Regulatory responses to build resilience to crises: ‘Tow Truck’ or ‘Guardian Angel’?

1: Introduction

Relatively recent charity scandals highlight one reason for low levels of public confidence in United Kingdom (UK) charities. These include the 2017 Oxfam scandal (following the announcement that field staff in Haiti solicited sex acts from beneficiaries), Kidscan, and as outlined by Burt and Mansell (2017), issues with UK charities’ personnel policies and practices (including inappropriately high executive remuneration, zero hour staff contracts and failing to pay the minimum wage), manipulation of information distributed to potential donors and bullying of donors, and discrimination against potential and actual clients. Etherington (2017, p. 60) notes the “charity brand” is at risk following ‘scandals and doubts about public trust and confidence’ (Connolly & Hyndman, 2013, p. 946), although McGregor-Lowndes and Wyatt (2017) place the blame for ‘sector instability’ on the popular press’ and social media’s fascination with charity scandals. Unsurprisingly, a 2019 survey reported a ‘sharp fall in the number of people who say they trust charities to spend their money wisely’. Negative media attention and financial crises impact not only single charities but also public perception of the charitable sector as a whole (Irvin, 2005). Hence, the Charity Commission of England and Wales (CCEW) identifies that a ‘charity trust crisis’ existed from 2014-2020 (Yonder Consulting & CCEW, 2022). Indeed, the 2018 measurement of public trust and confidence found respondents trusted the ‘person in the street’ more than charities (Populus & CCEW, 2018). Although levels of trust have increased post- the Covid-19 pandemic (Yonder Consulting & CCEW 2022), public donations have fallen dramatically.

Redressing charity trust crises may take some time. Despite the sector’s support of citizens through the Covid-19 pandemic raising the public’s trust in charities, a recent survey (Yonder Consulting & CCEW, 2022, p. 6) finds ‘the trust recovery for charities has plateaued’ with an increasing ‘trust gap’ between those with the highest trust (highly educated professionals living in cosmopolitan areas) and the lowest (blue collar workers in rural areas and small, traditional market towns). As donors are likely to give (and give more) when they believe in the importance of a charity and trust it (Bekkers, 2003), we argue that the current environment, including declining donations, signal financial and ongoing trusts crises within the charity sector.

Academic literature has recently shown interest in financial resilience to assist entities to absorb crisis shocks and to ‘bounce back’ to their original state, as well as ‘bounce forward’, to anticipate and cope with the unexpected, progressing through the development of new capabilities and the creation of new opportunities thus undergoing second-order change (Barbera et al., 2020, p. 532). Greater resilience in individual entities impacts a whole sector. Hence, to redress crises and scandals, governments commonly respond with new regulation to force change, and increase trust in ‘the system’ (Six, 2013; Unerman & Dwyer, 2004). This is not merely a UK phenomenon, but apparent internationally where new charity sector regulators have established increased requirements on charities (Cordery & Deguchi, 2018).

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1 Those who trusted charities to spend their money wisely was 43% compared to 48% in 2017. Report from: https://www.thirdsector.co.uk/...lentin&utm_source=20190522&utm_content=Third%20Sector%20Finance%20Bulletin%20(4)::&email_hash=[22/05/2019 21:03:51].

However, regulation may not always have its intended effect (Neely, 2011), with proponents of ‘better regulation’ arguing for more effective regulatory approaches (Bunea & Ibenskas, 2017). Further, Bunea and Ibenskas (2017, p. 589) note that any regulatory change is ‘susceptible to high levels of political contestation’, suggesting stakeholders hold diverse beliefs as to the legitimacy of greater regulation to respond to crisis and build resilience. Thus, we propose that regulatory interventions must be both well designed and executed in terms of their wider impacts on public perceptions of trust and confidence within the sector.

Whilst wholesale regulatory change for UK charities does not appear to be on the horizon, the CCEW has progressively reformed in recent years as outlined below. The oldest charity regulator in the world, the CCEW generally enjoys legitimacy within its regulatory space. Nevertheless, it is increasingly resource-constrained (National Audit Office, 2015), potentially limiting its ability to ‘do more’ to increase sector-wide resilience, monitor charities’ compliance with legal obligations and effective use of charitable resources and thus, to increase public trust and confidence. Hence, while resilience-building is an antidote and futureproofing response to crisis, and increased regulation can prevent crises, in this article we address the outstanding question as to how charities should be regulated and whether (and how) the CCEW can build resilience through regulatory means.

There could be two crises extremes for which we use the metaphor of a vehicular incident. Recognising that regulation may fall at many points along a continuum, we use the defined end points (preventing crises or redressing them) to ask: should the CCEW act as a ‘Guardian Angel’ to prevent crises, intervening to build and maintain sectoral resilience, or appear post-incident as a ‘Tow Truck’ to undertake action following incidents occurring such as harsh sanctions and de-registration? In this article we analyse publicly-available data on CCEW interventions, including its inquiries, operational compliance and other monitoring activities, and provide additional depth to our analysis through semi-structured interviews with participants who have been closely involved in charity regulation.

We add to the study of charity regulation and responsibilities within a confined but permeable regulatory space by analysing the regulatory framework, CCEW interventions, and making recommendations of effective responses regulator and charities can make to crises. As the imperative to maintain and build public trust and confidence is endemic in Anglo-centric charity regulation (Cordery & Deguchi, 2018; McGregor-Lowndes & Wyatt, 2017), these lessons should be widely applicable. Further, this multiple method study adds to the literature on regulatory space as it considers not merely the regulator and its actions, but possible responses by other stakeholders in the eco-system.

