noted that, unlike the proposal of the Australian Government, this provision is not addressed to any particular requirement of charitable status, but instead operates to disqualify consideration of an entity's view on marriage in the determination of eligibility for registration. To apply the words of one leading Canadian commentator, albeit posed as a more general proposition, such might be conceived as a 'surgical statutory intervention

> *'through which specific rules or principles are adopted for specific activities [to] bring greater transparency, rationality and integrity to the regulation of activities' and as a means of avoiding imbuing 'charities regulators with excessive discretion'.'* (Parachin 2020: 152).

Conclusion

It is clear that, as has been the position for much of its history, the law concerning advocacy by charities will continue to navigate the most contested areas of public policy and provide a

litmus test for our readiness to encompass competing views. The analysis provided demonstrates that, while the amendment clearly has work to do, opposition to the proposal by the Australian Government to amend the *Charities Act* appears to have not taken sufficient account either of the ongoing uncertainties concerning the public benefit of advocacy in Australia consequent upon the *Aid/Watch* decision, nor of the High Court's willingness to consider the development of the common law in other jurisdictions. Further, a review of this law shows that there are significant reasons to consider that the Government proposal does not go far enough in achieving the 'certainty' that the Expert Panel sought. Rather than targeting the 'public policy doctrine' alone, an amendment that, following the framework adopted in Canada at the time of the introduction of same-sex marriage legislation, disregards the consideration of a charity's position on marriage would, in the Panel's words, put the matter 'beyond doubt'.

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Contested Spaces: A Coinciding Rise of State Regulations and Technomoral Politics of Rights-Based NGOs in India.

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Abstract

Dominant political debates and scholarship on the escalating state regulation of the voluntary sector invariably focus on the causes and agendas behind State action. This paper draws on the recent insights into how increasing state regulation influences the operational space of rights-based Non-governmental Organisations (NGOs) increasingly mediated and negotiated by technomoral politics. The increasing use of legal activism by such organisations to contest the revocation of its registration under the Foreign Contribution (Regulation) Act (FCRA) 2010 shows that implementation of state regulation is a socially contentious process. Since its birth in 1976, the FCRA has continually caused both the Indian state and NGOs to negotiate and redefine their institutional boundaries and political relationships. In this paper, I position the recent tightening and amending of the FCRA regulations as a site where NGOs use constitutional rights and moral claims to both critique, and collaborate with, the state. With the growing rights-based discourses in the global politics, an increasing use of technomoral and judicialised political strategies by NGOs in India presents an opportunity to expand the space of citizen's rights and entitlements in times of shrinking dissent the world over.

Keywords

NGOs; State; regulation; law; Neoliberalism; virtuous politics; India.

Introduction

In 2016, the Indian Ministry of Home Affairs (MHA) rejected the licence renewal application of twenty-five non-governmental organisations (NGOs) under the *Foreign Contribution (Regulation) Act 2010* (the FCRA). An earlier report by the Indian Intelligence Bureau (the IB) in 2014, had made accusations against several NGOs, including Greenpeace, Actionaid, Amnesty International, CORDAID, the Association for India's Development, Gene Campaign and Navdanya for allegedly 'taking down' the country's GDP by two to three percent (Ranjan 2014). The confidential report that was submitted to the Prime Minister's office but later leaked into the media, lay accusations that the NGOs, funded by donors based in the US, UK, Germany and the Netherlands, were a manifestation of the infamous 'foreign hand' and apparently using 'people centric' issues like human rights, government accountability and economic fairness to lead mass protests, and most importantly, to stall 'development' projects in India (Firstpost India 2014). These NGOs were also criticised for painting the government 'Anti-Dalit'[i] which 'harmed' India's reputation in the international quarters (Ranjan 2014; Bhatnagar 2016). These conjured up claims were serious enough that further rigorous amendments to the FCRA were added in 2016 ; such as barring the foreign-funded NGOs, from engaging in 'political activities' and risking dissolution if they failed to inform the central government of any receipt and utilisation of the foreign funds within the first forty-eight hours (The Economic Times 2016).

Several NGOs welcomed the government's move to transparency but also labeled the state action duplicitous and questioned 'why an intelligence agency concerned with terrorism, espionage, and national security would conduct a witch hunt against civil society groups' (Bornstein & Sharma 2016: 77). There was widespread criticism of the lack of accountability of intelligence agencies such as IB, raising questions about 'transparency…being preached by an entity which is very cagey about disclosing any information about itself' to the public (Nayak 2015). In response, several of the effected NGOs filed Writ Petitions (litigation in the interest of the litigant) and Public Interest Litigations (litigation in the interest of the public) challenging the government's use of the FCRA (Sampath 2016). For instance, the Lawyer's Collective whose registration was cancelled by the MHA alleging misuse of foreign funds approached the High court arguing that the MHA order based on the FCRA was erroneous and misinterpreted (The New Indian Express 2017). Similarly, the Indian National Social Action Forum (INSAF) challenged those specific sections of the FCRA that prohibited any organisation from receiving foreign funding if its memorandum or bye-laws reveal its support for intent to partake in political activities (The Wire 2020). The courts in both these cases

reversed the cancellation of FCRA licences and also agreed that 'any organisation that supports the cause of a group of citizens agitating for their rights without a political goal or objective cannot be penalised by being declared an organisation of political nature' (Rajagopal 2020).

The escalating trend of tightening NGO regulation in contemporary India evokes an image of the overpowering state as a 'vertically authoritative entity' (Ferguson & Gupta 2002) striving to control the subversive voluntary sector. Yet, the cited sequence of events reveals that while the government does employ its sovereign authority to make stringent laws, NGOs also contribute to the execution of such laws by vocalising their concerns. The growing literature examining the concern that civil society actors are under pressure has although taken a distinctive perspective on allied and intersecting trends regarding state regulations. The literature on Securitisation of Aid and War on Terror have mostly paid attention to the effects of the state security policies and practices propagated after the Cold war and 9/11 attributing to the negative effects on NGOs. Similarly, for the scholars drawing attention towards the general backlash on the civil society, the rising illiberal NGO legislations have come to alter the representation of NGOs- from working for the common good to the self-interested entities (ICNL 2006). Jalali (2008) and others argue that a narrow focus on restrictive state policies alone cannot clarify why policies unfold differently in various contexts. Similarly, it also neglects to provide the reasons why some NGOs in the same country face more 'criminalisation' than others (Jalali 2008). Scholars (Kudva 2005; Jalali 2008; Dupuy et al. 2014) have argued that a focus only on the government policies ignores to illuminate the entire role of the state, especially how it also creates enabling conditions for NGOs to function. While drawing attention to the multiple roles played by the Indian state: a 'regulator', a 'funder', and also a 'political force', Kudva (2005: 259) has urged for a more nuanced analysis of NGO-state relations in India taking account of the NGO's 'uneasy' partnership with a 'strong' state blended with its own agency (see also – Tandon 2002).

