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## How Can New Governance Regulation Develop? Regulatory Dialectics and Mandatory Charity Performance Reporting

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# How can New Governance Regulation develop? Regulatory Dialectics and Mandatory Charity Performance Reporting

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# **How can New Governance regulation develop? Regulatory dialectics and mandatory charity performance reporting**

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## **Abstract:**

Increasingly New Governance approaches are evident in public administration, in contrast to the New Public Management (NPM) approach and reforms of last century. In focusing on competition and outcomes, regulation under NPM has been a tool to manage self-interested decision-makers, and is beset by conflict. Kane's model of regulatory dialectics could be applied to this approach. New Governance (variously known as New Public Governance, Public Value Governance) takes a process approach, aimed at problem solving and co-creating public good. It blurs traditional regulatory boundaries, and yet, the concern is that, when developing mandatory regulation, power imbalances may still occur and that the process approach may severely delay successful outcomes. We propose a New Governance-orientated model of regulatory dialectics. Here, the use of formal organisations, routine processes and informal dialogues facilitates repeated interactions, identifying more 'soft' than 'hard' responses by regulators and regulates. This less adversarial and more partnered process leads to greater engagement in regulatory development which impacts significantly on the regulation that results, and has the potential to improve acceptance of (and compliance with) mandatory regulation.

**Keywords:** Charity performance reporting, regulation, New Zealand, United Kingdom

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## **Introduction**

The dilemma of how best to design, mandate, and enforce regulation is ongoing, not least when the regulatees are outside of the for-profit marketplace. Over recent years, the development of voluntary and self-regulatory regimes (e.g. Potoski & Prakash, 2000) have provided examples of co-operation between regulators, regulatees and other stakeholders. These suggest possibilities for more democratic dialogue that should, in the words of Bryson et al. (2014), co-create public good.

Concurrent with this is the move from New Public Management (NPM) to New Governance approaches. Under NPM, those under the purview of regulators are perceived in the classic economics sense as the ‘economic man’, self-interested in their decision-making, with regulation used as a tool to achieve objectives (Bryson et al., 2014). As this approach is underpinned by competition (Osborne, 2006), such interactions are often beset by conflict as argued by Kane (1977, 1980, 1983) resulting in temporary solutions that are disrupted as regulatees opportunistically defy the requirements imposed on them. Alternatively, New Governance (variously known as New Public Governance, Public Value Governance, amongst others) perceives the benefits of democratic processes and the possibility of co-creation of public good (Bryson et al., 2014; Osborne, 2006). Nevertheless, this approach may still evidence power imbalances and, due to its focus on interactive processes and pluralism, hoped for outcomes may not be forthcoming (Young, Wiley, & Searing, 2020). The apparent weaknesses of New Governance led us to ask how this approach can be applied to the establishment of mandatory regulation, to ensure compliance and to reduce opportunism.

Responding to the call for more comparative longitudinal case studies (Bryson, Crosby, & Stone, 2015) we analyse the development of regulation for charity performance reporting.<sup>1</sup> Such reporting is important because charities that ‘tell their story’ through performance reporting should be able to counter criticisms of poor management and ineffectiveness, and make more informed decisions (Cordery & R. Sinclair, 2013). Further, surveys suggest that charities’ demonstrations of the difference they make is an important factor in cementing public trust and confidence (Horizon Research & New Zealand Charities Services, 2016; Populus, 2018). Despite its avowed benefits, research suggests charities face significant methodological and resource-based challenges in measuring and reporting performance (Cordery & R. Sinclair, 2013), and are motivated to avoid reporting ‘bad news’, preferring instead to ‘market’ themselves well (Dhanani & Connolly, 2012).

Considering these potential benefits and challenges, some jurisdictions have sought to regulate performance reporting. Recent research (McConville & Cordery, 2018) illustrates a spectrum of different jurisdictions’ efforts, identifying a ‘command and control’ NPM type approach in Australia, a market-based approach in the USA (also NPM, but with no mandatory performance reporting) and ‘New Governance’ approaches in the United Kingdom (UK) and New Zealand (NZ) (see Figure 1). Their preliminary research highlights the particular potential for New Governance approaches to lead to better charity regulation and reporting practices.

Yet, there is little evidence on how approaches to New Governance charity regulation develops: how actors are identified and engaged; how actors assert their influence; how conflicting demands are resolved. With increasing interest into how regulation is co-developed, this research aims to explore how New Governance regulation on charity performance reporting in

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<sup>1</sup> Performance reporting includes information on charity outputs (immediate or direct products and services delivered by a charity), outcomes (charities’ impact on beneficiaries and society), efficiency (ratios of inputs against outputs) and effectiveness (comparison of performance to targets).

the UK and NZ has developed over time. In response to calls for further theorisation of New Governance (Bryson et al., 2014; O'Toole, 2015), we utilise Kane's (1977, 1980, 1983) regulatory dialectics, which argues that regulation is developed through a series of repeated, cyclical interactions between regulators and regulatees. We contribute to regulatory literature by modifying Kane's dialectic - created to explore command and control-type banking regulation, and not previously used in either accounting standard setting or charity regulation contexts - building a model of how New Governance-type regulation develops.

The paper first presents the theoretical framework for analysis and the methods. The UK and NZ contexts are described and our findings on how regulation has developed are discussed. Our model of how New Governance regulation develops is illustrated with an example. Conclusions are presented alongside limitations and areas for further research.

## **Regulatory approaches**

Charity regulation is crucial in building the public trust and confidence that facilitates charitable activity (Cordery, Sim, & van Zijl, 2017). With significant increases in the scale of charitable activity, many jurisdictions are grappling with how to effect regulation, especially given 'scandals and doubts about public trust and confidence' (Connolly & Hyndman, 2013, p. 946). McConville & Cordery (2018) identify a spectrum of regulatory approaches as in Figure 1.

[INSERT FIGURE 1 ABOUT HERE]

Command and control builds on the NPM ethos of self-interested 'economic man' typically involving a legal or mandatory requirement (for example, to register with a regulator, or comply with accounting standards) (Cordery et al., 2017; Lim & Prakash, 2014). These often include detailed specifications against which compliance can be monitored or audited, and so

penalties can be applied to miscreants (Breen, 2009). In particular, regulated charities must comply with any command and control requirements in order to maintain their tax-free status and to attract public donations (Cordery et al., 2017). While focused on outcome (effective regulation), such regulation can be inflexible, costly and ineffective (Lim & Prakash, 2014), as seen with mandated public sector performance reporting which became ‘boiler-plate’, and actually reduced performance accountability in NZ (Neale & Pallot, 2001) and the UK (Boyne, Gould-Williams, Law & Walker, 2002).