First, we briefly consider reasons for charity regulation before turning to the current CCEW regulatory modal and the theoretical framework based on regulatory space within which formal charity regulation and the CCEW reside. Section three outlines our research methods, followed by the findings and discussion in section four. Section five contains the conclusion, including reassertion of our contributions, some limitations of our research, and areas for further exploration and focus.

2: Regulation within the charity sector

As ancient institutions, charities have long enjoyed strong public legitimacy and support and also from governments, especially as they can reduce the burden on state funds and benefit society (Hyndman & McMahon, 2011; Mayer & Wilson, 2010). Neoliberal reforms have increased dependence on charities as state service-delivery arms, or to fill gaps where the state no longer funds services; thus, the charity sector has expanded with support from the state, public, and corporates (Cordery, 2012). Many jurisdictions offer charitable benefits including exemption from income taxes, reduced consumption and property taxes, preferential access to government and philanthropic funds; donors
may also receive taxation rebates (Breen et al., 2009). Hence, governments regulate to restrict and hold accountable entities which avail themselves of these taxation and other benefits. In the UK, charities are accountable to donors, beneficiaries, and the general public, but in the first instance, trustees are accountable immediately to the CCEW under the Charities Act 2011 and its 2016 amendments (Charities Act, 2011; Charities (Protection and Social Investment) Act, 2016).

Proponents for better regulation argue for reducing state regulation and greater self-regulation by the sector (see, for example, Breen, 2009; Breen et al., 2017; Phillips, 2019). These calls receive less airtime in the UK given the longevity of its regulator. Further, McConville and Cordery (2018) present CCEW as a regulator that works in consort with the sector, having taken on a ‘New Governance’ style of regulation in recent years. We consider salient changes in CCEW regulation to lay the ground for a discussion on whether this could also develop charity sector resilience in the face of crisis.

2.1 CCEW’s developing regulatory powers

As noted, the CCEW restricts registration to eligible organisations established for charitable purposes. Charities must file an annual return, from which ‘appropriate information’ is published online for public consumption. To assist charities, the CCEW publishes numerous guidance publications for trustees, auditors/independent examiners, charity staff, and donors, and informs interested stakeholders proactively through a regular Charity Commission News. Along with providing advice, it signs off on ‘permissions’ (e.g., on changing objects, sell property etc, to ensure the potential risks to the public interest are managed), and intervenes with enforcement action regarding malpractice or misconduct. Incremental changes have taken place since the 1980s, culminating in the Charities Act 2011, with McGregor-Lowndes (2017, p. 1) noting the CCEW:

...has created an accessible public register of charity information, embraced digital technologies, implemented a statutory definition of charity..., tackled regulating political purposes... modernised its work practices and governance, and together with the sector has faced challenges to their independence from government.

Nevertheless, in the same volume, Fries (2017, p. 19) recognises that the late twentieth century process of modernising the CCEW was not directed towards making it the charity regulator per se, but “to enable the Commission to support the effectiveness of charities with advice and guidance and, where necessary, intervention (on carefully limited criteria) and on the other hand to make charities properly and publicly accountable”. Further, as the CCEW has evolved since the late 1980s, it argues that it promotes effective use of charitable resources to balance between ‘advice’ and ‘policing’, or as noted by Driscoll (2017), ‘empathy and steel’. The ‘empathy’ or ‘advice’ approach posits regulatory action as primarily remedial rather than enforcing sanctions for misdemeanours, underpinned by the belief that charity regulation must support the ‘fundamental independence of charities’ with regulatory interference only in cases of ‘illegality or impropriety’ (Fries, 2017, p. 20). Hind (2011) expresses this regulatory notion as operating with proportionality, accountability, consistency, transparency and in a targeted manner, while Driscoll (2017) argues that charity law must enable individual charities to uphold public trust and confidence. The CCEW does not work alone.

Maintaining trust and confidence in charities is a core requirement of the CCEW’s regulatory work which, Fries (2017, p. 26) argues requires “an active partnership with the sector”. Others operate within the regulatory space, including the National Council for Voluntary Organisations (NCVO) which has been active in work on defining public benefit (including the charging of fees), differentiating the amount of campaigning and political advocacy a charity could undertake and remain registered, chief executive pay levels, and fundraising regulation (Driscoll, 2017; Etherington, 2017). Further, NCVO developed a quality standards task force, a Code of Governance (re-formed in 2018/19) and

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3 See: https://www.gov.uk/government/organisations/charity-commission/about
undertakes many other activities to support charities, their trustees, and employees. Additionally, Driscoll (2017) notes the imposition of the Charity Tribunal (established in 2010) has further enhanced CCEW accountability. Other changes discussed by Etherington (2017, p. 74) include de-politicising the appointment of Charity Commissioners and the CCEW Chair, the National Audit Office’s (NAO) and Public Accounts Committee (PAC) challenges to the CCEW to strengthen its governance and strategy, and the media’s role in raising issues, but also at times, its misunderstanding of “the professional way in which many larger charities actually operate”. Considering these other stakeholders suggests a crowded regulatory space.

In response to the recent scandals in the UK, the 2016 Charity Act amendments gave CCEW additional powers to control charities’ fundraising, including requiring larger charities to publish information on their fund-raising activities which would support the efficacy of fundraising disclosures in their audited annual accounts (Charities Act, 2011, sec. 162A). Further, these amendments strengthened the CCEW’s ability to institute inquiries into a particular charity or class of charities (Charities Act, 2011, sec. 46) enabling the regulator to issue official warnings where a charity trustee has committed a breach of trust, duty, other misconduct, or mismanagement (Charities Act, 2011, sec. 75), to suspend trustees and appoint interim managers (Charities Act, 2011, sec. 76), to remove trustees and other officers following (or during) an inquiry (Charities Act, 2011, sec. 79), and otherwise remove trustees (whether disqualified or not) and appoint new trustees (Charities Act, 2011, secs. 79A, 80).