The literature on decoding the civil society space or *civic space* - the political and social landscape where citizens organise, debate and act – brings a more clear focus on the NGOs but it also fails to reveal how exactly they influence the civic space (see – Buys 2018). The literature on *political space* is eclectic and emphasises the role of external environment in defining this space; however it ignores the effects of behaviours and characteristics of NGOs *within* this space (e.g. Popplewell 2018). While theorising participatory development, Cornwall

(2002: 2) posited that *space* is something that is 'created, opened, reshaped' and not which is 'taken up, assumed or filled'. Elasticity rendered to the concept of *space* by Cornwall implies the possibilities of 'reshaping existing spaces, and renegotiating their boundaries' (Cornwall 2002:2). With an increasing concern that civil society actors are under pressure, Borgh and Terwindt (2012) have reasonably argued for reflecting on NGO space as an *operational space* jointly comprised of three distinct factors: the characteristics of the local political field; the particular mix of pressures with which NGOs are confronted; and the characteristics, objectives, and style of operation of NGOs themselves. According to the authors, this framework helps to see the operational space of NGOs not as given or static but rather as a product of interaction between NGOs.

Applying this current literature to the Indian context helps to visualise how all three of these aspects are increasingly mediated by the technomoral politics. Bornstein and Sharma (2016: 77) have defined this form of politics to be a 'complex, strategic integration of technical and moral vocabularies' proliferating in India at 'the intersection of two translocal processes i.e. the global diffusion of neoliberal good governance and development policies and the attendant judicialisation of politics; and the post-colonial Indian history of legal and moral civil society activism' (Bornstein & Sharma 2016: 77). With rising battles over meaning of development and democracy in politically and economically liberalised India, the 'technomoral discourses providing technical solutions to moral, human problems' (Bornstein & Sharma 2016: 79). They emerge from the operational space of rights-based NGOs to express their 'distinctive identities and moral projects' in order to re-negotiate their political relationships with the state (Bornstein & Sharma 2016: 77). The activists of Navsarjan Trust, an NGO working on the rights of the Dalits, when challenged the government decision to reject the renewal of its FCRA licence in the courts, have not only labeled the governmental opposition undemocratic but have also claimed that it is suppressing the rights of the most disadvantaged Dalit people in India. The case illustrates that while projecting itself as the representative of Dalit stewardship, Navsarjan also defends its position on human rights as well as staking a distinctive position in political relations with the state.

While benefitting from an extensive review of the multidisciplinary peer-reviewed publications on NGOs, the present analysis on the coincident rise of state regulations and technomoral politics is also based upon the grey literature and secondary resources such as NGO reports;

cross-sectional surveys; grass-root level campaign information available in the form of NGO memorandums and policy manuals or guidelines; and media articles. I also draw upon my first hand experiential knowledge gained through working (1997-2008) with the local, national and international NGOs in India and being an ongoing active participant of two social media network groups of Indian NGO professionals. The paper also benefits in general from my anthropological research background that includes carrying out multiple ethographic fieldworks (Sabharwal 2009, 2010, 2015, 2019) in several Indian villages where NGOs are also engaged in providing education, health care and emergency relief services to the people.

Missing the State: The NGO literature

NGOs are a particular type of actor in civil society, independent of the state and for-profit associations; however, scholars continue to debate whether and how NGOs in India differ from the other civil society actors such as community based organisations, grassroots advocacy groups, professional associations, citizen groups and so forth (Chandhoke 2003; Kamat 2002; Jenkins 2010; Vakil 1997). The proposed distinction is often contested in India with several activists of people's organisation wanting to avoid the NGO label that according to them denotes an 'apolitical (or worse, non-political or even depoliticising) form of social action' (Jenkins 2010: 411). The NGOs that are the subject of this paper are formal organisations that neither represent the government, nor the informal community based organisations, or the for-profit sector and under the FCRA they are seen to be in the need of a restraint. These NGOs strive to meet the needs of the marginalised sections of society by providing services and/or advocacy for social and/or policy change. For our purposes, NGOs are defined as a legally government registered entity, receiving funds from multiple sources (sometimes including foreign donors).

Much of the multidisciplinary literature produced on the NGO sector tends to look at the NGO-State relations rather narrowly – either optimistically or skeptically. With the inadequacy of state welfare in 1970's and 80's and the rise of globalisation, new political conditions had emerged for NGOs to flourish and academic scholarship emerged that portrayed NGOs in a promising light. This scholarship suggested that NGOs would represent local concerns and also promote liberal values by working towards the social and political reform (Wapner 1995; Keck & Sikkink 1998; Risse-Kappan 2005). With increasing globalisation, it was believed that

NGOs could act for the grassroots desire for liberal values such as social justice, human rights and equality and thereby could be the legitimate representatives of the citizens at large (Khagram et al. 2002). Scholars even argued that apolitical NGOs could act as the 'shadow state' or as parastatal apparatus that ultimately could replace the state's development role (Sen 1999: 329). This literature, however, overlooks NGOs' susceptibility to state coercion and the impact of government ideology or its administrative capacity to shape NGO-state interactions (see – Dupuy et al. 2014; Jalali 2008).

The scholarly critique of the NGO phenomenon that emerged in the nineties was largely from the disciplines of social sciences and development studies. In this literature, the rising number of NGOs and their influence was interpreted as emerging from the 'baskets of (foreign) funding agencies' rather than from the real political struggles of people (Chandhoke 2003). NGOs' dependence on external funding and thereby compliance with the funding agendas, raised questions around whether NGOs were accountable to the people or the funding agencies (Hulme & Edwards 1996). In India, the urban middle class NGO workers who constituted the senior management, were said to be 'not of the community' and by virtue of their class privilege were responsible for contributing to an unequal work culture (Kamat 2002). Such a critique was so prolific that it was seen as an NGO – social movement dichotomy wherein NGOs were considered as office based, reformist entities, making the poor depoliticised and dependent on charity, and social movements were seen as representing the grassroots, being radical, seeking people's empowerment and being essentially political in nature (Karat 1988 in Jenkins 2010).

It is clear that this polemical literature has either overstated state's decline or it is over focused on the international funding while underestimating the state's capacity and power to influence the NGO sector. In contrast, the paper while taking its cue from specifically Kudva (2005) and Dupuy et al. (2014), rests on the understanding that the developmental role of NGOs can be best understood in the context of the parameters set by the state and not otherwise (Also see – Jayasuriya & Rodan 2007). In the following section, the paper illustrates how in India, the NGOs have not been in any way *beyond* the state (Wapner 1995 in Dupuy et al. 2014: 422) and how NGOs 'emerge, operate, use resources, and survive' under the rules enacted by the state governments (Dupuy et al. 2014: 422).