At the other extreme, under NPM regulators may choose alternative tools to achieve their objectives, leaving it to the market to decide appropriate ‘regulatory’ levels. Examples include: (voluntary) self-regulation (Lim & Prakash, 2014), accountability ‘clubs’ (Gugerty, 2010; Sidel, 2005), third-party quality certification (Bies, 2010; Tremblay-Boire, Prakash, & Gugerty, 2016) and codes of conduct (Bies, 2010; Bromley & Orchard, 2016; Sidel, 2005). These may be developed by charities or regulatory entrepreneurs (McConville & Cordery, 2018; Sidel, 2005), typically making perceived donor-useful information publicly available (Gordon, Knock, & Neely, 2009). However, issues include cost (Sidel, 2005), exclusion of smaller charities (Prakash & Gugerty, 2016), and promotion of simple metrics (such as conversion ratios) with dysfunctional consequences (Tinkelman, 2009).

New Governance approaches merge or balance between these two extremes (Sinclair, 1997; Trubek & Trubek, 2007). They use different tools and engage more participants in co-regulation (Trubek & Trubek, 2007) - ‘a collective action by a significant number of non-state actors to shape their own behaviour and that of others in a (sub)sector through the establishment of norms, standards and credible commitments’ (Phillips, 2012, p. 814). New Governance ‘blurs boundaries’ between regulatory actors’ roles, regulatory stages and modes, and regulatory regimes’ functions and structures (Solomon, 2010), and, being increasingly co-

opted within the regulatory state, it results in a type of New Governance. Bryson et al. (2014) identify New Governance's key attributes as the working out of democratic theory, open to influence via dialogue and deliberation, with diverse approaches to knowing and responsiveness across sectors based on shared public values. Building on these key assumptions, Young et al. (2020, p. 481) note that this approach may fail 'unless the existing subtle or hidden power imbalances inherent in the systems are addressed', but also consider the process approach may not result in a successful outcome when stakeholders have incompatible views.

It is argued that New Governance yields the benefits both of market-based (e.g. flexibility and cost-effectiveness: Hepburn, n.d.; and harnessing industry expertise and resource: Solomon, 2010), and command and control regulation ((e.g. coercive compliance, with enforcement remaining as a potent fallback option: Harrow, 2006; Trubek & Trubek, 2007). Compared to its NPM counterparts, it is perceived as more light-handed than command and control, while being more effective than self-regulation (Solomon, 2010), by engaging with knowledgeable actors who are committed to regulation and can encourage others to comply (Harrow, 2006; Hepburn, n.d.; Phillips, 2012; Trubek & Trubek, 2007). These attributes may be particularly important in areas where 'one-size-fits-all' standards would be inappropriate – such as in performance reporting by charities (McConville & Cordery, 2018).

Nevertheless, practical and logistical difficulties cannot be overlooked such as: ensuring relevant actor participation through appropriate institutional arrangements, managing conflicting voices, addressing potential for capture, building legitimacy and logistics of time and cost (Baldwin, 2019; Gugerty, 2010; Phillips, 2012). Addressing these issues is a complex balancing act (Mayer & Wilson, 2010). Effective regulation requires competent regulators who regulatees believe to be legitimate (Amirkhanyan, Meier, & O'Toole, 2017; Phillips, 2012),



and who engage and connect with key stakeholders to avoid reversion to strict command and control (Phillips, 2012; Solomon, 2010). By balancing, New Governance regimes can flexibly ‘adjust to problems as they arise, [obtaining] the necessary ‘buy-in’ from the private sector to encourage cooperation’ (Solomon, 2010, p. 624). Solomon (2010) argues it is necessary to analyse how New Governance regulation develops and where and how it succeeds, with O’Toole (2015) arguing for closer attention to theory in analysing such networked behaviour. Recognising its use in NPM approaches to developing regulation for the self-interested ‘economic man’, we explore Kane’s regulatory dialectics as a model that may be modified to New Governance’s more democratic approaches to developing regulation.

### **Regulatory dialectics**

Regulatory dialectics (Kane, 1977, 1980, 1983) has been advanced as one possible model to explain how regulation develops, having been used to explore banking regulation, an example of traditional command and control regulation. Kane’s model argues that a regulatory dialectic is initiated by political demanders (the public, interested parties) lobbying government to change the ‘rules’ in their favour (Kane, 1977). Regulation is created (thesis) and regulatees respond (antithesis), often by avoiding new regulation. This generates undesirable unintended effects and/or conflicting responses. Re-regulation brings the synthesis stage, before conflict re-starts the cycle (Kane, 1983). Crucially, these repeating stages of regulatory avoidance and re-regulation are ‘opposing forces that, like riders on a seesaw, adapt continually to each other... with stationary equilibrium virtually impossible’ (Kane, 1980, p. 355). This model identifies an endless series of responses/revisions which emphasise the ‘tensions, paradoxes, and ambiguities inherent in efforts for regulators to impose restraints on persons and institutions’ (Kane, 1980, p. 355).

In these repeated interactions, regulators and regulatees utilise a range of tools. Short of re-regulating, regulators can enforce reporting requirements, increase penalties and add control activities. However, ‘trying to close loopholes tends to transform what may have initially appeared as a simple and tightly targeted set of regulations into a complex and wide-ranging network of governmental interference’ (Kane, 1980, p. 363), resulting in de-regulation or alternative regulation. Additionally, regulators have a range of ‘softer’ methods of suasion available, including (Kane, 1977): moral suasion (exhorting specific behaviour rather than penalising non-compliance); explicit suasion (formal communications encouraging compliance); and reputed suasion (using rumours of explicit suasion to encourage compliance). Kane (1983) suggests regulatees use one or more of three possible responses. First, regulatees may locate and exploit loopholes to circumvent regulation, avoid regulation completely or comply at minimum levels. Secondly, regulatory migration involves regulatees moving to a more favourable regulatory environment (albeit that this would be difficult for a charity seeking to raise funds and operate in a specific jurisdiction). Lastly, regulatees can try to develop or work with those with power to force changes in the regulations.

Core to Kane’s model is perceiving regulation as a dialectical process, rather than a thesis isolated from past processes. Interactions are non-contiguous and lagged, (albeit that regulatees respond more rapidly than regulators: Kane, 1980) with regulators and regulatees pursuing their own objectives, conditioned by expectations of the other. Importantly, a regulator’s and the regulatees’ respective positions and problems ‘is rooted in the detailed history of their prior conflict’ (Kane, 1988, p.333). ‘[R]ooting policies in concepts of stationary equilibrium’ (Kane, 1988, p.333) is unreliable. Repeated interaction, response and revision are key to this model of how regulation develops.

While regulatory dialectics is used extensively to explain banking regulation (see, for example, Gerding, 2016; Kane, 2007), it has also been applied to regulatory change elsewhere. For example, Urueña (2012, p. 295) discusses Colombian water supply regulation, which rather than being a ‘top-down’ approach, is a ‘dialectic coat of many colors’ with regulation subject to local adaptation. The exploration of dialectics in the Columbian constitutional regulatory state, with its focus on social transformation and redistribution, multiple regulators and a forum (Urueña, 2012), suggests that democratic New Governance approaches may also utilise a dialectic model as we now explore.