The CCEW response is presented as ‘risk-based regulation’ (CCEW, 2018c) with toolkit measures that work towards ‘responsibilisation’ of the sector to undertake self-governance and regulation (Phillips & Smith, 2011). Two examples are its moves to require: (1) registered charities to report promptly and fully any serious incidents along with the charity’s response; and (2) charity auditors or independent examiners to report matters they become aware of that they believe are likely to be of material significance for the CCEW in carrying out its regulatory functions (Charities Act, 2011, sec. 156) (McDonnell & Rutherford, 2019 report on the Scottish operation of this requirement). In support, McGregor-Lowndes and Wyatt (2017) suggest that the CCEW’s regulatory strategy now more closely mirrors the US, where individual charities must demonstrate that they are accountable and trustworthy to their stakeholders.

Considering US data, Brody (2012) argues that regulators should publish any sanctions it imposes on miscreant charities in order to legitimise the regulator, increase charity accountability, and serve as a warning to other charities. However, the CCEW reports only a sample of its interventions, citing that severe budget cuts since 2014 have reduced its ability to undertake regulatory activity, including withdrawing from targeted advice to charity trustees, in order to encourage charity sector self-regulation (Dunn, 2014). Dunn (2014) expresses concern that CCEW’s unwillingness/inability to engage with trustees on matters of concern (except through website resources) could lead to poor practice and reduce the pool of potential trustees. Therefore, while a US-styled regulation may be envisaged, she notes limited adoption of self-regulatory schemes specific to the UK, despite the operation of a number of self-regulatory and third-party nonprofit regulatory functions globally.  

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4 Additionally, the fundraising regulator (funded by ‘voluntary levies’ from large charities) works independently to examine charities’ practices.

5 CCEW defines a serious incident as ‘an adverse event, whether actual or alleged, which results in or risks significant harm to … beneficiaries, staff, volunteers or others… loss of money or assets… harm to the charity’s work or reputation’ https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity.

Aside from the obligation to comply with regulatory filing deadlines, trustees must engage with CCEW, for example when the charity is being liquidated, seeks to change its name, merge, and/or make other structural changes. Further, while charities must operate according to their stated purpose, trustees may approach the court to apply trust property cy-près (as near as possible) to replace outdated purposes with those “which are suitable and effective in the light of current social and economic circumstances” (Charities Act, 2011, sec. 67(3)). Such actions potentially alert CCEW of other issues needing investigation.

Scandals often bring calls for better governance and, in fulfilling its aim to ‘promote sound governance and accountability’ (Hyndman & McDonnell, 2009), the CCEW requires larger charities to file annual returns of financial information and a Trustee Annual Report (TAR) with a statement about the public benefit it has delivered, its reserves policy and explanations of any deficit funds (Morgan, 2017) as well as other voluntary disclosures. Yet, prior literature shows that charities file later than required, and such filings can be error-prone; with deficiencies in audited accounts (e.g. Breen, 2009; Cordery, 2013; Morgan, 2011; Phillips, 2013). Further, Connolly et al. (2013) find outright manipulation of accounting data to meet specific ratios, and Dhanani (2019) suggests charities’ reports use promotional tactics and omit bad news. Good governance can ameliorate these issues with Phillips’ (2012) Canadian study finding enhanced regulatory compliance when the regulator encourages good governance and reporting. Perego and Verbeeten (2015) argue that nonprofit entities adopting a Dutch ‘good governance’ code are more likely to disclose and manage executive pay levels. In the UK, the NCVO developed a ‘Charity Governance Code’ following a collaborative project, accordingly it is disappointing to note a recent report found trustees lacked relevant skills and need further support to address deficiencies (The Charity Commission et al., 2017).

In summary, while the CCEW enjoys greater powers under law to coerce charity accountability and compliance, it has fewer resources to scrutinise compliance. Through ‘responsibilisation’ - governance codes, charity self-reporting and requiring auditors to ‘whistle-blow’ – charities and auditors have increased responsibilities, including potentially to develop resilience to deal with crises. Yet, McGregor-Lowndes and Wyatt (2017) argue that charity regulators also have a vital role in providing the public with signals of charities’ trustworthiness, therefore we now consider how the concept of regulatory space can assist in answering our research question.

2.2 Changing regulation in response to crisis – warnings from the concept of regulatory space

Hancher and Moran (1998) developed the concept of regulatory space to explain relationships and structural factors contributing to a regulatory system, recognising the potential for fragmentation and competition within a regulatory space. Specific political, legal and cultural settings evidence values favour certain arrangements (Hancher & Moran, 1998). For example, some political systems favour charity self-regulation rather than imposing state regulation – and the balance may also change over time (Breen et al., 2017). Differing institutional structures within a regulatory space (for example: state versus federal governments, size and concentration of non-state organizations, interest groups and their support structures) may also explain the structure and purpose of regulation (Irvine & Ryan, 2013).

Of salience are the normative models applied to regulatory activities which March and Olsen (1989; see also Young, 1994) term a ‘logic of appropriateness’. Normative expectations of the role and find clubs in OECD countries or with global membership are less likely to incorporate monitoring and sanctioning mechanisms than others.