Situating NGOs and state relations in India

After independence in 1947, the remnants of Gandhian voluntary organisations from the freedom movement had come to collaborate with the Nehruvian socialist democratic state on *welfare* and *relief* activities for two main reasons – sustaining the Gandhian legacy and building a new democratic nation. For the first two decades, the state's close collaboration with the Gandhians reflected how the state invested a great amount of hope in civic activism and saw voluntary organisations as 'a force in reinvigoration of democracy' (Jenkin 2010: 412). In a recently decolonised society, civil society actors influenced by the voluntary action for Gandhian Swaraj (self-rule) also had new channels of legal engagement available to them in the form of a newly drafted Indian constitution to protect their fundamental rights and at the same time also to limit governmental powers (De 2014). The primary mechanism of regulation of these organisations was through registration under *The Societies Registration Act of 1860, The Indian Trust Act of 1882,* and the *Charitable and Religious Act of 1920.*

The second phase of NGO-State interaction from the 1970s, was largely influenced by post-colonial politics writ large with the government's populist *garibi hatao* (end poverty) schemes on the one hand, and clamping down on people's democratic rights on the other. Alongside committing to meet people's needs, the government in power also declared a state of emergency attributing causes to internal disturbances due to foreign interventions, curtailing civil liberties for almost 2 years between 1975 and 1977. The sense of optimism about NGOs' potential to play a major role in democracy's reinvigoration in this era coincided with the government passing the Foreign Contribution (Regulation) Act in 1976 in order 'to scrutinise NGOs receiving foreign funds for political activities' (Bornstein & Sharma 2016: 78). The government's anxiety about external subversion – the foreign hand – introduced new stipulations for NGOs as it was assumed that they were likely to threaten 'the sovereignty and integrity of India, the public interest, freedom or fairness of election to any legislature, friendly relations with any foreign state, harmony between religious, racial, linguistic or regional groups threatening' (Jenkins 2010: 415). Scholars now argue that in the wake of this government repression, an increasing numbers of social action groups dubbed as non-party political formations (Kothari 1984), emerged to contribute to political mobilisation which helped not only to bring the emergency to an end, but also how NGOs were seen as 'a force for the reinvigoration of democracy' (Jenkins 2010: 413). By now these groups had expanded their social justice work through newly formed judicial tools such as Public Interest Litigations (PILs). PILs were litigations filed in a court of law for the protection of public interests which

allowed these groups to question government policies and 'make policy interventions, and do political work' (Bornstein & Sharma 2016: 79). Therefore, long-term political struggles such as Narmada Bachao Andolan (NBA – Save the Narmada Campaign) against mainstream development contested through court battles and Gandhian tactics (See – Bornstein & Sharma 2016) compelled scholars to argue that NGOs in India could 'transform political agendas' (Chandhoke 2003: 71). With this, it was noted that NGOs that had previously been restricted to do 'development activities' , by the 1980s expanded their remit to engage in 'advocacy work' or, in other words, funded political activity (Jerkins 2010). Besides using PIL, the NBA activists also used global human rights and indigenous rights instruments to challenge the dam construction and government's failure to resettle dam displaced residents (Khagram et al. 2002).

Since 1970s, the rise of neoliberalism and widening reach of human rights consciousness raised critical questions on whether the increasing number of rights-based NGOs in India was a result of neoliberalism, or encouraged neoliberalism (Moyn 2010). As the number of foreign funded NGOs doing issue-based or rights-based work expanded, it also became increasingly intertwined with proposing technical solutions to moral and human problems under the rubric of good governance, invoking law, policy and constitution (Ferguson 1994; Comaroff & Comaroff 2006). Through interweaving technical proceduralism with moral concerns, NGOs also called for 'good governance' or governmental accountability, which conversely prompted states to closely monitor NGO activities (Sidel 2010).

During this time, the new revised FCRA of 2010 came to reflect more stringent measures for the foreign-funded NGOs as they now had to reapply to the government every five years - and comply to an added condition that FCRA funds could not be utilised for political or 'antinational' activities (Sampath 2016). Through this Act amendment, it was expected that NGOs will stop using 'foreign donations to criticize Indian policies [but] to do development work instead' (Voluntary Action Network of India 2014: 3). By 2016, the escalating state suspicion and tightening of NGO regulation made government revoke the registration of over 20,000 NGOs, technically violating the various provisions of the new FCRA regulation (Bhattacharya 2016). Such widespread cancellations also triggered several NGOs including INSAF to challenge especially the rule 3 of the FCRA (grounds for declaring an organisation political) in the courts where it demanded that the government re-evaluate FCRA and thereby

its execution (The First Post 2013). This shows that instead of missing or being absent, the state has always featured in defining the political relations of NGOs with the state actors.

Operational space of NGOs in India

National political field and context

In a democracy like India, it is visualised that NGOs would have established 'working relations with state agencies in order to reach consensus on particular topics or to make claims vis-a-vis the government or other societal actors' (Borgh & Terwindt 2012: 1069). These 'working relations' that Borgh & Terwindt (2012) refer to evolved in two ways against the backdrop of neoliberal reforms in India. First, there was a shift from 'development needs' to 'rights' talk that came to change the way NGO activists could make a claim on the state. Until this time, for instance, the exclusion and humiliation suffered by millions of Untouchables/Dalits in India had not become a human rights issue. With the goals of eradicating caste-discrimination in the world made the Ford Foundation and Human Rights Watch to give rise to the National Campaign on Dalit Human Rights (NCDHR) in India. The NCDHR campaign filed several petitions to the government demanding 'freedom from caste bondage' for 240 million Dalits and called on the successive governments to implement the Untouchability and the Atrocities Act in its entirety i.e. 'letter, spirit and action' (Bob 2007: 179). As the Indian state moved to privatise the economy with neoliberalism, NCDHR believed that Indian state's lassitude in enforcing its longstanding laws protecting Untouchables could more effectively be addressed by reframing caste-based discrimination into a more internationally attuned framework of work-and-descent-based discrimination (Bob 2007). Neoliberalism, in this way, brought the struggles fought on the streets into the courts (See – Moustafa 2014) and as a consequence, brought rights-based NGOs much closer to governmental practice (See – Odyssseos 2010).

Secondly, there was a dramatic increase in the number of NGOs from only 12,000 NGOs registered with the MHA in 1988 to now more than 2 million registered NGOs (Johari 2014). Some scholars attribute this to the advancing international donors' validation of 'NGOs as efficient development actors and their promotion of state-civil society partnerships in the name of good governance' (Bornstein & Sharma 2016: 80). But with NGOs playing an important role in providing development services, some argue that it has also turned them into 'Trojan horses' 'challenging state authority from within even as state institutions co-opt them'

(Bornstein & Sharma 2016: 80: see also – Sharma 2008). While encouraged NGO activity made the state uncomfortable, there is also a rising criticism of the increased gaps between the idealised NGOs and those NGOs that became conformist or statist agents (Jerkins 2010; Kamat 2004). Therefore, NGO-state 'working relations' in the neoliberal context of India are reflected in both ways i.e. through escalated state restrictions on the NGOs on one hand but also in recognising how the voluntary sector is a moving target that works with, as well as against, state agencies on development and redistributive justice (Also see – Kudva 2005).