## **Method**

We adopted the case study method as it facilitates a deeper understanding of social phenomena, such as regulatory development and because we seek analytical generalisability of our findings to explain ‘social forms, relations and processes’ (Parker & Northcott, 2016, p. 1110). To extend beyond the single case study, our selected jurisdictions (cases) of the UK and NZ are purposively chosen, as they operate New Governance charity performance reporting regulation. This allows us to demonstrate and theorise regulatory development.

To explore how New Governance charity regulation in the UK and NZ has developed, we analysed documents, literature and regulators’ websites. We also undertook semi-structured interviews with present/ past actors in UK and NZ charity regulation development. The appendix shows that these individuals represented sector interests, regulators and other important actors. Questions probed regulatory development, including the actors involved, political demands driving new regulation (thesis stages), and antithesis or conflicting voices and eventual synthesis. Our nineteen interviews were structured to encourage conversation, with prompting designed to explore processes and actors’ engagement. Interviews were recorded and transcribed, and lasted approximately one hour. Ethical approval was obtained

and interviewees were offered a transcript before analysis. Interviewees' assertions were also checked against documentary sources. All data were uploaded to NVivo for subsequent qualitative analysis, using an initial coding tree based on our theoretical framework. Each author coded the data from one jurisdiction and this was validated by the other author. Both authors jointly undertook second order analysis, by discussing all relevant content in each node in-depth, enabling validation of insights and comparisons between jurisdictions. Before we present the models of longitudinal regulatory change, we briefly explain the context of each of these cases.

## **Context**

### *Regulation of Performance Reporting in the UK*

The Charity Commission of England and Wales (CCEW) was founded in 1853, but only since 1960 have charities been required to keep accounting records and prepare financial reports (Cordery & Baskerville, 2007). In the early 1980's, research highlighted failures in financial reporting practices and broader performance reporting (Bird & Morgan-Jones, 1981). The Accounting Standards Committee (ASC) responded by establishing a charity working committee including representatives of the accounting profession, charities, foundations, and an assistant Charity Commissioner to develop an accounting standard. They consulted through a discussion paper and Exposure Draft (ED). The resulting (1988) Statement of Recommended Practice (SORP) focussed on financial reporting, with the omission of performance reporting criticised in sector comment and academic research (Hyndman, 1990). As guidance, this first SORP was largely ignored.

From 1990, responsibility for preparing the SORP passed to the CCEW's SORP Committee. This committee issued subsequent SORPs (1995, 2000, 2005), becoming a joint SORP-making body with the Office of the Scottish Charity Regulator (OSCR) for the 2015 (current) SORP.

The now Financial Reporting Council (FRC- formerly ASC) grants the SORP-making body its status, specifies requirements for a representative committee, consultations and EDs, and ultimately provides negative assurance (or not) on the SORP's compliance with underlying accounting standards. Legislative changes through various Charities Acts since the 1995 SORP have effectively made SORP compliance mandatory for the majority of large charities in England, Wales, Scotland, and Northern Ireland. These charities must register with the relevant regulators (CCEW, OSCR and Charity Commission for Northern Ireland (CCNI)) who are responsible for increasing trust and confidence in charities (Cordery & Deguchi, 2018) and make the Annual Reports of these charities available to the public through their websites. These Annual Reports contain Financial Statements and a Trustees' Annual Report (TAR), and since 1995 the SORP has included recommendations encouraging charities to report on their performance in the TAR.

The detail of these recommendations has changed over the SORP iterations. The 1995 SORP recommended reporting of achievements, examples, and using statistical information where available (CCEW, 1995), as did the 2000 SORP (CCEW, 2000). However, in response to concerns about poor application of these recommendations, SORP 2005 promoted more disclosure on charities' activities, performance against objectives, and on broader achievements (CCEW, 2005). SORP 2015 further encouraged larger charities to report on the impact of their activities (CCEW & OSCR, 2015), reflecting ongoing sector debate and academic research. Although requiring charities to report on performance, the SORP does not require reporting of specific measures, instead encouraging charities to 'tell their story'. This is more principles-based (McConville & Cordery, 2018) than traditional financial reporting requirements.

As recommendations, regulators do not monitor and censure charities' failure to report on performance. Neither are these reports required to be audited (FRC, 2017), or their compliance with the SORP's recommendations attested to. Nevertheless, research indicates that performance reporting by UK charities has increased over time, particularly subsequent to the 2005 SORP (see: Connolly & Hyndman, 2013; Hyndman, 1990; Hyndman & McConville, 2018). Figure 2 provides a synopsis of the regulatory changes over time.

[INSERT FIGURE 2 ABOUT HERE]

### *Regulation of Performance Reporting in NZ*

In contrast, NZ's charity regulator (Charities Services (CS)) did not begin operations until mid-2007 (having been established under the Charities Act 2005). Formerly (since 1990), NZ not-for-profit entities were encouraged to report on performance in a Statement of Service Performance (SSP), which was mandatory for public sector entities (under the Public Finance Act 1989 and conceptual framework and standard on presentation (FRS-2: Neale & Pallot, 2001). However, the take-up from the sector prior to the Charities Act 2005 was negligible. Even subsequent to the formation of the Charities Commission (later CS), no accounting standards were developed by the CS, nor by the accounting standard setters of the time (the Financial Reporting Standards Board (FRSB) and Accounting Standards Review Board (ASRB)).

A restructure of accounting standard setting away from the accounting profession led to the ASRB being re-established as the External Reporting Board (XRB) in 2011, with two sub-boards responsible for setting accounting and auditing standards respectively (Cordery &

Simpkins, 2016).<sup>2</sup> In 2009, a consultation began on a new accounting standards framework, including a requirement for charities to provide an SSP (ASRB, 2009; XRB, 2011). The prior requirements for performance reporting were carried over, with work beginning on a new standard and relevant guides. A standard for performance reporting for larger charities (and the public sector) was finally approved in late 2017 with effect from 2021 (early adoption is allowed) (McConville & Cordery, 2018). While requiring the preparation of an SSP, like the UK SORP, this standard is principle-based (McConville & Cordery, 2018) in that it encourages charities to tell their own story, avoids requirements to report specific measures, and even eschews terms such as output and impact. As these statements must be audited (unlike the UK), an audit standard was also developed and released in February 2019<sup>3</sup>.

A summary of NZ charity regulation development is shown in Figure 3.

[INSERT FIGURE 3 ABOUT HERE]

## **Findings on the Process of Regulatory Change**

The research question of this paper focusses on *how* regulation developed in these jurisdictions, not on what was developed (as described above for large charities). Specifically, we focus on how the New Governance dialectic between regulators and regulatees is facilitated, including three mechanisms our research identified as important in this dialectic: formal organisations, routine processes and informal dialogues. These inform our development of a New Governance-orientated model of regulatory dialectics.

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<sup>2</sup> These were the NZ Accounting Standards Board (NZASB) and the NZ Auditing and Assurance Standards Board (NZAuASB)

<sup>3</sup> NZASI *The Audit of Service Performance Information*.