7 This code was first developed in 2005 and is now in its third iteration. It can be downloaded from: https://www.charitygovernancecode.org/en.
purpose of any regulator constrain the boundaries which construct the regulatory space and the development of ‘appropriate’ regulatory solutions and structures (March & Olsen, 1989; Nicholls, 2010). Thus, Nicholls (2010) argues that when the UK developed its community interest companies’ regulation, the logic of ‘light touch’ regulation used accelerated social enterprises’ adoption of this new legal form and underpinned other initiatives the UK government had launched encouraging innovation and growth. Nevertheless, Nicholls (2010) questions whether this growth logic was an appropriate norm when it resulted in scant data to inform future policies and other users, including resource providers.

The legitimacy of new charity/nonprofit regulators within a regulatory space was also analysed in Ireland by Breen (2020) and Artiach et al. (2016) (in Australia). In both cases, the new regulator struggled to establish legitimacy within a disparate and conflicted regulatory space. While the CCEW is not new, the volatile environment in which charities now operate has led to calls for readdressing regulatory legitimacy (The Law Family Commission on Civil Society & Pro Bono Economics, 2023) recognising the environmental challenge to extant regulatory arrangements and regulatory boundaries, and possible contestations (Breen & Cordery, 2022; Hazgui & Gendron, 2015).

Several studies use the regulatory space concept to analyse post-crisis regulatory change. For example, Canning and O’Dwyer (2013) and Hazgui and Gendron (2015) study the realignment and superimposition of regulation in response to crises, finding key actors resisted regulatory change, withheld information, and downplayed the need for change. These studies and others show actors fear they will be required to cede power or influence within a regulatory space and that these contestations can lead to unintended consequences (Breen, 2020; Breen & Cordery, 2022; Nicholls, 2010).

Given regulatory change is a common response to crisis and other environmental changes, and the current environment evidences public trust and confidence below pre-scandal levels, we believe that it is appropriate to examine what norm should drive charity regulation. We now move to the method through which we examine our research question.

3: Context and method

To explore our research question of how the CCEW can build resilience in the face of crisis, we undertook two related enquiries. The first was to seek evidence of CCEW’s current regulatory actions. Specifically, we analyse publicly available data on CCEW’s interventions from 2014-2019. These include 193 publicly available inquiries, and reports on operational compliance and other monitoring. We also analyse charities’ responses to CCEW’s regulatory actions, seeking to ascertain whether misdemeanour/s sanctioned by CCEW are corrected, and if charities publicly disclose their misdemeanour. Additionally, we analysed significant concerns auditors raised in their charity audits, noting that CCEW reports that less than 25% of charity auditors alert the CCEW of such matters.

The CCEW reports on three types of monitoring activity: inquiries, operational compliance and monitoring. As the CCEW (2017, p. 9) notes:

“Our temporary protective and remedial powers include:

• restricting the transactions that a charity may enter into
• appointing additional trustees
• freezing a charity’s bank account
• suspending or removing a trustee
• appointing an interim manager.”
Where there are serious concerns of abuse in a charity, we may open a statutory inquiry under section 46 of the Charities Act 2011. We may do this where we are concerned that there may have been misconduct or mismanagement in a charity, when its assets are at risk, or where there is need to protect public trust and confidence in a charity or charities. The purpose of an inquiry is to establish the facts... The ultimate aim is to stop abuse, ensure trustees comply with the law and put a charity back on a secure footing for the future.”

The Charities Act 2011 empowers the CCEW to undertake inquiries for general or specific purposes. Further, it opens operational compliance cases unrelated to an inquiry and monitoring cases ‘to promote compliance by charity trustees with their legal obligations’ (CCEW, 2018a, p. 16). Operational compliance and monitoring cases may be informed by serious incident reports charities file (for number, see Table 1, column 9) or whistleblowing reports filed by auditors, concerned charity members or the public (for number, see Table 2, column 10). Charities also have a role in developing public trust and confidence and averting terminal crisis, meaning charities subject to inquiries and cases should make appropriate responses. Thus, we also sought to ascertain whether, if the CCEW had sanctioned a charity, did it report and correct the misdemeanour?

In this research, we analysed all inquiry cases published between 2016-2019, and the responses of investigated charities. Table 1 shows the number of cases (columns 2, 5 and 8 show the number of cases opened of each type – columns 6 and 8 also show respectively the number of operational compliance and monitoring cases closed). The CCEW publishes a select number of reports from inquiries and operational compliance cases (Table 1, columns 4 and 7) so that ‘trustees learn from them’ (CCEW, 2016). Nevertheless, the CCEW makes no statements when it begins a monitoring case or when it has completed one (see Table 1 column 8 for number started and concluded), although it states it will release a statement if needed to in the public interest, and/or to increase public trust and confidence in charities.

The CCEW also publishes some of its registration decisions, those to widen charity objects/cy-prés schemes, where there is a request to remove a charity from the register, a breach in compliance with the law, or a review of an order to appoint interim managers or trustees to a charity. The total number of these for the periods in table 1 were 10 - 2018 (1), 2017 (2) and 2016 (7).

Our second, related enquiry sought others’ views on the normative question of how charities should be regulated and whether (and how) the CCEW can build resilience. First, we analysed the NAO’s reports on the CCEW. These suggest the CCEW could ‘do more’ to increase sector-wide resilience and thus, to increase public trust and confidence. We also present findings from seven semi-structured interviews with those who have been closely involved in relevant regulation (Appendix A provides details of eight participants). To maintain confidentiality, we have not associated the role of the participant with their pseudonym, but note that our participants included an academic involved with reviewing regulatory performance, a contributor to the latest version of the UK Statement of Recommended Practice (SORP), two former employees of a regulator in a neighbouring geographical region to the CCEW, a former executive of the CCEW, a current executive for the CCEW and a CCEW manager responsible for production of guidance for charities.