Restrictive policies and actions

To understand the particular mix of pressures faced by rights-based NGOs in India, I divide the state restrictions into the following three categories: physical harassment and intimidation; criminal investigations; and administrative actions. Since India formally recognises basic rights and freedom of association, restrictive policies for NGOs are more at the level of formal laws and procedures (Buyse 2018) and so far there are relatively few reports of NGO staff being physically harassed and intimidated. However, there is certainly an increased rate of using *criminal investigations* against rights-based NGOs, but in most cases they are preventive measures such as account audits, police raids at NGO offices and the homes of NGO staff, blocking of bank accounts and seizing of computers along with mobile phones and personal documents (Shekhar 2019). The use of criminal proceedings has been very selective. For instance, a social media post by the ex-director of Amnesty International triggered the police filing a report against him (The Statesman 2020). Simply attending a Dalit event or singing Dalit resistance songs have also been pronounced criminal acts and participating activists have faced police arrests (Jenkins 2019). The administrative amendments discussed earlier have rendered the FCRA more stringent with a new requirement for licence registration to be renewed every five years; while the state retaining the arbitrary powers to refuse the renewal of the NGO licences without providing any valid reasons. The NGOs and activists criticised the government for selective targeting as the licences were first renewed and then revoked in disregard of any explanations or arguments by the government (Bhatnagar 2016). The new state regulations also expect NGOs that seek registration or prior permission for accessing the foreign contributions to register on the government online portal DARPAN- a platform that aims to provide space for an interface between NGOs and the key government ministries.

However, it is estimated that less than fifty percent of NGOs have taken an initiative to register on DARPAN since its introduction (Johari 2017). According to a representative of a peak body of voluntary organisations in India – VANI (Voluntary Action Network of India), several NGOs are not certain on the use of such portal websites because 'there are no explanations for these steps, just dictates from the government' (Johari 2017). NGO activists also alleged that the compulsory reporting mechanisms as part of DARPAN's registration reflect almost '*Aadhaar* (a biometric ID system for the Indian citizens by the government) kind of stipulations for NGOs'. Because divulging information through periodic reports could easily be used against several rights-based organisations that are trying to change the governmental policies and practices and are often at 'loggerheads with the government' (Johari 2017). This has also pushed several NGO representatives to characterise and designate such administrative restrictions as rather political in nature (Ganguly 2016).

Part partnership part opposition

As discussed earlier, rather being dichotomous, the relationship between NGOs and the state in India has moved along an oscillating continuum from sometimes being a dependent-client relationship to being a cooperative and also an adversarial one. In recent years, the relationship was defined as 'part partnership part opposition' where NGOs have positioned themselves as insiders as well as outsiders. They have been part of official commissions, advised the state on its five yearly development plans and also lobbied the government officials to change policies and introduce new citizenship rights. But a rightward push of the state has also witnessed a resurgence of the Hindutva with Rashtriya Swyam Sevak Sangh (RSS), the ruling party's right wing Hindu nationalist organisation, growing in prominence within the civil society domain (Varshney 2001), As compared to more professionalised partnerships in the past, the new model is claimed to be deeply polarised where Hindu organisations are setting the partnership agenda with the government (Singh & Behar 2018). Such coopting of the operational space of NGOs has also led to a new situation of NGOs being 'disallowed' from these collaborative spaces by the revocation of their FCRA licences when they differ from the right-wing political agenda of the government (Singh & Behar 2018: 136). With the rise of religious politics, the rights-based NGOs especially face difficult choices on whether to engage with the state or

remain aloof from the domain of the political agenda of the conservative politics (See – Jenkins 2010).

Response strategies of NGOs

As discussed earlier, challenging state policies through judicialised activism is not new in India. Some scholars argue that the increased use of technomoral politics by the NGOs has been aggravated due to the depoliticising effect where 'policy comes to replace politics' in the neoliberal context (Randeria & Grunder 2009 in Bernstein & Sharma 2016: 78). For instance, 'right to food' campaign activists had filed a Public Interest Litigation in the Supreme Court demanding country's food stocks to be used against hunger and starvation turning food security and poverty alleviation into the moral case of governmental responsibility (Bornstein & Sharma 2016). This shift of the politics into the legal or 'judicialisation of politics', (Comaroff & Comaroff 2006: 31), and the moral manifests a new form of politics (Bornstein & Sharma 2016) expressed by NGOs invoking legislative and constitutional rights in asserting their positional politics as also indicated in the following case of the Navsarjan Trust.

The technomoral politics of Navsarjan Trust

Established by Martin Macwan, a Dalit lawyer turned activist, Navsarjan (New creation) Trust worked on Dalit rights, to eliminate untouchability practices based on caste-discrimination. By 1998, Macwan, after becoming the first president of NCDHR, had broadened his fight by organising rights-based campaigns such as human rights value education, land rights, local governance, political rights and women's rights. Navsarjan's other advocacy tactics included organising workshops with senior advocates on changing laws, campaigning for exclusive courts for Dalit cases, digitising of key data to address caste discrimination, training and building capacities of the Dalit members of village councils and writing research reports on topics such as Dalit rights and empowerment (Navsarjan Trust website). In the last three decades, Navsarjan has also filed a total of sixteen petitions and two PILs in the courts demanding governments to strengthen laws and policies that establish equality and eliminate caste-based discrimination and violence against Dalit. For spearheading the important work on Dalit rights in India, Macwan has been recognised by two prestigious global awards, helping

Navsarjan in acquiring international legitimacy as well as overseas funding from the transnational donors (Bob 2007). Navsarjan is one of the largest grassroots NGO in the state of Gujarat and about eighty five percent (20 Million USD per year) of its funding to work in 3000 villages is secured from foreign sources (DNA 2016). Before the cancellation of its FCRA licence, Navsarjan had more than 80 field staff to run Navsarjan Vidhalayas (boarding schools from grades five to eight) and provide youth education on land laws, development schemes and how to combat drugs and alcohol addiction (DNA 2016). Navsarjan has combined the transformative politics of the Dalit rights' movement with a service-delivery approach as it has offered children's education in the Navsarjan Vidhayalas and has also mobilised the Dalit village council members, by keeping participatory governance on its political agenda (See – Jenkins 2010). This hybridity that Navsarjan has achieved and intersects in its vision and work, according to Bornstein and Sharma (2016), is also at the center of the technomoral politics.

Movement-based activism in India is associated with undertaking *political* activities whereas NGOs are assumed to take on *non-political* supportive work. Since NGOs are unaccountable to the public, they are often considered morally questionable due to their alliances with the international donors (Hulme & Edwards 1997; Kamat 2004). Despite its predominant reliance on foreign funding, Navsarjan has undertaken political activities. While countering the untouchability practices and simultaneously establishing 'equal citizens without discrimination' as a central education policy in its boarding schools, it has also avoided the so-called NGO trap. Technomoral politics, in this way, certainly relieves Navsarjan from obfuscating the overly simplistic division of movement politics and service delivery in its work (Also see – Jenkins 2010).