### *Formal organisations*

In both jurisdictions, formal organisations ‘own’ the process of creating regulation and facilitate other interactions. However, slightly different approaches are taken: in the UK, a specific body (the SORP Committee) facilitated by regulators was created, and the standard is subject to the accounting standard setter’s approval, while in NZ the existing auditing and accounting standard setters created the standards (with the assistance of subcommittees and working groups).

The UK’s SORP Committee has evolved (UK Int 4), becoming a joint-SORP making body with OSCR, then including the new regulators from Northern Ireland (CCNI) and the Republic of Ireland (Charities Regulatory Authority). It has embraced more representatives of sector bodies (NFP Synergy, New Philanthropy Capital) and grant-makers (Association of Charitable Foundations, individual grant-makers). One representative on the SORP Committee commented that: ‘we never would’ve engaged with SORP prior to me being on the Committee’ (UK Int 2).

While the FRC legally approves the SORP, interviewees perceived the relationship had transitioned, becoming less adversarial (UK Int 8) and more collaborative:

I think the thing to emphasise is that it is a collaborative relationship, so even though we, ultimately, hold the rubber stamp for approving a SORP, we respect the fact that it’s not our document. (UK Int 7)

With approval based on following FRC SORP-making policy, and its interest primarily on technical, financial reporting aspects, it was thought unlikely that the FRC would refuse to approve performance reporting requirements in the SORP (UK Int 7, 8). They did however engage in discussions on these aspects:



I think there was a feeling that, actually, what the SORP was proposing could've been better. You know, if it came down to it, we couldn't actually not approve the consultation, but we negotiated and came to an agreed position. (UK Int 7)

In addition to their own views, SORP Committee members felt responsibility for bringing a wide range of views into decision-making processes:

I don't think I've been in a conversation where somebody has said, "Oh, no, don't include X," or, "You don't wanna hear what Y says." I think the attitude of the people around the table is very much about not creating an echo chamber, hearing what actually is important. (UK Int 1)

Subcommittees and working groups have been used at various times, for example on performance reporting methodologies. An early 2000s working group foundered on 'problems from sector groups who were defensive of their own roles and methodologies' (UK Int 9), with grant-makers and 'others [who] believed regulators were straying into their patch in developing guidance' (UK Int 9). This conflict highlights the difficulty of mandating reporting on performance in absence of universally applicable metrics or methodologies. A subsequent expert group of selected, informed sector commentators, academics and practitioners was labelled the Annual Reporting Advisory Group (ARAG), and significantly influenced the development of performance reporting for SORP 2005 (UK Int 9), nevertheless:

We always drew back from requiring outcome/impact reporting... We never made any attempt to suggest methodologies for identifying outcomes or impact. People have tried, but there's never been coherent single approach accepted for it. (UK Int 9)

However, some have criticised the SORP Committee as being dominated by accountants, and efforts at engagement as suboptimal:

So, if you wanted to create a system which is extremely effective at giving the appearances of openness and inclusion, but in practice, having the opposite effect, it would look remarkably like SORP... (UK Int 2)

In NZ, formal organisations are also of critical importance, however the pre-existing formal organisations were used to develop the infrastructure for performance reporting rather than establishing a separate formal organisation as in the UK. These included: the XRB and its subcommittees (NZASB/NZAuASB), with advice from its Technical Reference Group (TRG) and the XRB Advisory Panel (XRAP). Rather than a specialist committee, this approach was suggested as related to the jurisdiction's principle of regulatory consistency across organisation types:

...It wasn't non-discrimination but it was regulatory consistency across sectors...So, the fact that you were a charity didn't matter...you should provide...you should report in the same way as these government agencies or businesses. (NZ Int 7)

Regulatory efficiency may also have driven the use of existing structures, and similar to the UK, sub-committees were developed at specific points, and formal consultation through TRG, XRAP and others was undertaken (see: routine processes). XRB oversight also facilitated the creation of an audit standard, largely in parallel with the reporting standard, through working groups and subcommittees between the two organisations:

It is something new and different...And [once the NZASB had] defined some of the things there, the [NZAuASB] went back and said 'Well okay, that's great but people have got to audit against this'...[Auditors] need to have some solidity in definitions...otherwise you aren't actually going to be able to audit against it...So, the response to it ultimately was a little bit of gnashing of teeth and almost throwing of toys,

almost...And now [the NZAuASB and NZASB are] grappling very much with that audit standard because we're trying to develop these two standards in sync. (NZ Int 2)

In both jurisdictions, we find formal organisations facilitating or owning the regulatory process. Co-regulation (Trubek & Trubek, 2007; Phillips, 2012) is evident in interactions between the accounting standard setters and regulators, to manage the regulation process, including the XRB's Advisory Panels and Working Groups in NZ, and the ARAG and SORP Committee in the UK. Such organisations (and their composition) develop to facilitate the evolving regulation and, in particular, to include more stakeholders who emerge as salient. Individuals involved in these organisations tend to be engaged, well-connected and bring expertise and commitment to regulation (Phillips, 2012). The formal organisations then engage in a series of routine processes and informal dialogues that further facilitate a dialectic between these regulators and regulatees, as discussed below.

### *Routine processes*

In both jurisdictions, routine processes include formal public consultations to develop (and in the UK seek approval for) performance reporting regulation. These create regular opportunities for repeated interaction and allow for transparency (as also recommended by Amirkhanyan et al., 2017; Peretz & Schroedel, 2009).

In the longer established UK context, each SORP iteration has included an ED, followed by formal consultation. This adheres to the FRC policy and is similar to accounting standard consultation processes, including the public availability of all consultation questions and responses. The SORP Committee develops the questions used and these are perceived as increasingly reflecting sector debate, particularly media reporting which brings in the wider notions of public good:

You can see in the latest round of consultation questions, I think, some very clear links [with] press interests... if you went through the current questions, you can almost go, “There’s the headline alongside it.” (UK Int 1)

Consultation responses/submissions are referred to the SORP Committee for their decision making.

NZ’s standard setting commenced with a wide consultation on charity regulation, reporting and associated legislative changes. This was facilitated by ANGOA<sup>4</sup> and reached over 2000 people, with strong support for charities to ‘tell their story’ (NZ Int 3). Following the enrolment of ANGOA, the policy maker, CS and the legislative change, the XRB developed an ED building on the FRSB’s prior Technical Practice Aid.<sup>5</sup> Further consultation included the XRB and CS running webinars (jointly and separately), road shows, roundtables, etc. Due to the length of the process and the substantial change that resulted from the first consultation and the development of the auditing standard, a limited scope revised ED was re-exposed for further consultation. As in the UK, the consultation and responses are on public record.

Interviewees from both jurisdictions gave numerous examples of where matters discussed in the consultation process impacted on the resulting standard, including requiring clarity on definitions in NZ (NZ Int 2) and a reluctance to require specific measures in the UK (UK Int 9). This also accords with the minutes of these organisations’ meetings (available through their websites), and feedback statements on consultations.

Common issues have also arisen across these jurisdictions, including difficulties in engaging stakeholders in the consultation: ‘generally people are quite disengaged when it comes to

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<sup>4</sup> The Association of Non-Governmental Organisations of Aotearoa (Aotearoa is the Māori name for NZ) which had wide legitimacy as a peak body. It is now called Hui E.