All interviews were conducted via video conferencing software, recorded, and transcribed automatically with a manual stage of checking and correction afterwards. Interviews were coded utilising a three-stage coding framework based on thematic analysis (Boyatzis, 1998). Organisational codes (Lee & Lings, 2008) were initially applied in order to establish a baseline perspective of the interviewee. Following this, an initial open coding stage allowed for themes concerning, inter alia, enforcement, engagement, self-regulation, and resource requirements to emerge. This stage was
followed by a further interpretive stage, that related response themes back to the research problem being investigated. We refer to interview data at appropriate stages in the following section.

4: Findings

First, we present the findings from the analysis of CCEW’s regulatory activity and then the views of others in the regulatory space on the role of the regulator in building charity resilience to avert or ‘bounce’ following a crisis.

4.1 Analysis of CCEW regulatory effort

Following the extraction of the CCEW regulatory activity data (see Table 1) over four years, three sets of related data were analysed: (i) all 135 published inquiry reports; (ii) all 58 operational compliance case reports (some cover multiple charities); and (iii) three of the published decisions directly related to charity misdemeanour (one from non-compliance with the law (2018) and two from appointments of interim managers (2016)). No similar statements are published on operational compliance cases or decisions. We therefore analysed inquiry and operational compliance case reports against five separate categories: failure to file, fundraising malpractice, misappropriation, mismanagement and safeguarding, as shown in Table 2. The CCEW notes that inquiries were undertaken against ‘double defaulters’ failing to file describing them as:

...charities that have defaulted on their statutory obligations to meet reporting requirements by failing to file their annual documents for two or more times in the last five years. During the year 74 charities [were]…tackled [as] double defaulters who fail to comply after warnings…. We ...issued 29 production orders to obtain financial information to assist our investigations... [as] a result... 35 charities have made good their default and filed the required outstanding accounting documents during this financial year [hence]... £35.2 million of charity funds is now visible to the public on our register... a further 18 charities had ceased to operate and we removed them from the register of charities (2016/17 p.28).
### Table 1: Number of new inquiries, operational and monitoring cases opened (data from: the CCEW 2016, 2017, 2018a, 2019).

<table>
<thead>
<tr>
<th>Date from-to</th>
<th>Inquiry cases opened</th>
<th>Live inquiries at year end</th>
<th>Inquiry reports</th>
<th>Operational Compliance Cases opened</th>
<th>Operational Compliance Cases closed</th>
<th>Case reports</th>
<th>Monitoring Cases (concluded)</th>
<th>Serious incident reports filed by charities</th>
<th>Whistleblowing reports</th>
<th>Application not regist. (rejected)</th>
<th>Charities removed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 April 2015 - 31 March 2016</td>
<td>53</td>
<td>135</td>
<td>35</td>
<td>1,327</td>
<td>1,309</td>
<td>25*</td>
<td>414 (426)</td>
<td>2,117</td>
<td>143</td>
<td>8,198 (2,644)</td>
<td>4,422</td>
</tr>
<tr>
<td>1 April 2016 - 31 March 2017</td>
<td>187</td>
<td>248</td>
<td>67</td>
<td>1,644</td>
<td>1,499</td>
<td>16*</td>
<td>503 (586)</td>
<td>2,181</td>
<td>142</td>
<td>8,368 (2,323)</td>
<td>4,556</td>
</tr>
<tr>
<td>1 April 2017 - 31 March 2018</td>
<td>135</td>
<td>79</td>
<td>22</td>
<td>2,269</td>
<td>1,925</td>
<td>12</td>
<td>415 (380)</td>
<td>2,819</td>
<td>388</td>
<td>8,375 (2,977)</td>
<td>4,360</td>
</tr>
<tr>
<td>1 April 2018 - 31 March 2019</td>
<td>103</td>
<td>155</td>
<td>11</td>
<td>2666</td>
<td>2473</td>
<td>7</td>
<td>434 (455)</td>
<td>3,895</td>
<td>662</td>
<td>8,074 (3,138)</td>
<td>4,812</td>
</tr>
<tr>
<td>Totals</td>
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<td></td>
<td></td>
<td>135</td>
<td>60*</td>
<td></td>
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</table>

* Some related to a request to widen their objects, so were not included in subsequent analysis (1 in 2016/17; 6 in 2015/16). Total therefore equals 53.
Table 2: Analysis of inquiries (I) and operational compliance (OC) cases years ending 31 March 2016-2019 (as published)

<table>
<thead>
<tr>
<th>Accusations giving rise to inquiry (I) or Operational Compliance (OC) case reports</th>
<th>2015/16</th>
<th>2016/17</th>
<th>2017/18</th>
<th>2018/19</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to file</td>
<td>I</td>
<td>OC</td>
<td>I</td>
<td>OC</td>
<td>I</td>
</tr>
<tr>
<td>Fundraising malpractice</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Misappropriation</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Mismanagement</td>
<td>4</td>
<td>14</td>
<td>16</td>
<td>12</td>
<td>4</td>
</tr>
<tr>
<td>Safeguarding</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>19</td>
<td>35</td>
<td>15</td>
<td>67</td>
<td>12</td>
</tr>
</tbody>
</table>

The most common CCEW action was to remove the charity from the register (an option taken only after the CCEW is certain that charitable gifts are protected (Morgan, 2010)), following appointing interim trustees or managers. The relevant trustees are also disqualified from undertaking such roles again.