Macwan claims that Navasarjan's FCRA licence cancellation is an arbitrary use of the state power because there are no legal procedures that Navsarjan has violated to invite such a governmental action (The Counterview 2017). He reveals that Navsarjan had renewed its FCRA licence on August 3 2016 permitting them to utilise foreign funds, but for no apparent reason the licence was made invalid on November 15 2016. What would have happened within a span of three months for MHA to declare Navsarjan an anti-national organisation remains a puzzle for Navsarjan (The Counterview 2017). Macwan also raises questions on the legal basis of the governmental audit of Navsarjan's accounts undertaken after the revocation of its FCRA licence (The Counterview 2017). Macwan declares the FCRA revocation to be a non-

administrative exercise that shows lack of transparency on the government's part (The Counterview 2017). Despite criticising the government's performance in executing FCRA, Macwan himself is not strictly past or beyond the state (Lewis 2010). He has acted as a government advisor to the planning commission (Niti Ayog), a central authority formulating India's five-yearly plans, besides teaching and training the magistrates, judges and civil servants (The Counterview 2017). After the un-democratic decision to revoke its FCRA licence, Navsarjan activists have expressed their deep anguish to the Indian President, Prime Minister, opposition leader, and to twelve different local government offices in their targeted villages (The Counterview 2017). They have painstakingly made visits to each of the government district headquarters and digitally recorded the act of handing over the protest memorandums to the district collectors. Such an undertaking of protest performances at the government offices has reflected that Navsarjan does associate itself with the rule of law but only through counter-posing movement-based politics as virtue. Even with such political activism, when Navsarjan made the case for more ethical politics, it separates itself from the undemocratic politics of the FCRA execution, but carries the need to infiltrate the state with twelve protest memorandums, in order to democratise it (Also see – Bornstein & Sharma 2016).

After Navsarjan's FCRA licence was revoked in 2016, MHA provided an official statement highlighting the reasons behind the licence cancellation. The MHA declared in its statement that Navsarjan is involved in 'undesirable activities aimed to affect prejudicially harmony between religious, racial, social, linguistic, regional groups, castes or communities' (Johari 2016,). Navsarjan's long reputation of being dedicated to the Dalit cause and Macwan's image as a devoted activist fighting tirelessly against caste-discrimination was no doubt defamed with the release of MHA's statement. In response, one of the Navsarjan's protest memorandum, given to the Amreli district collector on 15th December 2016 invoked technical as well as moral concerns by stating, '…to the contrary, for the past 27 years, Navsarjan Trust has been a critical force to uplift the Dalit community and has been a dedicated advocate for Dalit rights as provided by the Indian constitution and laws' (The Counterview 2017). Navsarjan in its response to MHA choose to frame its virtuous politics within the rights domain reflecting Navsarjan's long standing emphasis on using human rights framework to voice cultural and social discriminations against untouchables in India. Several scholars have now argued that with an expansion of the human rights discourses and institutions, they have also become intertwined with the proposed technical solution to moral or human problems (Kamat 2004;

Bob 2007). In other words, Navsarjan's vision of Dalit rights re-defines socially inflicted caste discriminations as economic and social rights (Bob 2007). Navsarjan has fought to defend and extend Dalit rights by successfully bringing changes to laws and policies such as those aiming to rehabilitate manual scavengers through state reforms, and by canvassing for Dalit jobs through Safai Kamdaar Municipal Corporation, and through the allocation of land to landless Dalits and in the process making the state democratic. This interweaving of technical proceduralism with moral concerns by Navsarjan is located in the same neoliberal context that also exacerbates the caste violence against Dalits in India (Bob 2007). Navsarjan uses the same technical means provided under the rubric of good governance to fight against caste-based discrimination that also secularises the untouchability or politics of identity, rooted in the centuries old cultural history of India (Rao 2009).

The case study of Navsarjan illustrates how FCRA regulation and its execution are actually situated in a contested socio-legal domain. The particular contestations highlight how institutional identities are troubled and mediated by the technomoral politics where non-state actors constantly try to position themselves as more transparent and ethical than the state. While using FCRA amendments, the Indian state wants to act transparent but Navsarjan uses legal activism to prove otherwise. Similarly, the state through FCRA calls out the NGO's work as political but the technomoral politics of Navsarjan has shown that how it is not easy to delineate. Overall, these contestations, while reflecting the larger debate around whether NGOs represent funding agencies, or people; and whether as an NGO they constrain political activism or not, shows the ever-changing matrix of the NGO-state relationship in India.

Conclusion

In response to the tightening regulation of the voluntary sector in India, the former United Nations (UN) special Rapporteur on the Rights to Freedom of peaceful Assembly and of Association, Maina Kiai, had pointed that certain provisions of the FCRA were not in conformity with the international human rights law and noted that, 'access to resources, including foreign funding is a fundamental part of the right to freedom of association under international law, standards, and principles, and more particularly part of forming an association' (Former UN special Rapporteur 2016). Invoking human rights to contest FCRA is part of the technomoral approach and, like Navsarjan, several other NGOs such as

Greenpeace, Sabrang Trust, INSAF, and Lawyer's Collective have methodically employed legal tactics to contest the governmental legal action. INSAF's petition contesting government's power to categorise any NGO as 'political' and to curtail its foreign funding as a violation of the fundamental rights enshrined in India's constitution, was also successful and concluded in a positive judgment. In March 2020, the Supreme Court agreed that 'political interests' described in the FCRA are 'vague and susceptible to misuse' the judiciary decided that NGOs demanding the 'citizens' rights through legitimate methods of expressing dissent could not be deprived of funds from foreign contributors' (Scroll, March 2, 2020). But within a few months in September 2020, the government also passed another parliamentary bill introducing further new additions and amendments to the FCRA. As per these new amendments, NGOs would have to drastically reduce the amount of funding that they spend on the administrative expenses while no NGO could access foreign funding without a prior permission from the concerned ministry.

The coinciding rise of state regulations and technomoral politics of NGOs in India, both unfold in the socio-legal field. State and non-state actors together join in these politics and render law-making a contentious social process (Bornstein & Sharma 2016). The FCRA and its amendments in a democratic context does reflect the power of the state but such laws and policies are also a key ground for NGO activism allowing it to critique state power and possibly alter governance structures. Navsarjan's negotiations and several positive judgments in favour of NGOs show that increasing use of technomoral politics also offers a hopeful potential to fight and defend the realm of rights. The case does reflect that the use of technomoral politics is constrained by the liberal-democratic framework in which technomoral politics operate. But this also illustrates that NGOs like Navsarjan are moving towards a new kind of 'positional politics' rather than being gradually depoliticised. Despite being at loggerheads with the ruling Hindu right government, a growing electoral success of especially Dalit women (Kamble 2019) demonstrates the 'politics of positionality wherein state and non state actors strategically construct their identities and difference in relation to one another' (Bornstein & Sharma 2016: 83).

Given the rising importance of rights-based discourses in global politics that usually deploy technical and moral idioms, it is anticipated that state regulation of NGOs will grow in India and elsewhere. It is quite likely that the use of technomoral politics will also expand in concert.

But noted earlier, this does not mean that other forms of NGOs engagement or mobilisation would diminish. Contemporary movements in India such as campaigns for Anti-Citizenship Acts amendments and NGOs being 'COVID warriors' (Gul 2020) show that legal activism does not preclude but rather facilitates NGOs' work, helping expand the sphere of dissent in a context that is under threat more than ever before.