<sup>5</sup> TPA-9 issued by the profession in 1994.

accounting standards’ (NZ Int 8). This leads to larger organisations in NZ (NZ Int 8) and accountants in the UK (UK Int 11) dominating consultation responses. The SORP Committee’s response has been to augment formal consultations with a wider research programme, often targeting harder-to-reach groups such as funders (UK Int 11, see also Connolly, Hyndman and McMahon, 2009). In some cases, wider engagement could be a double-edged sword: ‘consultation has the merits that everybody participates. It has the demerit that it can very easily not clarify but simply confuse the picture’ (UK Int 5). Similarly, in NZ, which had a much longer consultation process than any in the UK, there was a sense that: ‘it took a lot longer just because everybody has got what they think’s a good idea’ (NZ Int 5). In particular, some ‘good ideas’ were at odds with other accounting standards or beyond the boundaries of an accounting standard (NZ Int 5). UK members of the SORP Committee suggested they have dealt with this potential cacophony of voices by focussing on majority views and by bringing their own experience and knowledge to addressing the issues:

Some people in the SORP responses felt we should’ve been firmer rather than the nudge towards outcome and impact reporting. There was a minority of voices saying, “No, you really needed to push that agenda harder.” But, without any established sort of methodology for it, it’s very difficult to put it in the SORP. (UK Int 9)

These reflect the balancing act in a democratic process and are processes that regulatees can expect to continue, as has been seen in the UK and promised in NZ:

We’ve already indicated that we’re going to do a post-implementation review...So, that will be very much going to the users and saying, “is this meeting your demands? Is this meeting your requirements?” (NZ Int 4)

These routine processes are used to facilitate the ongoing dialectic between regulators and regulatees, demonstrating participation or collaboration (Bryson et al., 2014; Young et al.,

2020). There are examples of regulatee engagement leading to change in the regulation (Kane, 1988), while regulators use explicit and reputed suasion (Kane, 1977): including a wide range of (sometimes controversial) suggestions in consultations to encourage engagement and subsequent compliance with the resulting lighter-touch regulation. Regulatees in both the UK and NZ can be confident that, prior to new regulation, an ED will be published, with a resulting formal consultation. Over time, the reach of these routine processes has expanded to increase diversity of views (Young et al., 2020), and possibly the legitimacy of the regulatory process and resulting regulation. Moreover, these interactions often lead to continuing informal dialogues with actors, discussed below.

### *Informal Dialogues*

Along with formal organisations and routine processes, many interviewees in both jurisdictions discussed continuing, informal dialogues between the regulators and specific actors, at various stages in the process and for differing reasons.

At times, outreach focussed on the detail of components within an ED or consultation: in the UK, SORP Committee members reached out to knowledgeable individuals or groups:

Nigel [Davies: SORP Committee Joint Chair] would pick up the phone and say, “We’re thinking of saying this.” They’ll speak to different people. They’ll set up little accountant, fundraiser groups, etc. and now they understand that there are people out there who know as much about it, or more than they do, and they may want to tap into that. There’s nothing wrong with that, I think that’s good. (UK Int 4)

NZ developed similar informal dialogues, facilitated by good personal relationships:

[Our NFP sector group] had a fantastic relationship with [the first CE of the XRB]...So that was a really constructive relationship that then went into, as we got more towards regulation, working with [the policy maker]. (NZ Int 7)

This interviewee stated that the lack of resources in the charity sector to assimilate new regulation was a reason “to work on amelioration rather than resistance” and thus become part of the routine processes. The policymaker obviously appreciated this as:

...with the not-for-profit sector, engagement is much more challenging because the sector is so diverse. And that’s where it was really helpful to have [NFP sector groups] involved in the process, because they had good networks and we didn’t. (NZ Int 3)

Positively, such conversations facilitate deeper interaction and more two-way discussions, which are seen as constructive by those involved. However, unlike more formal consultations, questions and responses in these conversations are not necessarily a matter of public record, nor is it clear with whom such conversations take place. This could lead to perceptions of bias or undue influence by certain actors (Potoski & Prakash, 2000).

Informal dialogues also encouraged organisations (and their members) to engage with consultations: in the UK this included the Institute of Chartered Accountants of England and Wales (ICAEW) (UK Int 1, 6, 8, 9), Charity Finance Group (CFG) (UK Int 4, 9, 11) and grant-makers (UK Int 11). Groups such as the charities technical committee of the ICAEW and the CFG also assist by explaining the SORP, sharing good practice and encouraging compliance (UK Int 4). Beyond the traditionally engaged practitioner groups, other wider sector bodies were also engaged, including the National Council of Voluntary Organisations (NCVO) (UK Int 3, 9), the Association of Chief Executives of Voluntary Organisations (ACEVO) (UK Int 3, 11) and the Association of Charitable Fundraisers (ACF) (UK Int 9, 11). Such organisations have sometimes been in conflict with the SORP’s performance reporting recommendations, but now work more collaboratively in developing recommendations and building member support. One interviewee represented such a body:

The Charity Commission is becoming increasingly good at getting us, as well as other infrastructure bodies and charities, involved in the development process. I have to really give it to them that when they are developing guidance, or any consultation, we are now starting to see more and more often us being invited to the table, us getting to see drafts, and having our input into those...we're having these opportunities to meet with them face-to-face, so that when these changes do come in, we can go away and tell our members, and write blogs about it, and explain. (UK Int 3)

Similarly, in NZ, building consensus for change included working with 'champions' among accounting firms (NZ Int 5) and funders to secure their buy-in to the regulation (essential to reduce compliance costs for charities):

[The funders have] always looked at annual reports as part of their funding but they've always, from the sense that I get, they've always been frustrated by them...Without exception, the reaction to [the forthcoming performance reporting] is "this is fantastic". And the reason it's fantastic is simplistically for most of them, the point of view is "we now get 90% of the information we need from one place". (NZ Int 2)

These approaches to encouraging compliance are particularly important given the nature of the regulators and their resources:

...XRB is this light-handed regulator that simply doesn't monitor and enforce, it simply sets the standards. I mean of course there is a difference in regulatory culture...[With the Financial Markets Conduct] Act you're talking about millions of dollars as the maximum fines...and that framework for enforcement doesn't really exist [in the Charities Act]... (NZ Int 3)

Hence the NZ charity regulator undertakes outreach to encourage compliance (a role undertaken by other bodies in the UK as discussed above):



So, we did maybe about seven webinars this year, lunchtime ones and I think nearly all of them were on the reporting standards, yeah. And we had something like 6,000 registrants. So, we'll continue doing that kind of thing next year but [with a different] focus. (NZ Int 8)

There is evidence of significant continuing, informal dialogues with various actors and with the aim of consulting, educating and encouraging support/compliance/good practice. Actors involved may also be members of formal organisations, or consultation respondents, and their informal dialogues serve multiple purposes. Regulators demonstrate moral and explicit suasion (Kane, 1977) and regulatee engagement to encourage regulatory change (Kane 1988). Here they work as catalysts (Bryson et al., 2014), offering key actors opportunities to affect regulation's creation, but also offering regulators a means to harness sector expertise and resource (Solomon, 2010) and induce 'buy-in' that can build support for the resulting regulation (Phillips, 2012; Trubek & Trubek, 2007). For example, interviewees noted the engagement with various membership bodies (ICAEW, CFG, NCVO, ANGOA) that act as intermediaries to encourage initial engagement with consultations and subsequent adoption of best or recommended practices. This is particularly important in the context of the relatively light-handed, principles-based performance reporting regulation in both jurisdictions.