Typically, the CCEW makes a statement upon opening a statutory inquiry and links that statement to the charity’s filing on the CCEW website. Hence, we analysed the website and filing of each charity on which there had been an inquiry case report, an operational compliance case report or a decision to ascertain the reasons for the case and the charity’s response – whether they had corrected their misdemeanour or not. Additionally, we scrutinised charities’ annual reports (and website where possible) to ascertain messages about their misdemeanour. Should the charity acknowledge the inquiry, it would show accountability back to the regulator. This analysis is shown in Table 3.
Table 3: Regulatory remedies/reactions from inquiries (I) and operational compliance (OC) cases
years ending 31 March 2016-2019 (as published)

<table>
<thead>
<tr>
<th>Regulatory remedies or charity reactions from inquiries (I) and operational compliance (OC) cases</th>
<th>2015/16 I</th>
<th>2016/17 I</th>
<th>2017/18 I</th>
<th>2018/19 I</th>
<th>Total I</th>
<th>2015/16 OC</th>
<th>2016/17 OC</th>
<th>2017/18 OC</th>
<th>2018/19 OC</th>
<th>Total OC</th>
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</thead>
<tbody>
<tr>
<td>Charity removed from register</td>
<td>5</td>
<td>1</td>
<td>10</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>6</td>
<td>0</td>
<td>4</td>
<td>21</td>
</tr>
<tr>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Officer/trustee(s) disqualified</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
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<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Charity filing overdue again</td>
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<td>n/a</td>
<td>8</td>
<td>n/a</td>
<td>2</td>
<td>n/a</td>
<td>0</td>
<td>n/a</td>
<td>n/a</td>
<td>10</td>
</tr>
<tr>
<td>Charity mentioned I or OC on website/annual report</td>
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<td>0</td>
<td>2</td>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

We analysed the 11 decisions published between 2016 and 2019 that were additional to inquiries, compliance, and monitoring cases. We considered these to be routine. The data shows that the CCEW has increasingly moved to risk-based regulation practices and greater ‘responsibilisation’. Charities’ serious incident reporting and auditors’ requirements show a ‘proactive’ risk approach. However, less than one percent of charities report serious incidents, despite the numbers of these reports increasing dramatically since the Oxfam scandal in February 2018 (CCEW, 2018b). Nevertheless, no details or summaries of the serious incident reports are published, potentially reducing opportunities to improve public trust and confidence. Closely linked to the serious incident reports is the 2019 guidance issued by the CCEW concerning the ‘whistleblowing’ responsibilities of auditors and independent examiners (IE) who must report to CCEW when an audit report/IE includes a modification of opinion, has an emphasis of matter paragraph, or material uncertainty (related to going concern). CCEW was

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8 There were 3,595 reports of serious safeguarding incidents in 2019, compared to 2,504, 1,580 and 1,203 in 2018, 2017 and 2016 respectively and another 604 in the prior two years.

9 This is a statutory duty under Practice note 11 *The Audit of Charities in the United Kingdom* (from the Financial Reporting Council), but there are relatively few reports. In 2019 there were 662 and 2018, 662.
concerned that half of the accounts they reviewed did not meet their standards. Nevertheless, few auditors/IEs report, questioning the effectiveness of responsibilisation.

In summary, the CCEW assesses regulatory compliance by examining public concerns about charities and taking action ‘where appropriate’ to ‘put charities back on track’. When they have serious concerns from their regular monitoring, the CCEW uses its powers to investigate through statutory inquiries and deal with other issues of concern to the sector. But given the declines in public trust and confidence and the crisis situation in which charities are now operating, could the CCEW ‘do more’?

4.2 The logic of appropriateness within the regulatory space

Here we assess the logic of appropriateness (March & Olsen, 1989) of the normative question of how charities should be regulated and whether (and how) the CCEW can build resilience. First, we briefly consider the NAO’s reports on how the CCEW could ‘do more’ to increase sector-wide resilience and thus, to increase public trust and confidence. Then we present findings from seven semi-structured interviews with eight people who have been closely involved in charity regulation.

In four reports within 26 years, the NAO (2013, para. 9) ‘repeatedly identified concerns about the CCEW’s follow-up of regulatory concerns, use of its powers, management of resources, the relevance of its performance targets, and use of information’. Its investigation argued the CCEW could not adequately address public complaints due to insufficient resources to investigate all cases referred to it and noted the passivity of Charity Commission ‘undermines the Commission’s ability to meet its statutory objective to increase public trust and confidence in charities’ (NAO, 2013, para. 24). Later the NAO (2015) argued that the government should increase the CCEW’s funding, including developing a ‘sustainable funding model’ which could help CCEW (2017, sec. 3) ‘to regulate charities in a way that means the public can have trust and confidence in them’.

Given this sharp critique, we conducted a ‘deeper dive’ into the issues that may not be highlighted at the level of analysis that the reporting provides by interviewing individuals who have/had been closely involved in relevant regulation as to how charities should be regulated and whether (and how) the CCEW can build resilience. That is, should the CCEW act as a ‘Guardian Angel’ to prevent crises, intervening to build and maintain sectoral resilience, or appear post-incident as a ‘Tow Truck’ to clear the road for other traffic? This level of analysis presented us with several themes and opinions on this issues that we discuss in the subsections below.