NOTES

[1]The literal meaning of Dalit translates to 'oppressed' or 'broken'- is generally used to refer to people who were once known as 'untouchables' in the Hindu caste structure.

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FROM THE FIELD

China and its Regulation of Overseas NGOs, Foundations, and Think Tanks: Four Years of Implementation of a New Securitised Policy and Legal Framework

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Abstract

Four years ago, China adopted a sharply focused, comprehensive and restrictive regulatory framework for the control and monitoring of overseas nongovernmental organizations (NGOs), foundations, think tanks, trade associations and other nonprofits working in China, including those from Hong Kong and Taiwan. This report from the field discusses the origins and development of this new framework, which is centered in the Overseas NGO Law (2016, eff. 2017); analyses China's goals for this framework and methods of achieving the control it seeks; reviews the first four years of implementation of these new restrictions on overseas NGOs, foundations and other entities; and discusses some of the few formal enforcement actions taken by Chinese security forces to implement the Overseas NGO Law framework – and how much enforcement falls outside of formal sanctions.

The result of this multi-year process is comprehensive control and monitoring of the activities and grant-making by overseas NGOs, foundations and other nonprofits in China, including now increasingly in Hong Kong as well. Despite earlier hopes in China and beyond that the constraints of this new framework might be slightly loosened once China's political and security apparatus perceived full control over the overseas nonprofit sector working in China

(and now Hong Kong), there is no current sign of any relaxation in these measures, even in minor forms.

Keywords

Foreign funding; foundations; nongovernmental organizations; China; enabling environment; funding barriers; securitisation

Securitising overseas NGOs, foundations and other nonprofit organisations in China in the Xi Jinping era

We are now four years into the implementation of a sharply focused and restrictive Chinese regulatory framework for the control and monitoring of overseas nongovernmental organisations (NGOs), foundations, think tanks, trade associations and other nonprofits working in China. China has long monitored and restricted the work of overseas nonprofits in China, but these controls have taken new steps forward since the Xi Jinping administration came to power in 2012.[ii]

Prior to that, while China actively watched and at times restricted what nonprofit organisations could do in the country, that control and surveillance was uneven, dotted with silos of regulatory activity in which nonprofits could seek a place in which to operate that was somewhat askew from the Chinese state, and with episodic or even haphazard enforcement.

Different Chinese regulators regulated different silos – corporates and consulting firms working in the nonprofit space; foundations; community development organisations; more recently social enterprises, to name a few – and there was no one central regulator that understood and controlled the full range of what overseas nonprofits were doing in China and reported to Chinese political authorities on the activities of the sector.

The Restrictive Framework of the overseas NGO law (enacted 2016, effective January 1, 2017)

That siloised, fragmented framework of control largely ended with the enactment of the *Law on the Management of the Domestic Activities of Overseas Nongovernmental Organisations of the People's Republic of China* in April 2016 (Overseas NGO Law). The Law, effective

January 1, 2017, applied one political and legal framework to virtually all overseas nonprofit organisations in China, including those based in Hong Kong and Taiwan.[iii]

Under the Overseas NGO Law, there are two channels for overseas NGOs, foundations and other nonprofits to work in China – through the registration of an office in China（登记设立代表机构）with the agreement of a professional supervisory unit/partner institution（业务主管单位）; or through filing of 'temporary activities'（备案临时活动） with Chinese regulatory authorities. In both cases the overseas organisation must have a Chinese partner that vets, follows and collaborates in its activities.

The regulatory authority for both channels of activity, and for the work of all overseas nonprofit organisations in China since 2017, is the Ministry of Public Security in Beijing, one of China's major domestic security agencies.[iv] By June 2020, when this is written, the Ministry of Public Security has approved 550 office registrations by overseas (including Hong Kong and Taiwan) nonprofits in China, and 3,017 temporary filings of one year project activities by overseas nonprofits, in each case working with Chinese partners.[v]

Why is China doing this? At its root, China is securitising and closing civic space for overseas nonprofits, and a similar process is underway for domestic Chinese nonprofit organisations as well. China wants nonprofit organisations to be focused on service delivery and on cooperation with the state in managing society, and restrictions on both overseas and domestic groups are intended to pursue that policy framework and discourage advocacy except with permissible bounds.

As I and others have discussed in other work (Feng 2017; Jia 2017; Shieh 2018; Sidel 2018, 2020; Batke 2020), China's recent moves in these area are in part related to Chinese concerns about 'color revolutions' – the civil society-led popular movements which have swept Eastern and Central Europe, the Middle East, and Hong Kong in recent decades. In particular, the 'umbrella movement' in Hong Kong deeply worried the PRC authorities and helped lead directly to the passage of the Overseas NGO Law in 2016.

These restrictions have proceeded in two general phases. For overseas nonprofit organisations, in the first phase, the Ministry of Public Security was charged by Chinese political authorities (and in particular the new National Security Commission set up as Xi Jinping came to power in 2012) with developing centralised control and knowledge over the activities of overseas

nonprofit organisations in China. The Overseas NGO Law was the primary method of reaching that centralised control and knowledge. In a short span of four years, the Ministry has become the primary repository of knowledge and control of the activities of overseas NGOs, foundations and other nonprofits in China, from a weak base of knowledge and an uncertain control framework as recently as 2015 (Feng 2017; Jia 2017; Shieh 2018; Sidel 2018, 2020; Batke 2020).

In a second phase, which arguably began 2019 after widespread control and knowledge of the activities of overseas nonprofits in China was attained in phase one, the Chinese authorities have begun re-molding the role of foreign NGOs and foundations in China – by seeking to manage more intrusively, in some cases, the activities that those groups can undertake; by suggesting or mandating leadership of offices and projects in China, and in other ways.

Throughout all of this, the authorities have sought to gain full knowledge and control of the activities of overseas NGOs, foundations and other nonprofits in China; eliminate advocacy by overseas NGOs and foundations; to eliminate overseas funding of domestic advocacy organisations; to remove overseas nonprofits as interest groups in Chinese policy processes (Sidel 2020; Batke 2020).

In all of these goals the Ministry of Public Security has been highly successful in the tasks set for it by the National Security Commission and in the Overseas NGO Law. And it is important to note that this effective extension of control over overseas NGOs, foundations, trade associations and other nonprofits includes nonprofit organisations based in Hong Kong, Taiwan and Macao – the Chinese legislation specifies 'overseas' (*jingwai*) and that includes those areas, not just 'foreign.'

The overseas nonprofit organisations that remain in China, either with offices or with projects, have learned over the past several years that their activities and operations will be at least somewhat more constrained than in the past. This is, in effect, the bargain they must make for remaining in China in a legalised fashion.

Program planning must now be done well in advance, since a plan needs to be submitted for the following year and then reported on at the end of the year, reducing the flexibility in response that many NGOs and foundations treasure. Advocacy and policy activities are now rarely possible. Funding and support for domestic rights organisations and groups is virtually

impossible. Most program and other activities require the agreement and approval of the Chinese substantive partner and, in most cases, a local public security authority (Feng 2017; Jia 2017; Shieh 2018; Sidel 2018, 2020; Batke 2020).