## **Discussion and model development**

Regulation development has been described as a dilemma (Potoski & Prakash, 2000) especially when mandatory reporting and compliance is required. Recognising that there is a variety of tools available, along with the emergence of New Governance approaches to public administration the process of regulatory development needs greater theorisation and analysis. This paper aimed to develop a New Governance-oriented model of regulatory dialectics. Kane's regulatory dialectics (Kane, 1977, 1980, 1983) was developed from NPM approaches

to command and control banking regulation, and suggests regulation initiates as a thesis, to which regulatees react, through avoidance and other methods. Regulatees are portrayed as adversarial, self-interested actors that need specific regulatory tools (Bryson et al., 2014) and work in a highly competitive environment (Osborne, 2006).

In contrast, New Governance approaches are underpinned by democracy and the aim to co-create public good (Bryson et al., 2014; Osborne, 2006). Thus, they potentially engage more participants (Trubek & Trubek, 2007) and have the potential to blur boundaries, including between regulatory actors' roles, regulatory stages and structures (Solomon, 2010). Yet, New Governance may not take full cognisance of power imbalances (Young et al., 2020) and may focus more on processes than outcomes.

In terms of process, our evidence suggests New Governance regulation has an earlier thesis stage (when compared with command and control regulation), with the regulators (formal organisations) creating an ED of the proposed regulation (rather than simply issuing regulation). Antithesis from regulatees (potentially a broader pool than envisaged by Kane) is in response to the ED, through mechanisms such as the routine processes and continuing, informal dialogues. Synthesis in this context occurs after these interactions, with regulation's creation. Routine processes and informal dialogues continue as, rather than 'enforcing', regulators seek to encourage compliance/best practice reporting. They use 'softer' types of suasion, such as moral and explicit suasion (Kane, 1977), with 'harder' options to enforce requirements or to levy penalties not being deemed appropriate in this context. Over time, regulatees respond to the regulation by lobbying for change (Kane, 1988), especially through continuing, informal discussions or perhaps avoidance (evidence of this is often missing). Formal organisations begin the routine process again by issuing EDs and consultations, and the

dialectic continues, building on past interactions (Kane, 1988). Figure 4 shows an amended model.

[INSERT FIGURE 4 ABOUT HERE]

The proponents of New Governance-style regulation suggest a light-handed approach with engaged stakeholders being committed to the regulation and more likely to comply (Harrow, 2006; Hepburn, n.d.; Phillips, 2012; Trubek & Trubek, 2007). Nevertheless, despite this ‘softer’ approach, it is not without conflict, albeit more rare than in NPM-style regulation. Here, we discuss one of the relatively few substantive conflicts from the SORP development, showing how the mechanisms facilitate the dialectic, and their impact on the resulting regulation.

As discussed previously, performance reporting recommendations were expanded between the 2000 and 2005 SORP. This resulted in fairly extensive sector debate, including wide ranging suggestions of possible changes. Some grant-making charities were particularly opposed to increased reporting requirements: ‘they regarded themselves as private trusts, and they didn’t see any requirement to report to the public’ (UK Int 9).

The SORP Committee’s (formal organisation) ED and consultation included the recommendations for these changes (routine process); the formal thesis stage. Through that routine process funders made their opposition known (antithesis). In reaching synthesis, a number of mechanisms were employed. These included ongoing, informal dialogues between the SORP Committee (also CCEW) members and the most vocal opponents, and development of a joint guidance leaflet with the grant-makers body (the ACF). With some of the most vehement opposition coming from House of Lords members, who threatened to block the

legislation providing the SORP's regulatory backing, amendments were made to that underlying regulation:

If you look in the 2005 Regulations you'll see there's an exemption from reporting who you give donations to, and grants to, during the lifetime of the beneficiary of a grant-making trust. That was specifically done to appease [Lords] Hodgson and Sainsbury. (UK Int 9)

Additionally, reflecting the expectation that these will be repeated interactions within a dialectic, a conspicuous effort was made to bring influential grant-makers into the SORP development processes. More grant-makers were invited to join the SORP Committee (formal organisation), and grant-makers were directly targeted in the substantial consultation exercise (routine process) in 2008/9 (Connolly et al., 2009). Continuing, informal dialogues (UK Int 8, 9, 11) combined with these efforts to subdue grant-maker opposition to subsequent SORPs (UK Int 9, 11).

This example shows the complex balancing act (Mayer & Wilson, 2010), with conflicting voices and the need to build legitimacy amongst stakeholders (Amirkhanyan et al., 2017; Baldwin, 2019). Combined with the findings already discussed, we show the dialectic and clear examples of the stages of thesis, antithesis and synthesis, with the combined use of formal organisations, routine processes and informal dialogues. This example is particularly unusual in the context of the regulatory dialectic literature as it used soft suasion, both in the initial conflict and subsequent efforts to defuse this. While the suasion brought in actors previously not included, these were powerful actors and it has been difficult to observe the inclusion of those without power.

## Conclusions

This study analyses the two countries which have regulated charity performance reporting and it is striking that they have used such similar mechanisms to create their regulation. This regulation is beyond NPM, with no evidence of command and control or market-based approaches (McConville & Cordery, 2018). Self-regulation (Lim & Prakash, 2014) to stave off performance reporting regulation is also not evident; indeed, the emerging regulation appears to have been welcomed and awaited by various actors in both jurisdictions. There is strong evidence of New Governance regulation where, in the UK, the SORP promotes recommendations not requirements on how charities report, and in NZ, interviewees contrasted charity performance reporting regulation to command and control-type regulators such as the Financial Markets Conduct Authority. Co-regulation is evident between the accounting standards setter (FRC & SORP Committee/ XRB & NZASB/NZAuASB respectively) and the charity regulator (CCEW/ CS respectively). No sector bodies have been engaged in formal co-regulation, but in each jurisdiction it is apparent that such bodies are engaged in standard setting work through routine processes and informal dialogues. These may be described as institutional arrangements (Baldwin, 2019) to assist the acceptance of regulation. Distinction between routine processes and informal dialogues may reduce the blurred boundaries which can be a destabilising feature of New Governance (Solomon, 2010). It enhances cooperation, diversity, and participation as suggested by Bryson et al. (2014) and Young et al. (2020), in both the development of regulation and subsequent education and encouragement to comply. Nevertheless, it cannot guarantee the balancing of power between different stakeholders.