4.2.1 Guardian Angel Approach – advocate, guide, confidant, regulator?

Several interviewees saw the CCEW (and other charity regulators) as being tasked with providing holistic support to charities and the sector overall. One interviewee expressed how important it was that the regulator act as an advocate for the sector in building public trust and confidence:

“championing the public interest in charity...the Charity Commission has to be more than an organisation that just ensures that charities stay on the rails. It has to be an organisation that can help to create the most effective possible charity sector...there are times when the Charity Commission needs to stand up and be counted, and contribute to the debate about what sort of environment should we create as a society, as a nation, as a government with, you know? In order to best enable charities to thrive.” (Interviewee 1)

Although advocacy extends beyond sanctions typical of a regulator, it stresses the need for a commitment to building and maintaining public trust and confidence in charities and the sector, and an ensuing contribution to sectoral resilience. Other examples of regulatory activities that could be referred to as ‘up stream’ initiatives, were suggested as being geared towards promoting self-
regulation (responsibilisation). When asked how the regulator could assist in building resilience within the sector, several of our interviewees referred to such action:

“I think still that enabling role to [provide] guidance and the support for people to be the best they can as trustees and as charities is really important.” (Interview 3)

It is necessary for regulator intervention and guidance to take an integrated approach when considering such upstream initiatives. Again, several interviewees referred to the necessity of the CCEW to work within the wider regulatory space noting the sector bodies (umbrella organisations etc) that could provide this:

“for me, it’s an ecosystem. It it’s not just [the CCEW]. You can also think about kind of concentric circles, you know? So [the regulator is] focused particularly around legal requirements and duties of trustees and but then you know going around outside of that, you’ve got things like the charity governance code... We’re very keen on self-regulation and best practice... We think that sector infrastructure, bodies and other types of groups play a really important role, you know, as sometimes does government.” (Group 1 – Interviewee A)

Even though upstream activities are important, interviewees highlighted the need for the CCEW to competently tackle cases where things went wrong within charities, as we discuss in the next subsection.

4.2.2 Tow Truck Approach – freedom to operate, freedom to crash?

In contrast to the ‘guardian angel’ approach of upstream activities we explored above, some interviewees emphasised that, although there are opportunities for the CCEW to support charities, in fact, a number of limitations attend this. One interviewee highlighted that the diverse sector complicates regulatory approach, and advocated for fewer restraints on smaller charities:

“we heard very much from smaller charities who felt over-burdened and over-regulated, and not able to keep up with the requirements that were being put upon them. [They] worried about their future sustainability” (Interviewee 6)

Further freedoms are reflected in the recent version of the Charities Act which enables CCEW to take a more ‘hands off’ approach to regulatory interventions:

“the theme of that Act is to be directly in nature and provide flexibilities in the law for trustees and enable them to do a lot more than themselves or reduce some of the red tape that there is and that’s broad in in its coverage and touches on a significant number of [CCEW] guidance.” (Group 1 – Interviewee B)

This approach to less restrictive and potentially constraining regulatory influence was also reflected in the interventions that the CCEW took at the first stage of inquiries:

“So, one outcome of a case, might be to refer it to an inquiry. But in most cases [the CCEW would try] to resolve the issue, give guidance potentially and an action plan, before closing the case” (Group 1 – Interviewee B)

This may reflect the paucity of report data detailed in Tables 1-3 where perhaps many cases include minor misdemeanours. There, inquiries are opened and cases closed following the provision of upstream support and advice and are not particularly newsworthy. Such actions could be interpreted as successful interventions. Alternatively, they could reflect premature closing of cases following the
regulator’ minimal intervention due to a common issue raised by interviewees, that of under-resourcing. This has necessitated move of upstream support to online platforms as opposed to more engaging methods:

“It’s challenged [CCEW] to do what it used to in different ways, and actually in ways that are in tune with today’s world. So, putting a lot of information on [the] website. It’s not it’s not going to serve every single person…but certainly and providing information in a way that’s easier to access digitally.” (Group 1 – Interviewee B)

The effectiveness of this approach was questioned by other interviewees (as well as Dunn, 2014) including an umbrella body executive who stated:

“I’ve been [in post] for about fifteen years and not once has the Charity Commission approached us and said ‘We’d like to come and see you and talk about what’s happening in [local region] which surprises me. It really surprises me… [It may be] them saying ‘well you know we’re trying to maintain a respectful distance. And we don’t want to kind of impose ourselves’ so I can kind of see the argument for it. On the other hand, I think possibly it’s a resourcing issue because if they do it in one area then really, they have to do it in in every area.” (Interviewee 5)

Such under-resourcing and moves to greater online and less personalised advice and support suggests a regulator defaulting to the tow truck metaphor that we propose as it questions the extent to which the CCEW has resources to contribute towards sectoral resilience. We address this in discussing the findings against our research question and the chosen theoretical framework.

5: Discussion

This research questions how charities should be regulated, and whether (and how) the CCEW can build resilience because, despite identifying that a ‘charity trust crisis’ existed from 2014-2020, the CCEW has failed to increase public trust and confidence, instead it has plateaued at low levels (Yonder Consulting & CCEW, 2022). Much of the CCEW’s regulatory inquiries are related to charities that fail to file (see Table 2), but charities’ respond poorly; sanctioned charities continue to file later than the regulatory deadline and they do not highlight their mis-filings on their websites or elsewhere. The CCEW’s most common regulatory response to inquiries is to remove charities from the register, which further hides the charity from regulatory spotlight. This may suit both the CCEW and the charity.