This framework is comprehensive, and that has important implications for its enforcement. With the use of Chinese partner agencies and organisations to serve as partners for overseas NGOs, foundations and other groups, the Ministry of Public Security manages and operates this system in a vertically integrated fashion from Beijing down to the county level (where there are overseas NGOs or other groups operating) throughout the country.

Public Security's work on monitoring and controlling the work of overseas NGOs, foundations and other nonprofit groups in China has proceeded in two general stages. In the first stage, and at the overall political direction of the National Security Commission and the Communist Party, Public Security has gained comprehensive control of the overseas nonprofit sector in China and built the infrastructure for continuing knowledge, information, control and enforcement.

Since roughly the beginning of 2019, having gained that comprehensive control in the first two years of implementation of the Overseas NGO Law, the Ministry has begun the process of molding the work of foreign groups in China. This goes beyond the initial permission and control processes, seeking to influence programmatic activity by urging NGOs to support political priorities such as China's Belt and Road Initiative abroad. In some cases, the Ministry has sought to encourage overseas nonprofit organisations to nationalise the leadership of their operations in China, particularly as current directors and representatives finish their terms.

This hardened, securitised situation has left overseas nonprofit organisations with few choices. If they wish to remain working in China, they must adapt to the new strictures imposed by Chinese policy and the Overseas NGO Law; survivors with less flexibility. This has included, in some cases, ending work in disfavored areas such as governance, legal rights, and domestic violence. A few have moved their China operations out of the PRC to Hong Kong or even Taiwan, but in Chinese eyes this does not exempt them from having to follow the Overseas NGO Law and its requirements of either permission to operate projects (temporary activities) or an office registration in China.

Some organisations, faced with lessening flexibility, have sharply curtailed or ended their involvement in Chinese programs. Some organisations abroad, both funders and those

operating programs, have sought to work in China in the shadows, sending funds in quietly from abroad, working quietly through Chinese partners, and in other ways. Some organisations that arguably operate as social enterprises or even as businesses have sought to obtain exceptional status, with only modest success.[vi]

Perhaps the key way for overseas nonprofits and foundations to continue working on policy and advocacy issues in China has been through Chinese universities. The Overseas NGO Law exempts overseas universities and scientific and technological institutions and their Chinese counterparts from the Overseas NGO Law when they engage in 'academic exchange and cooperation' under Article 53 of the Law, an important term that is undefined in the Law or in any subsequent regulatory document[vii]. Under this 'carve out', some overseas groups have been able to work through foreign academic institutions, and in a very small number of cases directly through Chinese academic institutions, to carry out some work without registering under the Overseas NGO Law.

There remain a number of issues for the Ministry of Public Security and other Chinese policymakers to work out in the implementation of this new system for governing the work of overseas nonprofits in China. The scope of 'temporary (project) activities' remains somewhat unclear, even four years after the enactment of the Overseas NGO Law. How long and how widely the university and academic 'carve out' from the prohibitions of the Law will remain available remains unclear, as Chinese universities begin the process of enacting their own regulations governing work with overseas NGOs and foundations, with national encouragement. The scope of acceptable overseas corporate philanthropy remains somewhat unclear, as does the definitions and entitlements to overseas social enterprises. Policy toward the few foreign think tanks operating in China remains murky.

In the next several years, a number of important issues confront overseas nonprofits working in China. Perhaps the most important is whether some overseas groups and foundations will continue operating in China as their programming options their narrow – even as they have become more legalised in China than they may have been before. For now, the major foundations and most of the major international nonprofit organisations remain in China, but they will need to think about their longer term prospects, particularly if they want to work on advocacy or even capacity building activities.

Enforcement of the new Chinese framework of overseas nonprofit organisations

The key elements of the new Chinese securitised and centralised system for controlling and monitoring the work of overseas nonprofit organisations is generally outlined above. In the remainder of this short article, I focus on how this new framework is being enforced by the Chinese authorities.

I focus on this because of a few well-known cases of enforcement and punishment, but also for a perhaps more paradoxical reason – that there have actually been relatively few cases of actual, formal enforcement of the securitised and more restrictive provisions of the new Law on the work of overseas nonprofits in China.

In a system that very clear securitises and restricts the work of overseas NGOs, foundations and other nonprofits in China, why has there been so relatively little formal, actual enforcement of the Law?

It is not because the Law does not contain available sanctions. The Overseas NGO Law permits the government to issue administrative and criminal punishments against offending overseas nonprofit organisations and their Chinese counterparts, and, as indicated above, vests all power and responsibility under the Law in the Chinese Ministry of Public Security, which uses its enforcement powers in other contexts without much hindrance.

It is the structure of the Law and the framework that the Ministry of Public Security and others in the Chinese polity set up to manage overseas nonprofits that results in relatively little actual, formal administrative or criminal enforcement under the Law.

In a permission- and partner-based regulatory structure, where each overseas nonprofit must find and sign an agreement with a Chinese partner that is responsible for its activities, and obtain permission from the Ministry of Public Security to carry out its activities in China, most non-obedient nonprofits are weeded out in the careful and multi-step administrative process that is required to obtain permission either to set up an office in China or to carry out project activities. And the required Chinese partner for each overseas organisation and each activity have primary responsibility for vetting those activities and for making sure that the overseas organisation does not overstep its bounds.

So, in most cases, 'enforcement' is an *a priori* matter of vetting and permission. Only those activities which are vetted and permitted are allowed, and most nonprofit organisations do not go beyond those. Where NGOs or foundations seek to carry out activities beyond those approved in advance through formally filed annual plans, the Chinese organisational partners and sometimes the public security authorities must approve those new activities as well. Most enforcement activities are not needed because the licensing and permission process weeds out virtually all activities that that Chinese state would prefer not to occur.

That accounts for most 'enforcement' of the strictures on overseas nonprofits in China. Yet over almost four years since the Overseas NGO Law came into effect in January 2017, there have been a handful of formal enforcement actions against overseas nonprofit organisations and their Chinese counterparts. Here I briefly review several of these enforcement actions and try to discuss how they 'slipped through the cracks' and why the Chinese authorities may have taken enforcement action against them.

Detention of Taiwanese NGO activist and labor activists from China Labor Watch (May/June 2017)

In May and June 2017, a Taiwanese NGO activist named Lee Ming-che was detained in China, supposedly in connection with his ties to Chinese NGOs. Official Chinese news services said that Lee had 'colluded with mainlanders … established illegal organisations, and plotted and carried out activities to subvert state power' (AFP 2017; Wong 2017).

In November 2017, Lee was sentenced to five years in prison in China for political activities on the mainland and assisting families of Chinese dissidents (Human Rights Watch 2019; Batke 2019). In May and June 2017, several activists who worked with China Labor Watch, which is based in Hong Kong and New York, were detained in China in connection with their investigations into labor violations at Chinese factories (Batke 2017a, 2017b).