We propose that regulatory dialectics is integral to New Governance processes. The dialectical relationship between regulators and regulatees evolves regulation as a result of repeated thesis and anti-thesis interactions, which we describe in our model. These continual adaptations (which Kane, 1980, describes as a see-saw) have made the NZ's standard setting process very

lengthy (six and a half years from the XRB's formation to the standard's issuance) and has led to iterative changes in the UK over a longer period of time. This echoes the concern of Young et al. (2020) that New Governance approaches are most concerned with process over outcomes. Especially in the mature UK context, change is based on past interactions, as more stakeholders are represented in formal organisations, routine processes change, and informal dialogues begin or deepen. This reflects Kane's (1988) suggestion that positions and problems of respective regulators and regulatees arise from the prior history of their interactions.

However, the interactions observed in these New Governance regulatory processes and facilitated by formal organisations, routine processes and informal dialogues, are of a specific type. Regulators engage primarily using 'soft' approaches rather than 'hard' penalties or enforcement. Arguably, the framing of the SORP's performance reporting as recommendations, and the ongoing work to build a consensus to support this, particularly through the use of interested and expert intermediaries, relies on moral suasion (Kane, 1977). As performance reporting regulation matures, examples of explicit suasion – where the regulator formally encourages compliance – are also observed. In NZ, the NFP sector joined the policymaker to undertake joint roadshows to a wide range of the affected public, while in the UK, the SORP committee engages with the CFG, ICAEW and more recently NCVO, initially to consult their members, then using moral and explicit suasion (Kane, 1977) to 'sell' new regulation back to those members who also represent the affected public. Similarly, the SORP Committee and XRB both use working groups (and the individuals involved) as intermediaries to both seek input and broadcast their message via seminars, conferences etc. This is particularly important, because so much is about encouragement to report well, rather than merely to report (a hallmark of New Governance-type regulation). In both jurisdictions, the threat of heavier regulation, and more prescription of what to report (a more command and

control type approach) is used as the ‘big stick’ to drive engagement with this process (Kane’s (1977) reputed suasion).

Regulatees, too, employ softer tools of resistance under New Governance than they do against NPM-style regulation. Key stakeholders’ influence on regulation arises primarily from lobbying for change through the described mechanisms; there is little evidence of forceful opposition or moving away from the regulator (virtually impossible in the charity space). Quiet avoidance remains an option, especially in the UK context due to the fact the SORP is a recommendation, but also in NZ where it could be argued that it may be possible to just barely meet the requirements, yet provide comparatively meaningless information. While hard evidence of the scale of such avoidance is lacking in both jurisdictions, those engaged in regulation seem to consider anecdotal evidence of its occurrence or potential for occurrence in developing recommendations/requirements: for example, in decisions related to requiring specific metrics in the UK, or avoidance of certain terms in NZ.

Our extension of Kane’s regulatory dialectics shows a less adversarial process. Instead of the creation of regulation by one party, and forceful opposition and resistance by (only) self-interested others, the mechanisms described appear to act as buffers ameliorating opposition, to give a smoother, less adversarial and more partnered process. This may be because some see performance reporting as the morally in the public good, or as an important means of charity legitimisation. Such reporting also has a lower personal or organisational cost than some other sectors’ regulation (e.g. banking). Alternatively, perhaps the New Governance approach has made regulation of performance reporting less contentious by developing generally acceptable requirements and spreading the message of its benefits and ‘best practice’. A third perspective might suggest regulatory capture: a number of UK interviewees indicated that they believed the SORP to be deliberately ‘mild’ on performance reporting, perhaps because regulatees

involved in its development have sought an easier path. This also raises the issues of who is engaged in, or excluded from, formal organisations, the difficulties of engaging a mix of actors in routine processes, and the potential for informal dialogues to result in perceptions of undue influence on the process reflecting concerns expressed about New Governance regulation more broadly (Potoski & Prakash, 2000; Young et al., 2020).

The contribution of this paper is in the development of a New Governance-orientated model of regulatory dialectics, contributing to the regulatory dialectics literature, as well as not-for-profit/ charity regulation research, both areas described as under-theorised (O'Toole, 2015; Phillips, 2013). This evidence and model can inform those charged with regulating charities, government policy-makers, those who are regulated and those who would seek to influence regulation.

Considering the limitations of this work, we acknowledge that NZ and UK are at different stages on the regulatory cycle, and while this analysis is contextually-limited, nevertheless these cases provide an opportunity for analytical generalisation. Further research could follow the NZ case, particularly considering the impact of new regulation on reporting practices. Regulatory dialectics and New Governance appear to provide a way forward to not only practice, but also to begin theorising charity regulation which should assist its development.



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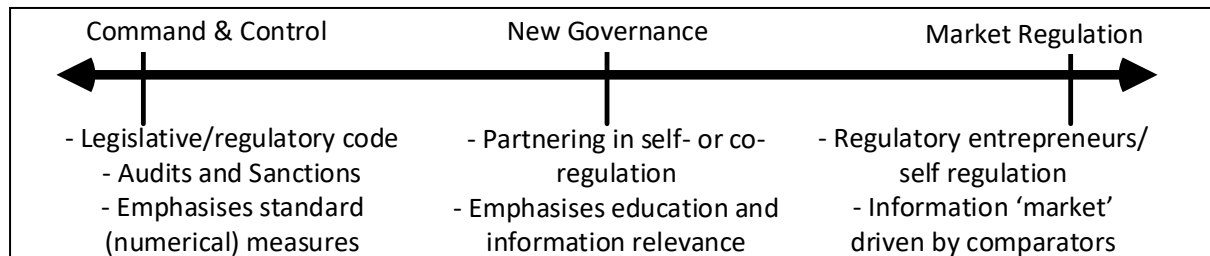
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## APPENDIX: Interviewees' backgrounds and identification