Despite Charities Act changes to increase the CCEW’s regulatory powers, only a sample of that activity is publicly available for analysis. Hence, we have little knowledge of the extent to which the CCEW has utilised all its regulatory powers by suspending trustees and appointing interim managers, removing trustees, or even merely issuing warnings. Yet data in Tables 2 and 3 shows regulatory sanctions, and cases in Table 1 have resulted in thousands of charities being de-registered. Charities are also reticent to acknowledge they are (or have been) under the regulatory spotlight. The CCEW’s decision not to expose how it has utilised its regulatory powers, except in a few rare cases goes against the advice by Brody (2012) that regulators should publish sanctions imposed in order to increase charity accountability and assist sectoral resilience.

The CCEW encourages good governance which Phillips (2013) notes should increase regulatory compliance, but it investigates mismanagement in 72% of the operational compliance cases, and was second only to ‘failure to file’ in the number of published inquiries. This confirms other research that governance remains poor, despite CCEW’s website materials (The Charity Commission et al., 2017). The correlation of regulatory response with operational compliance is low, but removing charities from the register is the most common response. Hence, while scandals shine the light of scrutiny on
charity governance (Hyndman & McDonnell, 2009), the CCEW has not increased charity resilience to enable charities to ‘bounce back/forward’ from crises. Further to the need for greater transparency of regulatory activity to build public trust and confidence in the charity sector and to build capacity it is unclear how a lack of transparency in regulatory intervention can be effective in increasing charity resilience. We question whether these calls for the CCEW to do more are against the normative logic of appropriateness for the charity regulator.

Our analysis has been underpinned by the concept of regulatory space (Hancher & Moran, 1998). While trumpeting ‘responsibleisation’ (CCEW, 2018c; Phillips & Smith, 2011), and seeking greater charity disclosures and to involve auditors in its regulatory remit, the CCEW’s current approaches confirm Dunn’s (2014) concern that, without eco-system support, poor practice will increase. Table 1 shows thousands of inquiry reports, operational compliance cases, monitoring cases and charities that have de-registered. And the responsibleisation has seen limited take-up from auditors/IEs from the information available. Additionally, charities have filed thousands of serious incident reports, but the CCEW does not publish their content, nor how the charity or the regulator have contributed to their resolution.

Charity regulation changes over time and these changes in the CCEW reflect those in other countries where there has been a shift towards self-regulation (Breen et al., 2017) or ‘responsibleisation’ (Phillips & Smith, 2011). Thus, we sought to examine the ‘logic of appropriateness’ (March & Olsen, 1989) behind charity regulation in England and Wales. Regulatory space arguments suggest that, in the face of crises, regulation could be reconsidered (Canning & O’Dwyer, 2013; Hazgui & Gendron, 2015). Yet, prior literature warns of unintended consequences (Breen, 2020; Breen & Cordery, 2022; Nicholls, 2010) and, while the CCEW may argue for greater powers to regulate, the push for charity independence is strong within the regulatory space.

Within this eco-system of regulatory space are government, umbrella bodies, regulators, charities, charity trustees, professionals and so on. While this could suggest wide support, sometimes it feels like a crowded regulatory space with little personal touch. As charities face a new environment, the Law Family Commission on Civil Society and Pro Bono Economics (2023) argue for stronger linkages between the public sector and civil society to provide vital insight and connections in shaping the environment. Being concerned about frustrations between sectors, they argue linkages would ‘enable charities to maximise their impact and support an operating environment that contributes to the sector’s resilience and effectiveness’ (The Law Family Commission on Civil Society & Pro Bono Economics, 2023, p. 83). This would enable greater understanding of the wide roles that charities perform in society and their policy and practical needs. Our interviewees also expressed that the CCEW has a role to advocate for the charity sector, to educate the media about ‘the good things that are being achieved’. They believe that strengthening the linkages between the CCEW and charities could increase charity resilience, as long as charity independence is maintained.

This research is not without limitations, the most obvious being that we were unable to access reports of all CCEW regulatory activity in the time period analysed as it was not publicly available. Further, the sample of interviewees, whilst small offered deep insights although we recognise there are opportunities for further research into regulatory design as highlighted by Bunea and Ibenskas (2017) in the for-profit space. Other examples of greater regulatory openness would also be helpful.

6.0 Conclusion

In answering the normative question of how charities should be regulated and whether (and how) the CCEW can build resilience through regulatory means, we have drawn on actions and interviews to explore different ways this longstanding charity regulator can ‘do more’ to help a sector ‘bounce back/forward’ from crisis. ‘Doing more’ may also avert a crisis of its own legitimacy. While we see evidence and support for the CCEW to act as a ‘Guardian Angel’ to prevent crises, intervening to build
and maintain sectoral resilience, resource constraints limit the ability of it to do so. Nevertheless, increases in transparency around regulatory action could be achieved without any increase in CCEW powers (and little increase in resource use). More openness about regulatory activity, particularly more detailed reports on the outcomes of ex-post functions would flag to others (particularly trustees) the need for actions to increase resilience.

Yet we suggested charity regulation to build resilience after crises could operate at two extremes by using the metaphor of a vehicular incident for charity-sector crises. Current regulatory action takes more of a ‘Tow Truck’ approach to clear the road for other traffic rather than building resilience and along with it, public trust and confidence. This is evident from the plateaued public trust and confidence, reduced donations and sanctions and de-registration?

Nevertheless, given the long running charity crisis and need to build sectoral resilience, it is apparent that there is appetite for the CCEW to act more as a ‘Guardian Angel’ to prevent crises. Strong support exists for the CCEW to increase its advocacy for the sector, to provide more personalised advice and transparency. This is not to suggest it has responsibility for single-handedly building resilience in each charity. The charity sector is a crowded regulatory space and the norm of charity independence runs deep.
References


### Appendix A: list of interview participants and interview times

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<tr>
<th>Pseudonym</th>
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</tr>
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