These may have been the first detentions of persons associated with overseas NGOs and NGO activity since the Overseas NGO Law came into effect in January 2017. But the Overseas NGO Law was not directly invoked when the detentions of these personnel were announced, and the criminal action taken against the Taiwanese activist Lee Ming-che proceeded under Chinese criminal law, not under the Overseas NGO Law.

At various points analysts have asked whether the Overseas NGO Law may be formally cited in charges against Hong Kong or other labor activists detained in China (ChinaFile 2018a), but at the time of this writing this does not appear to have taken place. Labor activists detained in China appear to be being charged under Chinese criminal and labor law.

Detention of Canadian Michael Kovrig from the NGO International Crisis Group (December 2018)

In December 2018, China detained a senior staff member in the international NGO the International Crisis Group (ICG) in Beijing, and initially seemed to indicate in an announcement by the Chinese Foreign Ministry in Beijing that he had been detained under the Overseas NGO Law for unlawful activity by an overseas nongovernmental organisation (Batke 2018).

But the mention of the Overseas NGO Law was quickly dropped. Kovrig remains in harsh detention in Beijing as of the time of this writing (December 2020), and it quickly became clear why he had been detained – as retaliation, and hostage taking for the detention in Vancouver of a senior official of the Chinese information technology firm Huawei on charges pending and an extradition request from the United States.

The International Crisis Group had operated openly in China and with Chinese institutions for a number of years, and had been engaged in trying to become legalised in China through an office registration or filing of temporary activities under the Overseas NGO Law. Those attempts had not been completed when Kovrig was taken. Other than the initial mention by the Chinese Foreign Ministry shortly after Kovrig was taken, the Chinese authorities seem not to have (or not at all frequently) raised the Overseas NGO Law in connection with Kovrig's detention.[viii]

Administrative detention under the Overseas NGO Law: Rainbow China (Hong Kong) (January 2019)

In January 2019, one of the leaders of a Hong Kong LGBT advocacy and HIV/AIDS activist organisation named Rainbow China was detained in Shenzhen, just over the border from Hong

Kong in Guangdong Province, subjected to administrative detention under the provisions of the Overseas NGO Law, and then deported from China back to Hong Kong.

The exact circumstances and reasons for Mr. Cheung Kam Hung's administrative detention and deportation under the Overseas NGO Law are not clear, though Rainbow China was reportedly involved in advocacy work on LGBT and HIV/AIDs issues in China. One of the curious elements of this case was that the deportation order issued against Mr. Cheung was issued from the public security authorities in Wuhan, a major city far from Shenzhen, and a metropolis not known as a hub of activity for Rainbow China (ChinaFile 2019; HK01.com 2019).

Penalties to the US NGO Asia Catalyst for Violations of the Overseas NGO Law (November 2019)

In November 2019, in a surprising move, the Chinese Foreign Ministry announced administrative sanctions against the American NGO Asia Catalyst for unlawful activities in China (Parkin 2019)[ix].

This is another curious case. Asia Catalyst had filed to undertake 'temporary activities' in China 'to provide support to Guangzhou community organisations that work with people living with HIV/AIDs' and had been listed on the 'temporary activities' (project activities) official database compiled and issued by the Chinese Ministry of Public Security. That project, 'Capacity-Building Training for Guangzhou-Area AIDs Organisations,' had been organised with the Yuexiu District Zhitong Public Welfare Service Center in Guangzhou.

But this approved project activity was removed from the Ministry of Public Security official database in June 2018, without explanation. Asia Catalyst reported that 'the activity in question did not take place, or that if the [Service Center in Guangzhou] did carry out the activity, it did so with another partner and Asia Catalyst was not involved' (ChinaFile 2018b).

Then, in November 2019, two Asia Catalyst consultants in Beijing were brought in for questioning in connection with these activities, and Asia Catalyst was issued with a violation letter. After Asia Catalyst indicated that these activities had not taken place and the consultants agreed not to carry out unapproved activities, the matter appears to have ended – though the violation letter appears to be still in place.

The other 'temporary activity' (project activity) that appears to have been approved by public security authorities and then dropped from the temporary activities database was an 'anti-domestic violence law conference' co-convened by the American Bar Association and the China Legal Exchange Center in Beijing. By 2018 the ABA had moved their previous Beijing office to Hong Kong. The conference was indeed held in Beijing in April 2018, but the temporary (project) activity listing disappeared from the official Ministry of Public Security website in July of that year. No explanation was given (ChinaFile 2018b).

Enforcement Through Regulatory Means and Very Episodic Coercive Enforcement

Among the more than 500 overseas nonprofit offices registered in China and the more than 3,000 project activities registered with an approved partner by Chinese authorities since the Overseas NGO Law came into effect in January 2017, there have been relatively few cases of coercive enforcement under the Law, and several of those enforcement cases are murky.

In that sense, from the perspective of the Chinese authorities, the regulatory framework established under the Overseas NGO Law has been a success; the overseas groups that China most wants not to be active in the country are, unless they go underground, largely weeded out in the application and approval process (Sidel 2020).

What remains are a few cases of post-regulatory coercive enforcement, largely based on individual facts, and intended to send a message to specific organisations and a broader array of advocacy groups in China and abroad. When the application and approval process is so highly controlled and extensively vetted, most advocacy and other 'troublemaking' NGOs are weeded out in the process, and little coercive enforcement is needed. That appears to be the key lesson from enforcement of the China Overseas NGO Law in its first years.

NOTES

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[ii] Significant restrictions on foreign NGOs and foundations are not only the product of Chinese political authorities and regulators. Around Asia and far beyond states and regulators have long restricted the activities of foreign NGOs, foundations and other nonprofits in various ways – from restrictions on establishment to limitations on activities, financing controls, and a myriad of other controls. For further discussion of these and other limitations on civil society organisations in Asia, see Sidel and Moore, *The Law Affecting Civil Society in Asia: Developments and Challenges for Nonprofit and Civil Society Organisations* (ICNL, 2020), at https://www.icnl.org/post/report/the-law-affecting-civil-society-in-asia.

[iii] For the text of the Overseas NGO Law, see https://www.chinafile.com/ngo/laws-regulations/law-of-peoples-republic-of-china-administration-of-activities-of-overseas.

[iv] In thinking about these issues over a number of years, I am grateful for the friendship and fine work of Jessica Batke, Jia Xijin, Shawn Shieh, Katherine Wilhelm, and others. Their and others work are cited below and in my other writing on this theme.

[v] For this and much more data on the Overseas NGO Law, see the ChinaFile NGO Project, www.chinafile.com/ngo. The data here is from https://www.chinafile.com/ngo/analysis/visually-understanding-data-foreign-ngo-representative-offices-and-temporary-activities.

[vi] This information about overseas NGO responses to hardened Chinese policy comes from extensive discussions with overseas NGOs working in China since 2017.

[vii] Article 53 of the Overseas NGO Law is at https://www.chinafile.com/ngo/laws-regulations/law-of-peoples-republic-of-china-administration-of-activities-of-overseas.

[viii] This information comes from news articles and author interviews.

[ix] Mark Sidel is currently a member of the board of directors of Asia Catalyst in the United States but has used only public information in this discussion

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