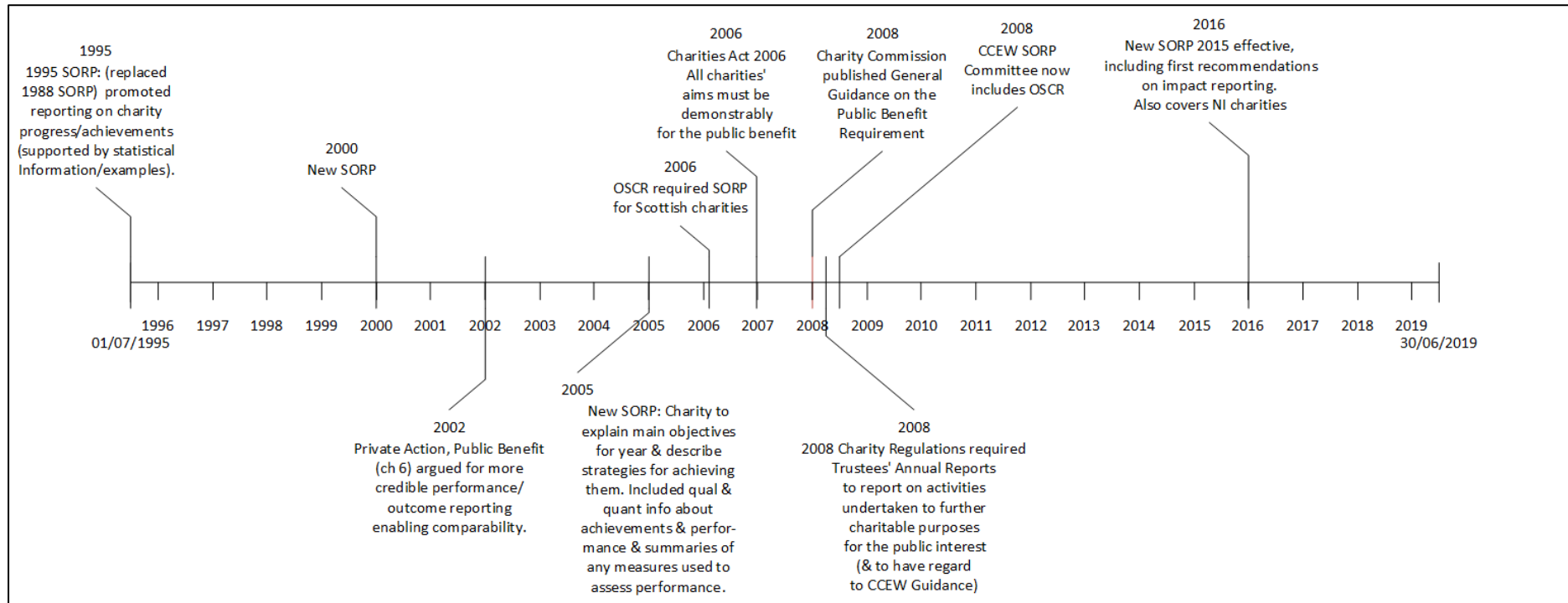
<b>Assigned number UK</b>	<b>Background</b>
Interviewee 1	Professional Institute and Practitioner Sector Body, 2015 and current SORP Committees, Non-accountant
Interviewee 2	Sector Body, Current SORP Committee, Non-Accountant
Interviewee 3	Sector Body, Non-Accountant
Interviewee 4	Practitioner, Practitioner Sector Body, 1995, 2000, 2005 and current SORP Committees, Accountant
Interviewee 5	Practitioner, Regulator, 1995 SORP Committee, Accountant
Interviewee 6	Practitioner, Practitioner Sector Body, Accountant
Interviewee 7	Standard setter, 2015 and current SORP Committees, Accountant
Interviewee 8	Regulator, 2015 and current SORP Committee, Accountant
Interviewee 9	Regulator, 2000, 2005 and 2015 SORP Committee, Accountant.
Interviewee 10	Practitioner, Civil Servant in Government Department, Regulator, 1995 SORP Committee, Accountant
Interview 11	Regulator, 2005, 2015 and current SORP Committees, Accountant.
<b>Assigned number NZ</b>	<b>Background</b>
Interviewee 1	Treasury official, Standard Setter (locally and internationally), Accountant
Interviewee 2	Audit Partner, Mid-Tier Firm, Standard Setter, Accountant, Member (Trans-Tasman) profession's charities sector advisory body
Interviewee 3	Policymaker in Government Department, Accountant
Interviewee 4	Standard Setter staff, Past President of Professional Body, International Office Holder, Accountant
Interviewee 5	Standard Setter staff, Accountant
Interviewee 6	Standard Setter staff, Accountant
Interviewee 7	Sector Body, Non-Accountant
Interviewee 8	Regulator, Accountant, Member (Trans-Tasman) profession's charities sector advisory body

**Figure 1: A spectrum of regulatory performance accountability approaches for an accounting standard-setter** (McConville & Cordery, 2018 citing Hepburn, n.d.; D. Sinclair, 1997; Solomon, 2010; Trubek & Trubek, 2007)

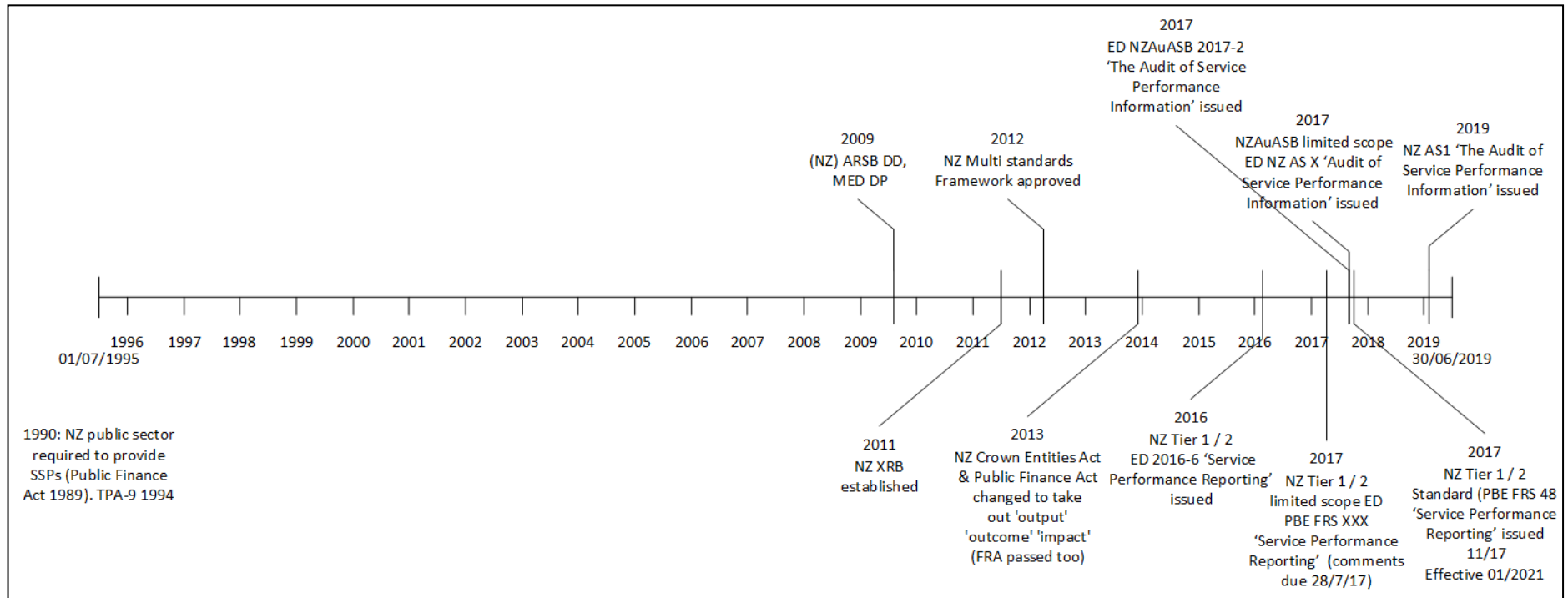




**Figure 2: UK charity regulation development**



**Figure 3: NZ charity regulation development in respect of non-financial reporting**



**Figure 4: New Governance Regulatory Dialectic**

